

**RESPONSE TO FEBRUARY 2004 COMMENTS FOR
MONTEREY REGIONAL STORM WATER PROGRAM**

Prepared April, 2005

NOTE TO READERS: This document is an updated version of the Supplemental Sheet “Response to Comments” originally prepared for the February, 2005 Regional Water Quality Control Board hearing. The revisions in this version reflect the following changes that have occurred since the February, 2005 writing:

1. Water Board staff have suspended issuing Draft Cease and Desist Orders for prohibited discharges to the Areas of Special Biological Significance. Future enforcement on this issue is still to be determined.
2. The City of Carmel-by-the-Sea and the Pebble Beach Company have withdrawn their Notice of Intents to comply with the Phase II Stormwater General permit. These two entities are intending to voluntarily participate in the Monterey Regional Storm Water Program, but will not be included in the Water Board’s consideration on this matter.
3. Water Board staff have expanded the area that we recommend be required to utilize Attachment 4 Design Standards. This issue is discussed in full in the Staff Report.

The applicable Recommendations from this February, 2005 response have been incorporated into the more recent Staff Report prepared for the Monterey Regional Storm Water Management Program, May 2005 Water Board agenda item.

The Monterey Regional Storm Water Management Program (MRSWMP) was first posted on the web for public comment in February – April, 2004. Regional Board staff received seven comment letters representing twelve entities. Three letters requested a Regional Board hearing on the MRSWMP. One commenter withdrew his request for a hearing once his requests were met. Several of the commenting entities also requested a hearing, and have not rescinded their requests.

In response to the comment letters, Regional Board staff emailed and/or phoned each of the commenting entities to discuss the main points of their letters, and to arrange a meeting between the commenting entities, the Monterey Regional Group participants, and Regional Board staff. Additionally, representatives in surrounding Monterey-area cities asked to attend the meeting as observers. The June 8, 2004 meeting took place in the Monterey area. The purpose of the June 8, 2004 meeting was to give the commenting entities, the Monterey Group participants and the Regional Board staff an opportunity to discuss concerns about the MRSWMP in an attempt to reach consensus.

At the close of the June 8 meeting, the Monterey Regional Group requested to withdraw their SWMP, and make revisions to reflect the main concerns discussed at the meeting and in the comment letters. The Monterey Regional Group submitted a Final Draft SWMP, dated December 8, 2004, which was deemed complete by Regional Board staff, and was posted to the State Board website and emailed to all interested parties on December 10, 2004, for a 30-day

public comment period. A summary of the changes made to the MRSWMP has been prepared by the Monterey Group participants and is attached to this Supplemental Sheet (Attachment 1).

Following the December 10, 2004 Monterey Regional Storm Water Management Plan (MRSWMP, or SWMP) posting, Regional Board staff received three comment letters, and one letter of support for the MRSWMP. All of the respondents had submitted written comments in conjunction with the February 2004 posting. This Staff Report responds to: 1) Richard R. Horner, January 5, 2005 (Attachment 2); 2) Natural Resources Defense Council (NRDC), January 10, 2005 (Attachment 3); 3) The Ocean Conservancy (TOC), January 10, 2005 (Attachment 4); and 4) The Monterey Bay National Marine Sanctuary, December 29, 2004 (Attachment 5). Responses are grouped by subject. Responses number 1 – 54 are directed to the first three commenters¹; Responses 55 – 65 are directed to the MBNMS.

After the response due date, Regional Board staff received additional comment letters from Save Our Shores, and Friends of the Sea Otter, and a co-authored letter of support from the Cities of Scotts Valley, Santa Cruz, Capitola, Watsonville, and County of Santa Cruz. The comments parallel some of those which have been addressed below. A few additional comments are added and addressed herein. Because of the short time frame, the comments are not summarized, however the three letters are included as Attachments 6, 7 and 8 to this response sheet.

Phase I Applicability

1. *“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”, NRDC, pg. 4, last paragraph*

2. *“...we request that the MRSWMP be revised to be consistent with the standard set forth in Building Industry Association.”, TOC pg. 2, paragraph 1*

Response to Comments No. 1 and 2 - NRDC compares the Phase II Monterey Regional SWMP to the above-referenced Phase I municipalities. The Monterey Regional MS4s are subject to Phase II, not Phase I permit requirements². *Building Industry Association of San Diego v. State Board* does not require all Phase I or Phase II permits to include effluent or receiving water limits; the court upheld the permitting authority’s ability to require more stringent standards than MEP if necessary under the Clean Water Act. In addition, Phase II MS4s are subject to different regulations. (See 40 CFR §122.30-122.37.)

Attachment 4 prohibits discharges from causing or contributing to a violation of water quality standards in receiving waters. Staff has decided to recommend that the Regional Board require most areas covered by the MRSWMP co-permittees to comply with Attachment 4.

¹ All four of these respondents also submitted letters in April, 2004 following the initial MRSWMP posting. All references in the statements below are from the January 2005 letters unless otherwise stated.

² See Regional Water Quality Control Board July 21, 2004 letter to the Monterey Regional Stormwater Group.

The permits that NRDC cites are both Phase I permits. Although some cities in other Regions have elected to meet the storm water requirements by participating in Phase I programs of larger entities (see Response to Comments 5 - 6), the small to medium sized cities are not required to do so.

Staff agrees that more stringent requirements than MEP are necessary to protect the ASBS. Staff recommends that the MRSWMP be revised to include Attachment 4 Design Standards for the Monterey MS4 urbanized areas that are discharging to the ASBS or 303(d)-listed water bodies. Additionally, the State Board will impose additional requirements if it grants exceptions to the ASBS prohibition.

3. *“...many smaller cities operating under Phase I permits throughout California are implementing BMPs that have proven to be effective and feasible...The fact that these areas have been operating under Phase I permitting rules demonstrates that small cities are no less able to implement strong programs.”, NRDC, pg. 5, last paragraph and continuing to pg. 6; see Horner, 4/16/04, pp. 4-5.*

4. *“...the Monterey Region has a projected 20.7 percent growth rate in this decade, which is similar to Phase I cities. In this connection, the economies of the Monterey Region parallel or surpass the economies of some Phase I cities. Notably, the rapidly growing tourist industry for the Monterey Region is the eleventh largest in the State. These comparable population and economic statistics support the need for stronger stormwater controls and measure in the MRSWMP.” NRDC, pg. 6, last paragraph.*

Response to Comments No. 3 - 4: See Response to Comments No. 5 – 7 (below), which discuss the designation criteria used for Monterey Region MS4s (and all other small MS4s). Smaller cities in other regions may have chosen to link up with Phase I permittees when the Phase I regulations went into effect; the choice that other cities made as to how they complied with the regulations does not change the requirements for Phase II cities, including those in the Monterey region. The commenters have not provided details on what the relative financial contributions of the smaller cities is to their Phase I counterparts in their co-permit situation, or what BMPs the smaller cities are implementing that are superior to the MRSWMP.

Regarding the strength of the storm water controls, this Staff Report in the Discussion Section III provides detailed examples of where the MRSWMP shows its strengths and goes beyond the basic requirements, as requested by the commenters.

Attachment 4 (Design Standards)

5. *The Monterey Regional Group should be complying with the Phase I (large and medium) permit³.*

³ Richard R. Horner, Ph.D., comment letter for MRSWMP, dated April 16, 2004, pg. 4, paragraph 1, “Considered on a more localized scale, it is also appropriate that the Monterey permittees meet the MEP standard in the same fashion as Phase I jurisdictions.” And pg. 4, paragraph 2, “There is yet another reason why the Monterey area should be held to the same standard on BMP implementation as the Phase I permittees: in fact, a number of relatively small cities, whose population ordinarily would entitle them to Phase II status, have been assimilated in Phase I permits by virtue of sharing a common separate Stormwater drainage system with one or more large municipalities.”

6. *“Although not listed in Attachment 5 of the General Permit, several of the applicants – most notable the County of Monterey – are legally obligated to comply with these requirements (if viewed individually (cites U.S. Census Bureau 2001 population estimate of 407,629). Moreover, in combination, the participating entities are well beyond the 50,000 population level that triggers the applicability of these provisions.” NRDC April 16, 2004 letter, pg. 16, 3rd paragraph*

7. *“...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 exercising the joint application option, and to capitalize on the existence of resources of co-permittees ... they must be prepared to fulfill, in the aggregate, the requirements of a single permittee in their position. ... it makes no sense to have different development requirements in a single region ...” NRDC, pg. 12, 3rd paragraph*

Response to Comments No. 5 – 7: The NRDC asserts that the Monterey Region MS4s should be subject to Attachment 4 Design Standards based on: 1) overall county population, 2) combined population of the municipalities, and 3) the number of customers served by the Monterey Regional Water Pollution Control Agency (MRWPCA).

Although Attachment 4 does not automatically apply to the entire MRSWMP for the reasons discussed below and in the Staff Report, staff is recommending that Marina and Seaside and the urbanized areas of Pajaro and Spreckles be subject to Attachment 4 because they discharge to 303(d)-listed water bodies. Similarly, staff is recommending that the municipalities of Monterey City and Pacific Grove and the urbanized Carmel River area be subject to Attachment 4 because they discharge to an ASBS. This is consistent with the Clean Water Act and the General Permit, as discussed in the Staff Report.

Attachment 4 of the MS4 Permit applies to MS4s that serve a population of 50,000 or more and/or have had 25% or more population growth over 10 years. Attachment 4 does not apply to MS4s that serve a population of less than 50,000 or that do not meet the 25% growth criteria, even if the MS4 happens to be located in a county or metropolitan area that meets the population or growth thresholds. In fact, *all* small MS4s located in an urbanized area of 50,000 or more must obtain permit coverage. (40 CFR 122.32(a)(1); see EPA 833-F-00-00, Jan. 2000, Fact Sheet 2.1, *Who’s Covered?*, at <http://www.epa.gov/npdes/pubs/fact2-2.pdf>; and EPA 833-F-00-004, Dec. 1999, Fact Sheet 2.2, *Urbanized Areas: Definition and Description*, at <http://www.epa.gov/npdes/pubs/fact2-2.pdf>.) Based on the commenter’s analysis, all automatically-designated small MS4s would be subject to Attachment 4. This is not the case. (See General Permit, Attachment 5.)

State Water Resources Control Board (State Board) and the Regional Board staff utilized the U.S. Census data within the "urban clusters" of Monterey County to determine which segments of the County needed permit coverage. This designation process is specified in the permit. Thus,

it is inappropriate to cite the entire Monterey County population as justification for requiring Attachment 4 provisions.

The commenter cites the existence of the Monterey Regional Water Pollution Control Agency (MRWPCA) as evidence for the interconnectedness of the storm water system across the region. The MRWPCA handles wastewater, not storm water (see <http://www.mrwPCA.org/html/mission.html>). The Phase II Storm Water program does not concern wastewater systems, therefore the interconnectedness of MRWPCA does not have a bearing on the Phase II designation.

The MS4 Permit distinguishes between a Permittee and co-permittees. Nothing requires the Regional Board to apply these standards to all co-permittees in the aggregate. A co-permittee must meet the Attachment 4 standards only if the co-permittee area is subject to high growth or serving a population of at least 50,000 or if the Regional Board determines that Attachment 4 is necessary to comply with Clean Water Act Section 402(p) due to site-specific considerations. Any other interpretation of these standards would discourage smaller cities from participating in a regional SWMP, with the net result that fewer resources are available both for the regional SWMP and the smaller cities' programs. The MRWPCA operates the wastewater treatment system, not the storm drain system, and therefore was not designated as a Phase II permittee, and has no bearing in the argument of a unitary MS4 system. Each MS4 installs, operates, and maintains its own storm water system. The Phase II Permit Finding 10.c discusses interconnected systems, but the discussion focuses on whether a contributing entity must be designated for permit coverage. The purpose of Finding 10.c has no discussion of determining whether interlinked systems would result in Attachment 4 applicability. The Phase II permit does not suggest that if there are significant contributors (per the 10% contribution rule described in Finding 10.c), then the populations of the two or more MS4s would be added together; doing so could theoretically push an entire locale from the Phase II permit and into Phase I permit criteria. Both the Phase I application requirements and the Phase II regulations are clear that interconnected MS4s do not become a single MS4. (see e.g. 40 CFR 123.35(b)(4), (d)(1)(i).)

Regional Board staff did examine storm drain maps to determine whether one MS4 discharged to another MS4 when considering the ASBS-discharge issue (see CDO for City of Monterey and the Staff Report for Item No. 28). Judging from contributing land mass, the actual flow from the City of Monterey to Pacific Grove is likely less than 10% (refer to Phase II Permit Finding 10.c), however Regional Board staff determined that the City of Monterey was contributing to the ASBS-discharge. See the Staff Report for further discussion of Attachment 4.

8. *“The MRSWMP’s approach to Attachment 4 requirements...is arbitrary and capricious and otherwise inconsistent with law...Nor does it explain exactly which municipalities will implement the Attachment 4 requirements or the basis for not applying the requirements to certain municipalities. All cities covered by this application must implement structural BMPs as required by Attachment 4.” – NRDC, pg. 2, last bullet*

9. *“...I opined and presented justification for the view that the supplemental provisions of the Order should apply to the Monterey region ... in view of the high quality and sensitivity of the*

resources involved. The MRSWMP continues to ignore the entire matter, without even suggesting it has been considered.” – Horner, pg. 2, 3rd paragraph

Response to Comments No. 8 and 9: Please refer to Response to Comments No. 5 – 7, above, for description of the Attachment 4 criteria. The argument for blanket application of Attachment 4 provisions was an issue in several of the April 16, 2004 comment letters, and was discussed at the June 8, 2004 public meeting for the MRSWMP. Regional Board staff conducted research and found that portions of the Monterey Region have experienced a 25% or greater population growth rate. Regional Board staff determined, and stated in their July 21, 2004 letter (see footnote 1, page 1) that Prunedale, Castroville and Sand City are the only municipalities within the Monterey Regional Group that meet the Attachment 4 listing criteria (as based on population growth rate). This matter was not ignored. The MRSWMP also acknowledges that some of the Monterey Regional Group area are subject to Attachment 4 provisions (see BMPs 3-5.a, 4-1.a, and 5-1.a). Regional Board staff recommend that the MRSWMP be revised to include a list of the actual MS4s or MS4 areas that are required to apply Attachment 4 Design Standards (either by the Regional Board or based on General Permit terms), listed above.

With regard to the Comment No. 9 reference to high quality receiving water, Regional Board staff agree that the Attachment 4 provisions should be applied in exceptional water quality areas, including ASBS areas, and 303(d) listed impaired water bodies. If the Regional Board agrees that Attachment 4 is required for ASBS and 303(d) listed-dischargers, then all of the Monterey Regional urbanized areas except Del Rey Oaks and Monterey County Toro Park area will be required to apply Attachment 4 criteria.

10. “...as currently stated it seems that the permittees have implicitly accepted that the Design Standards requirements in Attachment 4 apply to all permittees.” NRDC, pg. 12, 2nd paragraph

Response No. 10: BMPs 3-5.a, 4-1.a, and 5-1.a specifically state that a subset⁴ of the Monterey Group are required to implement Attachment 4 requirements. As explained in Response No. 8, Prunedale and Castroville (both are urbanized areas within Monterey County), and Sand City are subject to Attachment 4 requirements. These are the only areas of the Monterey Regional Group that are required (or have agreed to) implement Attachment 4 conditions. If the Regional Board agrees that Attachment 4 is required for ASBS and 303(d) listed-dischargers, then all of the Monterey Regional urbanized areas except Del Rey Oaks and Monterey County Toro Park area will be required to apply Attachment 4 criteria.

11. “The MRSWMP does not adequately explain how the requirements for Attachment 4 (“Design Standards”) will be implemented.” – NRDC, pg. 2, last bullet

Response No. 11: The MRSWMP states that Attachment 4 requirements will be followed by the Attachment 4-required areas in BMPs 3-5.a, 4-1.a, and 5-1.a (see Table 4-1), by requiring that the adopted ordinances meet Attachment 4 criteria.

12. a.” How will the directives in the cease and desist orders be integrated with the MRSWMP?

⁴ “For MS4 urban areas meeting the Phase II Permit Attachment 4 criteria, ...”.

b. Will the municipalities under the CDO prepare a separate plan from the three municipalities identified in the July 21, 2004 letter?

c. Will Marina remain the sole city in the group exempt from the Design Standards requirements?”, NRDC, pg. 13, paragraph 1

Response to Comments No. 12.a and b –The Regional Board will still require the ASBS dischargers (including The Pebble Beach Company and the City of Carmel-by-the-Sea) to comply with the Ocean Plan by obtaining State Water Board exceptions and any permits required by the exception(s), or by eliminating the discharges.

Response to Comment No. 12.c – See response to Comments 8 and 9.

BMPs and MEP

13. “I further observed that the Order states that to meet the standard a permittee must employ all applicable BMPs, except those that are not technically feasible or whose cost exceeds potential benefit.” – Horner, pg. 2, 2nd paragraph (emphasis added)

The Phase II General Permit Fact Sheet states,

Consistent with U.S. EPA guidance, the MEP standard in California is applied so that a first-round storm water permit requires BMPs that will be expanded or better-tailored in subsequent permits. In choosing BMPs, the major focus is on technical feasibility, but cost, effectiveness, and public acceptance are also relevant. If a Permittee chooses only the most inexpensive BMPs, it is likely that MEP has not been met. If a Permittee employs all applicable BMPs except those that are not technically feasible in the locality, or whose cost exceeds any benefit to be derived, it would meet the MEP standard. MEP requires Permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs are not technically feasible, or the cost is prohibitive. (See SWRCB Order WQ 2000-11, <http://www.swrcb.ca.gov/resdec/wqorders/2000/00wqo.html>.) (emphasis added)

The comment is inconsistent with the Order Fact Sheet and State Board precedent, including Order WQ 2000-11 (“L.A. SUSMP” Order). The Fact Sheet does not say that a permittee must employ all available BMPs (except those technologically infeasible), as the commenter states. The Fact Sheet does say that if a permittee employs all technologically feasible BMPs, then it would meet MEP. However, the next sentence states what is actually required, which is to choose an effective suite of BMPs. It is never stated that the permittee must choose all applicable BMPs.

14. “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.” NRDC, pg. 4, 3rd paragraph

15. “The MRSWMP fails to assure that the programs are ‘designed to reduce the discharge of pollutants...to the Maximum Extent Practicable (MEP)....” NRDC, pg. 2, 1st bullet (the continuation of this quote is addressed below, under Pollutant Discharge heading)

Response to Comments No. 14-15: The SWMP includes those BMPs that the Monterey Regional Group determined could be obtained, installed and/or implemented (technically feasible) and that they could afford and would produce pollutant reduction benefit that justifies the implementation cost (economically feasible)⁵. The Monterey Group utilized storm water quality data from the region, applied knowledge and observations from watchdog groups and internal municipal staff, and determined the likely pollutants of concern and probable best methods to address the pollutants, to arrive at the list of BMPs included in the SWMP. Staff believes these BMPs satisfy the MEP standard.

With regard to the NRDC's sentence, "*In fact, the BMPs do not even come close to what is maximally practicable*", and the second quote above, the Court of Appeal recently ruled that since the Clean Water Act does not define MEP, it was proper for the Regional Board to define MEP in the permit:

... As broadly defined in the Permit, the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. This definition conveys that the Permit's maximum extent practicable standard is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning. Further, the Permit's definitional section states that the maximum extent practicable standard "considers economics and is generally, but not necessarily, less stringent than (Best Available Technology)...In other contexts, courts have similarly recognized that the word "practicable" does not necessarily mean the most that can possibly be done. [Citations omitted.]⁶

The commenter's use of the word "maximally" appears to be based in the criticism that the SWMP does not require all BMPs technologically possible. The Court of Appeal and Order Fact Sheet citations given above consistently state that not all BMPs must be used to meet MEP. The purpose for having each municipality write a SWMP is to encourage and allow the MS4 to apply local knowledge of what BMPs are best suited and most feasible for their community. It has never been the intent of the EPA or State or Regional Boards to prescribe a set of BMPs that must be used. There is no basis in the permit or court decisions to suggest that if a municipality does not employ all possible BMPs, then it is predetermined that they cannot meet MEP. See also, Comment Response No. 12.

16. "The MRSWMP must satisfy the well-established MEP standard in California..." NRDC, pg.4, italicized heading (first part)

17. "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 program." – NRDC, pg. 2, 2nd bullet

⁵ refer to MRSWMP, section 4, beginning with page 4-7

⁶ *Building Industry Ass'n of San Diego County v. State Board*

18. *“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”. – NRDC, pg. 9, 1st paragraph*

19. *“...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.” NRDC, pg. 4, 3rd paragraph, last sentence*

Response to Comments No. 16 – 19: The commenter incorrectly implies that there is a standardized set of BMPs that are being used across the state or country in “similar” cities, and that the governmental documents are tailored such that an MS4 could pick one set of unified standards and apply them to meet MEP. This is not the case. As the General Permit Fact Sheet MEP discussion (above) describes, the MEP “standard” is very individualized and is very dependent upon local factors. What is applicable for one city, may be entirely unreasonable or ineffective in another similar sized city, due to geography, soils, rainfall, public perception, water quality variations, cost-benefit tradeoffs and so on. The Monterey Regional Group, in developing the SWMP, first considered what their local pollutants of concern were, then chose applicable and feasible BMPs from the model programs and documents.

Pollutant discharge

20. *“The MRSWMP fails to assure that the programs are ‘designed to reduce the discharge of pollutants...and protect water quality.’ – NRDC, pg. 2, 1st bullet*

Response No. 20: It is difficult to prove or guarantee a program’s outcome prior to implementing the program. The Phase II permit requires permittees to “implement BMPs that reduce pollutants in storm water to the technology-based standard of MEP.”⁷ The State Board explained MEP as “the technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii)...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.”⁸ As stated in the Staff Report Discussion Section III, and in Response to Comments No. 13 – 14, and 18, the SWMP follows this protocol, and are therefore protective of water quality. It may be that as the program is implemented, some BMPs need to be expanded or better-tailored, but an adaptive program meets, rather than contradicts, the MEP standard.

Additionally, the MEP definition in the General Permit Fact Sheet states, “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. The way in which MEP is met may vary between communities.”⁹ This means that it is not expected (or possible) to pre-determine whether a storm water program will definitively control storm water

⁷ Phase II permit, Effluent Limitations, C.1

⁸ SWRCB Order WQ 2000-11 (City of Bellflower et al.).

⁹ Phase II permit Fact Sheet, pg. 9-10

pollution. However, based on the discussions above, staff believes that the SWMP is protective of water quality and meets the MEP standard.

Water Quality Standards

21. *“The MRSWMP must...focus on attaining water quality standards”, NRDC, pg. 4, italicized heading (part 2), and “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.”, NRDC, pg. 5, 3rd paragraph*

Response No. 21 - Building Industry Association of San Diego confirms that Clean Water Act section 402(p) requires a municipal discharger to control the discharge of pollutants to the maximum extent practicable by implementing BMPs, and to meet any more stringent requirements the permitting agency determines are necessary. See Response to Comment 1. Staff has reviewed the SWMP and concluded that the BMPs meet the MEP standard. However, Attachment 4 will be applied to all Monterey Regional urbanized areas except Del Rey Oaks and Monterey County Toro Park area if the Regional Board agrees that Attachment 4 is required for ASBS and 303(d) listed-dischargers.

Discharge Prohibitions

22. *The SWMP does not comply with discharge prohibitions. – Horner, from pg. 1, 1st sentence of paragraph 2*

Phase II General Permit (applicable to all Phase II MS4s):

B. DISCHARGE PROHIBITIONS

1. Discharges of waste that are prohibited by Statewide Water Quality Control Plans or applicable Regional Water Quality Control Plans (Basin Plans) are prohibited.
2. Discharges from the MS4s regulated under this General Permit that cause or threaten to cause nuisance are prohibited.
3. Discharges of material other than storm water to waters of the U.S. or another permitted MS4 must be effectively prohibited, except as allowed under Provision D.2.c, or as otherwise authorized by a separate NPDES permit.

Mr. Horner claims that the SWMP does not comply with discharge prohibitions, of which there are three in the Phase II Permit. The commenter is not clear whether he believes that the permittees may violate other prohibitions. There is no evidence that the Monterey Regional Group MS4s are violating any of the prohibitions with the exception of the ASBS-discharges. The ASBS-discharge issues will be handled through future enforcement actions. The fact that a discharger will be in immediate non-compliance with an NPDES permit is not a basis to deny permit coverage, but does provide a basis for future enforcement or citizen suits.

Receiving Water Limits, Receiving Water Objectives

23. *The SWMP does not lead to attainment of receiving water objectives. – Horner, from pg. 1, 1st sentence of paragraph 2*

Mr. Horner's comment on "receiving water objectives" (presumably this refers to water quality standards and objectives) suggests that the SWMP is not stringent enough to protect water quality. Please refer to Response to Comments No. 19 and 20.

Mr. Horner also argues the entire Monterey Regional Group should be subject to Phase II Attachment 4 Supplemental Provisions, which contain receiving water limits. Mr. Horner's April 16, 2004 letter states, "It is simply incomprehensible why a metropolitan area of more than 400,000 experiencing a growth rate over 20 percent should not be subject to the supplemental provisions." (Pg. 6, item 7; see also page 1, second paragraph and pg. 5, item 5). Regional Board staff discuss the idea of a blanket Attachment 4 requirement, and designation criteria in Response to Comment No. 5 - 7, above.

Detail in the SWMP

24. *The SWMP "program" is not a program, but mostly a set of vague statements of intention to comply with the Order. – Horner, pg. 1, 2nd paragraph*

25. *"Because the MRSWMP is incomplete and vague, it fails to allow for adequate and transparent public review as required..." - NRDC, pg. 2, 3rd bullet*

26. *"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." – NRDC, pg. 2, 1st bullet; page 3 last paragraph*

27. *"Without specific details on all programs it is impossible to determine if they will effectively control polluted urban storm water runoff..." – NRDC, pg. 4, 1st paragraph*

28. *"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.", TOC, pg. 1, paragraph 2*

29. *"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 require by Environmental Defense Center v. EPA (citation omitted).", TOC, pg. 1, paragraph 2*

Response No. 24 – 29: The above quotes center around the concept that the MRSWMP does not provide detailed enough descriptions of the five-year program. Please refer to the Discussion Section III of the Staff Report, and Response No. 36.

Comment 27 also questions whether the MRSWMP will "effectively control" pollution. The Phase II Permit requires the permittees submit annual reports, which must include, among other things, "An assessment of the appropriateness and effectiveness of the identified BMPs" (Permit Section F.1.b). See also, Response No. 18. The Phase II MEP definition concludes with the statement, "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.”⁶ The SWMP proposal is implemented, and the annual report requires that the Monterey Regional Group analyze and report on how effective the plan was at controlling or eliminating pollutants in storm water and propose any necessary changes.

Time lines

30. The SWMP “fails to prescribe a comprehensive set of actions, to (be) completed by designated dates, and measured for success according to objective criteria and means of evaluation.” – Horner, pg. 2, 1st paragraph

31. “The plan programs a two-year delay in making any significant progress.” – Horner, pg. 2, paragraph 4

Response to Comments No. 30 –31: These comments criticize: a) choice of BMPs, b) the time frame, and c) success measurements. Please refer to Response No. 24-29, which addresses item (a), and Response No. 33, which addresses item (c).

The commenter states that the time frame is too long before BMPs are implemented. In response, reviewers (commenters, Regional Board staff, and others) must consider the program as a whole when looking at the implementation time frames. Considering each of the programs being initiated is new or specifically modified to meet the new storm water requirements makes it clear that the MS4s are taking on a significant responsibility in the first year. To summarize, the first year requirements include adopting three template ordinances, planning and implementing inspection programs, public hotlines, hotline response mechanisms, developing and implementing public outreach and education plan, planning and conducting two workshops, supporting and participating in water quality monitoring, inventorying businesses and industries for future inspection lists, eliminating 100% of illicit connections discovered, developing municipal employee training and procedures for at least 19 identified activities, stenciling storm drains and catch basins, and inspecting and cleaning catch basins. The commenter has stated correctly that educational materials, ordinance templates, and procedure-descriptions exist and are available to the Monterey Regional Group, and therefore should speed up the implementation timeframe. Although the Monterey Regional Group can utilize outside resources, it is time consuming to gather, review, evaluate, and often modify outside resources to ensure that they are applicable to the local area. With all of the other new programs being initiated, and understanding that the MS4s are still grappling with methods to fund the storm water program, Regional Board staff believe the SWMP timeline is reasonable.

32. “...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).” TOC, pg. 1, item 1

Response to Comment No. 32 - The commenter is critical of annual timelines, and suggests more frequent task periods be included in the SWMP. Regional Board staff agrees that it would be valuable to the SWMP implementers to have large implementation plans broken into smaller tasks, with associated short term time lines, and possibly checklists of interim items to

accomplish. This appears to be a logical method to ensure that precursor steps are taken in a timely manner to accomplish yearly goals. However, because permittees are only required to report annually, and because Regional Board staff is not in charge of overseeing the MRSWMP program management, staff does not believe we must require the group to include goals more frequent than the current annual time line. If the first annual report indicates that goals are not being accomplished as planned, or if the annual report does not provide a clear indication of what was accomplished and by which entity, then the Regional Board Executive Officer has the authority to require more frequent and/or more detailed monitoring reports as needed.

33. *“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 BMPs. ...the measurable goals have been made less specific.” NRDC, pg. 9, last paragraph and continuing to pg. 10*

Response to Comment No. 33 – Please refer to Response No. 32 which discusses the yearly time commitments. With regard to the question of the goals that are being measured, the EPA Measurable Goals Guidance that the commenter cites (page 10, note 2) continues:

There are a number of different ways you can write your measurable goals. You can consider developing measurable goals based on one or more of the following general categories (emphasis added):

1. Tracking implementation over time. Where a BMP is continually implemented over the permit term, a measurable goal can be developed to track how often, or where, this BMP is implemented.
2. Measuring progress in implementing the BMP. Some BMPs are developed over time, and a measurable goal can be used to track this progress until BMP implementation is completed.
3. Tracking total numbers of BMPs implemented. Measurable goals also can be used to track BMP implementation numerically, e.g., the number of wet detention basins in place or the number of people changing their behavior due to the receipt of educational materials.
4. Tracking program/BMP effectiveness. Measurable goals can be developed to evaluate BMP effectiveness, for example, by evaluating a structural BMP's effectiveness at reducing pollutant loadings, or evaluating a public education campaign's effectiveness at reaching and informing the target audience to determine whether it reduces pollutants to the MEP. A measurable goal can also be a BMP design objective or a performance standard.
5. Tracking environmental improvement. The ultimate goal of the NPDES storm water program is environmental improvement, which can be a measurable goal. Achievement of environmental improvement can be assessed and documented by ascertaining whether state water quality standards are being met for the receiving waterbody or by tracking trends or improvements in water quality (chemical, physical, and biological) and other indicators, such as the hydrologic or habitat condition of the waterbody or watershed.

EPA strongly recommends that measurable goals include, where appropriate, the following three components:

- The activity, or BMP, to be completed;
- A schedule or date of completion; and
- A quantifiable target to measure progress toward achieving the activity or BMP.

(Measurable Goals Guidance (Guidance) for Phase II Small MS4s, page 9.) The MRSWMP includes measurable goals similar to the example measurable goals in Guidance pages 12-21, and the List of Measurable Parameters in Guidance pages 36-55. As the co-permittees develop the BMP programs, they can revise the SWMP during the annual review to incorporate the more

specific requirements, and additional quantifiable goals (e.g., numbers of various construction site BMPs that developers have installed). Section D of the General Permit allows small MS4s five years from when the discharger obtains permit coverage¹⁰ to fully implement the SWMP.

Upon examination of the measurable goals categories listed above (from the Guidance Manual), one can see that the first categories are less direct measures of BMPs affect on water quality, compared to the later categories in the list. The Guidance manual requires goals fall into “one or more” of the categories, without necessarily utilizing all categories. At the beginning of a storm water program’s initiation, Regional Board staff finds it to be reasonable to see many more of the measurable goals of any SWMP fall into the first categories listed above. However, as a storm water program matures, it is highly reasonable to expect later iterations of the SWMPs to have measurable goals in the more “advanced” categories.

In light of the comments received, Regional Board staff recommends the following changes be made to the Measurable Goals (MG) category of the following BMPs:

BMP 5-1.c – MG should read, “Date guidance document adopted and implemented by permit holder.”

BMP 6-4.cd – MG as worded is not quantifiable or reportable. Revise MG to reflect a method of objective reporting.

34. In the Post-Construction Program “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?”, NRDC pg. 9, 3rd paragraph

Response to Comment No. 34 - This comment contains several aspects already addressed in this Staff Report. Comment response No. 26 addresses the “program to create a program”. With respect to the concern about the program extending “over a year or longer”, see Comment Responses No. 30 - 31. See Comment Responses No. 16 - 19 regarding the availability of “proven BMPs”.

Specific comments on the SWMP

35. Regarding MCM No. 4: Construction Site Runoff Control – “...the MRSWMP provides only sketchy coverage of a well-developed field.” – Horner, pg. 2, paragraph 4

Please refer to Comment Response No. 21 – 24.

Comments on Specific Minimum Control Measures (MCMs)

36. MCM No. 5: Post-Construction Runoff Control in New Development and Redevelopment – The BMPs in this MCM are a “shell” consisting of a proposal to draw up an ordinance,

¹⁰ State Board Q and A, <http://www.swrcb.ca.gov/stormwtr/smallms4faq.html> , #18

implement plan review and site inspection within two years. The author would like to see the SWMP include the sub-tasks as individual BMPs. – Horner, from pg. 2, 5th paragraph

37. “...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”, NRDC, pg 9, paragraph 3

Response to Comments No. 36 and 37 - Section D of the Permit describes what the SWMP must contain to meet the six Minimum Control Measures (MCMs) that are the heart of the SWMP. For four of the six MCMs, the first sentence states that the Permittee must “Develop, implement, and enforce a program...”. The Phase II Fact sheet states (pg. 7), emphasis added,

It is the intent of this General Permit that SWMPs submitted with the NOI contain sufficient information such that RWQCB staff and interested parties understand the BMPs that will be implemented or will be developed and implemented over the course of the General Permit term (which is five years)...”(emphasis and parenthetical comment added)

The General Permit requires that the SWMP to describe programs, and that the SWMP give an indication of what the programs would be, but that the programs be developed and implemented over the five year permit term. If all of the details of each program were developed prior to, and contained within the SWMP, the document preparation time would be incredibly lengthy and would itself become the “program development” time period, thus actually delaying the public review and true implementation phase of the process. The MRSWMP provides enough information for a reviewer to reasonably understand what actions the Monterey Regional Group will be undertaking in the next five years. This Staff Report Discussion section includes explanation and examples of how the SWMP meets and exceeds the minimum requirement for BMP choices and details. SWMP Table 4 gives a summary of the activity, the intention of the activity, action items (termed “Implementation Plan” in the Table), yearly goals, and the implementing group(s). The Monterey Regional Group will report yearly on the success of meeting the annual goals, and will provide their work plan for the following year. Regional Board staff believes this information is sufficient to evaluate what BMPs will be implemented, why they were chosen, who is in charge of the work, and whether the BMPs were completed as planned. The Permit does not require the level of detail needed to manage the project(s), only the information needed to understand what BMPs will be used. This SWMP provides that level of detail.

38. Where the MRSWMP relates BMPs to certain identified pollutants of concern in the Illicit Connection and Illegal Discharge MCM, “the list is stunningly incomplete. It omits numerous other applicable source controls and all treatment controls.” – Horner, pg. 3, last paragraph

Response to Comment No. 38 - Please also refer to discussion above. The Monterey Regional Group used local water quality data to determine local pollutants of greatest concern. They then chose BMPs to target those pollutants. There are likely other urban pollutants in lesser concentrations than the “most critical list” identified by the sampling programs. However, it is economically infeasible and would weaken the impact of the current program if the Monterey Regional Group were directed to spread resources (financial and other) to cover all possible urban sources and BMPs, instead of focusing on known pollutants of concern for their locale.

39. MCM No. 6: Pollution Prevention and Good Housekeeping for Municipal Operations –

- a. *“...the program addresses only a small set of the issues in this category...” Horner, pg. 2, last paragraph*
- b. *the program “misses the management and maintenance of: (1) the storm drain system, (2) the sanitary sewer system (prevention of flow to storm drains), (3) streets and bridges, (4) parks and recreation facilities, (5) airports (if present and operated by a permittee), and (6) corporation yards. It fails to recognize and address common potential pollutant sources for these locations...” Horner, pg. 2 last paragraph, and continuing to pg. 3*

Below is a list of the MRSWMP BMPs that target the areas that the author states are missing from the SWMP.

Storm drain system – BMP 3-2 requires the MS4 to map and update storm drain system maps. BMP 6-10 require the MS4 to annually inspect, clean, repair, re-inspect, and document catch basins, storm drain inlets and piping.

Sanitary sewer system (prevention of flows) – MCM 3, Illicit Discharge and Detection (IDD) deals intently with septic and sewer system overflows, in addition to other types of illicit discharge. The IDD program includes methods for public reporting, response procedures, site inspections, storm drain mapping to help track and capture discharges, education, training, and ordinances effectively prohibiting discharges.

Streets and bridges – BMP 6-9 targets streets and bridges. BMP 6-6 targets street sweeping.

Parks and recreation facilities – BMP 6-4a,b,c,d, and e all discuss program items to effectively manage landscaping and lawn care to protect storm water quality.

Airports – The MRSWMP, pg. 3-3, lists the Monterey Peninsula Airport as one of the facilities over which the participating entities do not have jurisdiction.

Corporation yards – The following BMPs from the MRSWMP apply to corporation yards: BMP 6-1, training, 6-2, inspection, 6-3 proper motor oil disposal, 6-4, proper material storage, 6-6, street and parking lot sweeping, 6-7, automotive activities, 6-8, vehicle washing, and 6-10 storm drain inlet cleaning.

ASBS discharges

40. “Despite being home to five [ASBSs], greatly important to the regional ecology and economy, the jurisdictions shrank from proactive steps at all, instead opting to seek exceptions to discharge prohibitions. This strategy is exceptionally shortsighted [given the large population draining to the ASBSs. The delaying tactic of seeking an ASBS exception almost ensures substantial damage to resources.] ” – Horner, pg. 3, 2nd paragraph

41. “The MRSWMP’s failure to comply with the ASBS requirement is illegal.” – NRDC, pg.3, 1st bullet

Response to Comments No. 40 – 41: The municipalities accurately stated what the options were for responding to the ASBS-discharges. They also stated their preference to the options before

them: to apply for an exception¹¹. The ASBS-dischargers have that option. The ASBS-discharges acknowledged that the State Water Resources Control Board may or may not grant an exception to the ASBS-discharge prohibition, and stated that they intend to comply with the applicable regulations. Although the commenters may not prefer this approach, it does not violate the Ocean Plan or the storm water requirements.

42. "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.", TOC, Pg 2, item number 2

43. "It is disheartening to hear Regional board staff suggest that the Board should patently decline to enforce an unambiguous legal requirement under its jurisdiction.", TOC pg 3, paragraph 3

The commenter's two suggested methods are viable options, however they have the drawback of delaying SWMP Best Management Practice implementation until such time as the discharges have ceased or the State Board grants (an) exception(s). Either option will likely take one or more years to fully meet. Meanwhile, because the Discharger(s) are not enrolled in the Phase II permit, the MS4s might not implement BMPs, which would result in no additional water quality protection beyond the current activities. The option that Regional Board staff support, is to acknowledge and bring enforcement to the MS4s for the illegal discharges, while at the same time allowing the MS4s to enroll in the Phase II permit and implement the SWMP.

44. "The series of Cease and Desist Orders (CDOs) prepared by RWQCB staff to address the ASBS issue do not remedy the problem...Accordingly, we reiterate our request that the MRSWMP be revised to include such measures". TOC, pg. 3, last paragraph

See response to comments 12a and 12b.

45. The approach to ASBS discharges is unacceptable because, among other things, the SWMP does not specify which ASBS the discharge is to, the parameters for the exception, or the duration.

Response to Comment No. 45: The State Board will address the precise requirements of the exception in accordance with the Ocean Plan's exception process. The permit prohibits the ASBS discharges. Staff has not determined what enforcement mechanism to recommend to the Regional Board. Regional Board staff recommends that the MRSWMP section titled "Areas of Special Biological Significance" be amended to state that the Cities of Monterey and Pacific Grove are discharging to ASBS No. 19, "Pacific Grove Gardens Fish Refuge and Hopkins Marine Life Refuge" ASBS.

¹¹ As of January 31, 2005, the City of Pacific Grove had issued a letter to the State Water Resources Control Board stating their intent to apply for an exception. The City of Monterey was not issued a notice of illegal discharge letter from the State Board, and consequently had no reason to respond.

46. *The Ocean Conservancy disagrees that the conditions in the Ocean Plan proposed amendments indicate the type of controls that are appropriate for ASBS discharges. From TOC, pg. 3, paragraph 1*

Response to Comment No. 46: See response to comments 12a and 12b.

47. *NRDC provides comments on Six Minimum Control Measures on pages 14 –15 of their January 10, 2005 letter. The introductory paragraph for this section discusses an overall concern that :*

- a. SWMP is vague – See Response No. 24 - 29
- b. Does not meet MEP, – See Response No. 14 - 15
- c. development of programs, – See Response No. 24 - 29
- d. lacking meaningful target dates, – See Response No. 30 - 32
- e. specifically refer to the San Diego and Lost Angeles municipal storm permits as examples of complete programs. – See Response No. 1 - 2

48. *Public education comments summarized (pg. 14, NRDC):*

- a. *Target audience is too broad* – Response to 46.a: The Monterey Regional Group have put together a very detailed Appendix E that provides examples of materials that are currently being used and will be developed to meet a large cross section of the population. Several members of the Monterey Regional Group were involved in the Model Urban Runoff Program,¹² which led to the development of much of the Public Education materials and background resources. Because of this extensive background material and understanding of the public education needs, the MRSWMP Public Education section is very strong from the outset, and provides materials for multiple, but separate targeted audiences, as described in MRSWMP Appendix E, and summarized in the “BMP Intent” for BMP 1-1. Regional Board staff believes the Monterey Regional Group should be encouraged to use their existing resources and knowledge, and aim for educating multiple target groups as they describe in Appendix E.
- b. *Bacteria and pathogen sources not adequately accounted for (i.e. septic tanks)* – Response to 46.b: The SWMP, pg 4-12, under “Bacteria” lists potential sources of “sanitary sewer, septic system, and illegal dumping”, which are sources that will be identified and eliminated through the Illicit Discharge and Detection Minimum Measure.
- c. *Number of media exposures is undefined* – Response to 46.c: Please refer to the last paragraph of each section of Appendix E, which gives the exact methods of measurements and measurable goals, and the summary table on page E.15 of Appendix E.

¹² Model Urban Runoff Program (MURP) was completed in July of 1998. MURP is a comprehensive how-to guide developed for local governments to address the issues of polluted runoff in the urban environment. The guide incorporates the essential elements of a strong urban runoff program with examples of ordinances, best management practices, illicit connections, new development and redevelopment, commercial and industrial facilities, reporting forms and an education and outreach program. The MURP was prepared by the City of Monterey, City of Santa Cruz, MBNMS, California Coastal Commission, Association of Monterey Bay Area Governments (AMBAG), Woodward-Clyde Consultants, and the Central Coast Regional Water Quality Control Board with money from a State 319 (h) grant.

- d. *Distribution of educational materials unclear* – Response to 46.d: Please refer to Appendix E for detailed descriptions of how the multi-media education materials will be distributed.

49. *Public participation comments summarized (pg. 14, NRDC):*

- a. *Intent of program should also focus on informing the public of what it can do to improve and protect water quality, instead of telling what should not be done.*

Response to 49.a: SWMP Appendix E, Public Education provides numerous examples of what should be done, in addition to what activities to avoid to protect water quality. The BMP/Activity associated with BMP 2-1, referred to by the commenter, is to “Encourage general public and stakeholder involvement in identifying and solving storm water management problems...”(emphasis added). Solutions may only be arrived at if the group is discussing what can and should be done.

- b. *Implementation details are vague – Number of storm drains marked:*

Response to 49.b – Please refer to MRSWMP Appendix F, which states that 520 hours per year will be dedicated to public involvement activities including storm drain stenciling” (pg. F-3). Details in MRSWMP Appendix F are for Fiscal Year 2004-2005. Regional Board staff recommend the Annual Report include a similar work plan for each year, with projected budgets as given in Appendix F of the MRSWMP. (Please see also Response No. 65)

- c. *Dry weather monitoring?*

Response to 49.c: The Urban Watch program, Described in Appendix F, monitors dry weather flows.

- d. *Which communities are targeted for meetings?*

Response to 49. d.: Appendix F explains, “The Workshop #2 held in permit Year 1 will focus on general Phase II requirements and BMPs to increase overall public awareness and knowledge of the Phase II program. The Workshops #2 held in the subsequent four permit Years will target specific audiences and associated contaminants of concern. Examples of potential target audiences include: restaurants; automotive industry; contractors – painters, landscapers, roadwork; designers – architects and engineers; and others that are identified either by municipal staff or through the public involvement process.” The Monterey Regional Group have stated that they would like utilize lessons learned from each preceding year’s activities, to determine which target audience is most appropriate in order to gain the greatest water quality benefit.

- e. *Chart in Appendix F-6 missing this (referring to the above subjects in item 49) key information*

Response to 49.e: Regional Board staff agrees that it is unclear whether the Chart is an incomplete projection of the year’s goals, or whether it is intended to be filled out and the year’s end and submitted with the Annual Report. Staff recommends the purpose of Appendix F-6 chart be clarified prior to SWMP approval.

50. *Illicit Discharge, Detection and Elimination comments summarized (NRDC, pg. 15)*

a. Which businesses inspected and when?

Response to 50.a: BMP3-3.a states that the “Attachment 4 listed businesses and industries (are) to be monitored”. Timing of the inspection is not given, but in our experience is not critical because illicit connections or discharge can happen, and be detected, at any time of the year. The SWMP gives a measurable goal of Minimum of 5% inventoried businesses inspected per year.

b. Why two years to get inspection guidance?

Response to 50.b: Regional Board staff encourages reviewers to consider the program as a whole. The Illicit Discharge and Detection program includes many more tasks, which, taken together, are both necessary and time consuming. The Phase II Permit recognizes start-up time is needed to get a storm water program running, and provides five years to fully implement programs. Please also refer to the discussion provided for Comment No. 30 – 31.

c. Inspections beyond RV parks needed

Response to 50.c: Please refer to Response 48.a.

d. Proper or uniform response to public calls

Response to 50.d: BMP 3-1.c “Implementation Plan” description states that “Each permit holder will create an internal protocol for handling reports of potential illicit discharges within their zip code.” Each permit holder will log, investigate and respond to the calls. Permit holders will document activities, including final outcome.

e. See April 16, 2004 NRDC letter

Response to 50.e: April 16, 2004 comments were summarized and discussed at a June 8, 2004 meeting with MRSWMP commenters, Monterey Regional Group, and other interested public. The agenda and summary points are attached to this Staff Report (Attachment 1). Additional response to April 16, 2004 comments will be provided by Regional Board staff in Supplemental Sheets for this item.

51. Construction Runoff, Post-Construction Runoff, and Municipal Operations Minimum Measures comments summarized (NRDC, pg. 15)

- a. Too vague – Please see Response No. 24 - 29*
- b. “plan to create a plan” – Please see Response No. 24 - 29, and 36 - 37*
- c. No assurance water quality standards will be met – Please see Response No. 21*
- d. See April 16, 2004 letters from NRDC and Horner – Please see Response No. 49.e*

Program implementation

52. NRDC raises concerns about who of the Monterey Regional Group will be implementing the programs, and how compliance will be measured for each permittee. from pg. 10, last paragraph.

53. "As a result of the lack of specificity in each program requirement, the implementation as well as the target dates will vary widely", NRDC pg 11, first paragraph

Response to Comments No. 52 – 53: The Monterey Regional Group has agreed to add the following definitions to the Glossary of Terms and Acronyms, Appendix D in the MRSWMP: 1) MRSWMP Group: The group comprised of all the members of the Management Committee, working together as a team, and 2) MS4 Administration: The person or persons within each of the 9 individual co-permittee's organizations that are working on their entity's compliance efforts to fulfill their BMPs and MGs as set forth in the MRSWMP.

As discussed above in Response to Comment No. 27, the Monterey Regional Group is required to report annually on the progress and effectiveness of SWMP implementation. Each municipality is responsible for the SWMP implementation in full. The Monterey Group has stated verbally that they intend to provide annual reporting on the program as a whole (region-wide progress), and on the efforts of each MS4. Target dates are set in the SWMP (Table 4-1), therefore there is not cause for stating that "target dates will vary widely". (Please see also Response No. 65)

Regional Board staff will review the Annual Report and determine whether it provides enough detail to assess the program implementation. The Regional Board and the Executive Officer have the authority to request additional reporting if needed.

Arbitrary and capricious

54. Because the BMPs are not defined or substantive, they cannot meet the MEP standards. 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." NRDC pg. 9, 3rd paragraph

The first and second sentences are addressed in Responses to Comments No. 24 – 29, and Comment No. 20, respectively.

Miscellaneous

Conclusory statements such as those found in the MRSWMP do not constitute substantial evidence.

California law requires that, considering the administrative record as a whole, substantial evidence must support an administrative agency's findings regarding the basis for its decision. A reviewing court will resolve reasonable doubts in favor of the administrative findings and decision. *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 513. The record as a whole, including the staff reports and stormwater literature on which staff relied, as well as the discussion in the SMWP itself, constitute substantial evidence for the staff recommendation. The Board will adopt findings to substantiate its decision at the hearing.

Comment Letter from National Oceanic and Atmospheric Administration, Monterey Bay National Marine Sanctuary, April 28, June 18, and December 29, 2004

The Monterey Bay National Marine Sanctuary (MBNMS) submitted three comment letters. The first two, dated April 28, 2004, and June 18, 2004, raised questions and concerns about the SWMP. The most recent, December 29, 2004, letter supports the revised SWMP currently up for approval. Therefore, staff has not prepared written responses to the first two comment letters. The following statements summarize MBNMS's December 29, 2004 support letter.

55. *"The revised BMP describes a program that is more integrated across the permit coverage area and describes more quantitative "Measurable Goals" – two of the MBNMS's main concerns with prior additions."*, pg. 1, 3rd paragraph

56. *"...the MBNMS supports the adoption of the (SWMP) by the RWQCB. Further delay would serve only to delay addressing an issue that has critical importance to health of our aquatic resources and the MBNMS. The Group has put for a good faith effort in developing a plan that is realistic considering available resources..."*, pg 1, last paragraph

Regarding Public Education and Outreach –

57. *"...the MBNMS is encouraged by the commitment of resources for the education and outreach task..."*, pg. 2, paragraph 3

58. *"...the MRSWMP has identified several tasks...that will track changes in awareness and behavior"* pg. 2, 4th paragraph.

59. *The MBNMS is encouraged to see the education program will be targeting BMPs for commercial industries, construction and gardeners, homeowners, and landscapers."* Pg. 2, 5th paragraph

60. *"The MBNMS acknowledges the good faith effort expressed..."* pg.2, 6th paragraph

Regarding Public Participation and Involvement –

61. *"The revised BMP table details that all MRSWMP jurisdictions will recruit volunteers and provide logistical and financial support for the Annual Coastal Cleanup event, storm drain stenciling, and Urban Watch and First Flush events. The MBNMS is encouraged by the commitment to these programs..."*, pg. 3, first paragraph

Regarding Illicit Discharge and Detection –

62. *The MBNMS states that it's concerns have been addressed (pg. 3, paragraph 5), and cites the public reporting system, storm drain mapping and updating plans, and plans to track and identify pollution sources.*

Regarding Construction Site Storm Water runoff control –

63. *“The MBNMS supports the Group’s intention to address this (form) of pollution through the development of an ordinance and enforcement capabilities.”, pg. 3, paragraph 6*

Regarding Post-Construction Development and Re-Development

64. *MBNMS feels that the Attachment 4 requirements as they will be applied in the case of the Monterey Regional Group will help mitigate the potential impacts from converting open space to residential or commercial uses, pg.3, last paragraph*

Regarding Municipal Operations pollution prevention and good housekeeping

65. *The MBNMS urges more quantitative measurable goals for street sweeping, and development of strong feedback mechanisms. The MBNMS looks forward to working with the Group on program implementation., pg. 4, 2nd paragraph*

The lack of street sweeping specific goals (BMP 6-6.a) is the only specific criticism that the MBNMS has of the SWMP. Regional Board staff recommends approving the MRSWMP provided the Monterey Regional Group add the “determined schedule appropriate for each MS4”¹³ with specific goals including units of measurement (i.e. “X” times per month, or miles/month).

MBNMS discusses the need for strong feedback mechanisms to ensure the SWMP is being implemented as planned. Regional Board staff agrees with the importance of having quality assurances built into the program, and recommend that the Annual Report contain a section that specifically discusses methods of feedback/quality assurance mechanisms used each year. Regional Board staff recommends that the SWMP be amended to include a section on the Annual Report which will include:

- A work plan for each year, with projected budgets similar to the 2004-2005 plan provided as Appendix F of the MRSWMP. (from Comment No. 49.b)
- Description of quality assurance/feedback mechanisms used to ensure that the SWMP BMPs were implemented, maintained, and/or functioning as planned;
- Report on each individual MS4’s activities and success at meeting the SWMP goals;
- Report of the overall success of the region in protecting water quality through SWMP implementation
- Annual reporting on the program as a whole (region-wide progress), and on the efforts of each MS4 (refer to Comment Response No. 51 - 52)

Overall, the MBNMS is supportive of the program. The commenter, a National Marine Sanctuary with both a local presence and federal oversight, expresses a high degree of willingness to work with the Monterey Group in implementing the SWMP as soon as possible, for the benefit of water quality.

¹³ Quote from BMP 6-6.a Measurable Goal, Table 4-1 of MRSWMP

Comment Letters from Save Our Shores and Friends of the Sea Otter (received after the comment date)

The letters are attached to this document. Most comments parallel issues that have been addressed above. Additional comments not addressed previously are as follows:

Friends of Sea Otter :

Although this letter was received after the stated due date, the letter either refers to other comments that staff has already responded to, or provide policy comments and suggestions rather than comments on the SWMP. The policy comments and suggestions are noted. Staff agrees that individual jurisdictions should collaborate on as many BMPs as possible and that consistency and maximizing resources are important goals. It is up to the participating entities to prioritize and obtain adequate funding to meet all requirements, but staff is committed to providing assistance as appropriate if SWRCB grant money is available.

Save Our Shores:

Response to the following items (refer to letter)

BMP 1-6 refer to staff's recommendations for Annual Report section, second bullet.

BMP 6 Good Housekeeping refer to MRSWMP pages 4-9 through 4-14 which discuss the listed pollutants.

BMP 1-1a See response to comment 46.a. Regional Board staff encourages the Monterey Group to utilize all non-profit and neighborhood groups.

BMP-2.2a-c Regional Board staff has no basis for agreeing or disagreeing with this statement, and is not in the position to direct the Monterey Groups finances.

BMP 5-1a-51f The Storm Water regulations intentionally allow for a cross-over of duties in this arena. The Monterey Group is assuming the responsibilities that are required by the Phase II Permit.

Chart Showing Budget Breakdown Comment noted. It is the duty of the Monterey Group to determine the effectiveness of each BMP, and report on findings and changes if needed during the Annual Reporting period.

Please also see Response to Comment No. 49.e

Co-authored letter of support from the Cities of Scotts Valley, Santa Cruz, Capitola, Watsonville, and County of Santa Cruz

The commenters fully support approval of the SWMP. Letter is attached.

RECOMMENDED CHANGES TO THE DRAFT MRSWMP

Based on comments received and discussions given above, Regional Board staff recommend the following changes be made to the MRSWMP prior to its approval by the Regional Board, or that approval be contingent on these revisions:

1. Revise the MRSWMP to include a list of the actual MS4s or MS4 areas that are required to apply Attachment 4 Design Standards, listed above. (see Comment No. 9)
2. The following changes be made to the Measurable Goals (MG) category of the following BMPs (see Comment No. 33):
 BMP 5-1.c – MG should read, “Date guidance document adopted and implemented by permit holder.”

 BMP 6-4.c and d – MG as worded is not quantifiable or reportable. Revise MG to reflect a method of objective reporting.
3. Amend the MRSWMP section titled “Areas of Special Biological Significance” to state that the Cities of Monterey and Pacific Grove are discharging to ASBS No. 19, “Pacific Grove Gardens Fish Refuge and Hopkins Marine Life Refuge” ASBS. (see Comment No. 45)
4. Clarify the purpose of Appendix F-6 chart prior to SWMP approval. (Comment No. 49.e)
5. Add the following definitions to the Glossary of Terms and Acronyms, Appendix D in the MRSWMP: 1) MRSWMP Group: The group comprised of all the members of the Management Committee, working together as a team., and 2) MS4 Administration: The person or persons within each of the 9 individual co-permittee's organizations that are working on their entity's compliance efforts to fulfill their BMPs and MGs as set forth in the MRSWMP. (Comments No. 52 – 53)
6. Revise BMP 6-6.a measurable goal from “determined schedule appropriate for each MS4”¹⁴ to (a) goal(s) which include(s) units of measurement (i.e. “X” times per month, or miles/month) used each year (Comment No. 65).
7. (Comment No. 65) Add a requirement in the MRSWMP that the Annual Report section include:
 - A work plan for each year, with projected budgets similar to the 2004-2005 plan provided as Appendix F of the MRSWMP. (from Comment No. 49.b)
 - Description of quality assurance/feedback mechanisms used to ensure that the SWMP BMPs were implemented, maintained, and/or functioning as planned;
 - Report on each individual MS4’s activities and success at meeting the SWMP goals;

¹⁴ Quote from BMP 6-6.a Measurable Goal, Table 4-1 of MRSWMP

- Report of the overall success of the region in protecting water quality through SWMP implementation;
- Annual reporting on the program as a whole (region-wide progress), and on the efforts of each MS4.

ATTACHMENTS:

Comment letters are included without their attachments. Full versions may be found on the Regional Board website,

<http://www.waterboards.ca.gov/centralcoast/Board/Meetings/2005meetings.htm>

Attachment 1 - Summary of the Changes Made Between the February 17, 2004 and the October 27, 2004 Versions of the MRSWMP

Attachment 2 - Richard R. Horner, January 5, 2005 letter

Attachment 3 - Natural Resources Defense Council, January 10, 2005 letter

Attachment 4 - The Ocean Conservancy, January 10, 2005 letter

Attachment 5 - The Monterey Bay National Marine Sanctuary, December 29, 2004 letter

Attachment 6 – Friends of the Sea Otter letter received January 31, 2005

Attachment 7 – Save Our Shores letter received, January 28, 2005

Attachment 8 - co-authored letter from the Cities of Scotts Valley, Santa Cruz, Capitola, Watsonville, and County of Santa Cruz., received February 2, 2005