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File No. 028536-0007

## LATHAM & WATKINS<sup>LLP</sup>

July 26, 2006

### VIA EMAIL AND FACSIMILE

Mr. Ryan Lodge  
Staff Engineer  
California Regional Water Quality Control Board  
Central Coast Region  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401

Re: Comments regarding Monterey Regional MS4 Permit and Storm Water  
Management Plan

Dear Mr. Lodge:

On behalf of our client, Pebble Beach Company ("PBC"), we would like to thank you for this opportunity to comment on the pending issuance of the first-term, statewide small municipal separate storm sewer system ("MS4") permit<sup>1</sup> to the Monterey regional municipalities and the draft Monterey Region Storm Water Management Plan ("MRSWMP").<sup>2</sup> Issuance of this Permit to these entities constitutes the first time these entities will be regulated under the MS4 permit program, a program based upon a progressive implementation of best management practices ("BMPs") meeting the maximum extent practicable ("MEP") standard. As one of the significant landowners in the region, PBC is a "coordinating" entity under the MRSWMP. We have concerns regarding the proposed inclusion of specific programs in the MRSWMP that have not been established as practicable for this region, and which were not intended by the California State Water Resources Control Board ("State Board"), the agency which issued the Small MS4 Permit, to apply to this region.

<sup>1</sup> State Water Res. Control Board, National Pollutant Discharge Elimination System General Permit and Waste Discharge Requirements for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems, Order No. 2003-005-DWQ, NPDES No. CAS000004 (Apr. 30, 2003) (hereinafter the "Permit" or the "Small MS4 Permit").

<sup>2</sup> The County of Monterey and the incorporated cities within the county are the proposed permittees under the Small MS4 Permit subject to the present Regional Board matter. Throughout this comment letter these municipal entities are collectively referred to as the "Permittees." The draft of the MRSWMP referenced in this comment letter is the draft dated June 1, 2006 which was posted on the Regional Board's website on June 13, 2006. A document proposing revisions to the draft MRSWMP ("Errata Sheet") was made available by the Monterey Regional Water Pollution Control Agency to the Permittees on July 24, 2006, but has not yet been publicly noticed by the Regional Board.

Item No. 13 Attachment No. 4  
September 7-8, 2006 Meeting  
Monterey Regional Storm Water  
Management Plan

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Our comments center primarily upon the application of Attachment 4 of the Permit through the MRSWMP. Attachment 4 to the Permit contains the "supplementation provisions for larger and fast growing regulated small MS4s," (Permit, Fact Sheet at 9-10) and contains a program applicable to new development and significant redevelopment that largely replicates programs in effect in large urban areas like Los Angeles, Orange County, and San Diego. It took years for these large urban regions to develop and put in place the municipal resources and person-power to support these programs, which were not in effect until years after the MS4 permits first applied in these areas. Our primary concern is that accelerating these programs in the Monterey region is not practicable, and may have negative, unintended consequences for the region, its economy, and its business community. We also are concerned that this unprecedented acceleration of programs intended for large urban areas has not been noticed properly by the Central Coast Regional Water Quality Control Board ("Regional Board") and effectively constitutes the issuance of a new or substantially amended permit, with associated procedural and due process implications.

Our comments are presented in more detail below.<sup>3</sup>

**A. Attachment 4 of the Small MS4 Permit**

Because the Attachment 4 provisions of the Permit are central to our comments, we have included some background information regarding Attachment 4.

Per the requirements of the Permit, Attachment 4 applies only to those small MS4s serving over 50,000 people or that are subject to "high growth," which is defined by the Permit as growth of at least 25 percent over ten years. (Permit §E). Within Attachment 4, there are two basic sections: Section A dealing with receiving water limitations, and Section B dealing with design standards for new development and redevelopment projects. The design standards section of Attachment 4 describes requirements for new development and redevelopment projects requiring specified types of BMPs, specifying sizing requirements for treatment BMPs, and mandating that permittees establish programs to ensure certain categories of developments implement and maintain BMPs meeting the design standards. (Permit, Attach. 4, §B.) Attachment 4's receiving water limitations language requires permittees meet receiving water standards through a process of iterative BMP implementation. The programs established in Attachment 4 are more stringent than those applicable to other small MS4s subject to the Permit. Per the Permit's fact sheet:

These more stringent requirements are applied to communities that are larger and, therefore, capable of a more extensive storm water program, and to communities that are fast growing, and therefore may have greater impacts on storm water runoff associated with

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<sup>3</sup> Due to the lack of notice and lack of proper procedure provided by the Regional Board for its apparent changes to the Small MS4 Permit as proposed for the Monterey region Permittees, we reserve our right to comment and further augment the record at a later time; we do not waive any of our procedural or substantive rights in this matter through this comment letter.

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construction and the loss of pervious lands. (Permit, Fact Sheet, at 10.)

It appears that the design standards of Attachment 4 have been incorporated into the MRSWMP as Attachment E and are proposed for implementation throughout the Monterey region. We also have been informed that the receiving water limitations of Attachment 4 are being considered by the Regional Board for incorporation into the MRSWMP.

**B. Discussion**

1. Incorporation of the Attachment 4 Design Standards into the MRSWMP

The Attachment 4 requirements represent major programs and have been implemented in the past by only the large, Phase I MS4 systems and certain selected Phase II MS4 programs. To throw all of the small MS4 programs of the Monterey region into this complex regulatory program as a part of their first permit term is not only against the plain language of the permit, but also is unreasonable and unrealistic. It has taken many years for the Phase I permittees to develop and implement programs such as the design standards program described in Attachment 4. For example, in Orange County, the municipal permittees only managed to develop and implement such a program during their third permit term. Additionally, for the large urban permittees implementing these design standard programs, such implementation typically takes multiple, full-time, staff dedicated to administration of the program—resources which may not be available for all of the small communities in the Monterey area. Without a substantial foundation documenting why such acceleration is warranted and feasible, it would be arbitrary and capricious for the Regional Board to accelerate the Attachment 4 programs in the Monterey area at this time.

a. The Small MS4 Permit Does Not Impose Attachment 4 on All of the Monterey Region Permittees.

The MRSWMP goes beyond the Permit requirements related to post-construction storm water management for new development and redevelopment projects (Permit §D.2.e) and incorporates the design standard requirements from Attachment 4. Attachment 4's design standard program is not required by the Permit to be applied to all of the Permittees. As stated above, Attachment 4 applies only to small MS4 programs of a certain size or with a specific high growth potential—neither of these factors appear to be applicable with regard to all of the Monterey region Permittees.<sup>4</sup> The Regional Board staff has stated as much in their prior staff report on this matter.<sup>5</sup>

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<sup>4</sup> The Permit includes a list of potential small MS4 permittees that were anticipated to fall under the Attachment 4 requirements (Attachment 5) and none of the Monterey region municipal entities are included on the list; furthermore, based upon the Permittee's Notices of Intent (MRSWMP, Appx. A) none of the Permittees would meet the population requirement triggering application of Attachment 4. The Regional Board's prior Staff Report on this matter states that the cities of Castroville, Prunedale, and Sand City would come under the Attachment 4 requirements due to a finding that they have "high growth rates" as defined by the Permit.

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b. Rationale for the Limitation on Application of Attachment 4.

As discussed in the Permit's fact sheet, the rationale for not applying the design standard requirements of Attachment 4 to the majority of small MS4 permittees was a question of administrative resources. Most small MS4 permittees do not have the requisite management capacity to administer the complex regulatory program required by the Attachment 4 design standards. For this reason, application of the design standards is reserved for the largest of the small MS4 systems and for Phase I MS4 systems (such as the Counties of Los Angeles and San Diego). To foist such a complex regulatory program upon the Monterey region Permittees in their first MS4 permit when such programs are typically reserved for larger municipal entities, is both an extraordinary measure and is based upon unrealistic expectations of what the Permittees reasonably should be expected to do during the first permit term.

c. Improper Foundation of the Attachment 4 Elements in the Draft MRSWMP.

It would appear that the design standards portions of the MRSWMP have not come from a deliberative Permittee process fully examining how Permittees would be able to staff and administer the more stringent new development and significant redevelopment program. Rather, it appears that the Permittee acquiescence in applying the Attachment 4 design standards for the entire region is an accommodation to third-party pressures to avoid potential legal challenges by improperly accelerating the application of these programs without foundation. Third party pressure is an inappropriate foundation and does not appropriately justify expansion of the Attachment 4 programs in the MRSWMP beyond the terms of the Small MS4 Permit. Given the history of how Attachment 4 came to be incorporated, there is no substantial evidence supporting the implementation of the Attachment 4 requirements to all the Permittees. For the Regional Board to impose the design standards program on the whole of the Permittees would be arbitrary and capricious.

d. Effects upon the Business Community.

The Regional Board should distinguish between the Permittees' acquiescence including the Attachment 4 design standards in the MRSWMP from the potential impacts of that program

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Regional Board, Staff Report for Regular Meeting of February 9-10, 2006, Item No. 5 (related to the Permit and the MRSWMP), at 3 (Hereinafter "Staff Report"). While it may be that Attachment 4 provisions are appropriate to impose upon the listed cities of Castroville, Prunedale, and Sand City due to their triggering Permit §E, we do not believe that other Permittees which do not trigger §E requirements should have Attachment 4 programs forced upon them.

<sup>5</sup> "Attachment 4 Design Standards are not required for all Phase II entities. Attachment 4 Design Standard are required for "areas subject to high growth or serving a population of at least 50,000." Staff Report, at 3. We understand that the Regional Board may believe application of the Attachment 4 programs would be justified for Monterey region municipalities that discharge to 303(d)-listed water bodies or Areas of Special Biological Significance ("ASBS"). Regional Board, Responses to February 2004 Comments for Monterey Regional Storm Water Program, at 6. However, the Permit provides no legal justification for such an expansion of the Attachment 4 requirements. Section 3 of the Permit is clear: Attachment 4 applies only to those large (50,000 or more in population) or high growth (25% or greater) small MS4 systems.

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on the Real Parties at Interest; it is the business community that would be required to implement the required BMPs through their respective municipalities that may be overloaded by the administrative burden of overseeing such a complex program. For example, if small municipalities cannot effectively process new development or redevelopment projects due to a lack of technical capabilities, a lack of sufficient staffing, or a lack of resources, it is the business community that will suffer as projects languish in the administrative process. The Regional Board has not yet presented any findings which would demonstrate that the small MS4 Permittees have the administrative resources capable of effectively managing the Attachment 4 design standard program, that would justify imposition of such a complicated program upon all of the Permittees, or that would support the water quality-based need for such a program throughout the Monterey region.<sup>6</sup> Prior to approving the MRSWMP containing this program, the Regional Board must consider the abilities of the small MS4 Permittees to manage the program, and the effects on the business community should the programs prove too much for the modest resources of the Monterey region Permittees.

e. Rewriting the Permit to Go Beyond Federal Requirements.

As described above, by incorporating Attachment 4 design requirements into the MRSWMP and imposing such requirements on entities to which it was never intended, the Permit is being rewritten. Specifically Permit provisions (§E) that mandate application of Attachment 4 only to the largest and fastest growing small MS4 systems are being rewritten and expanded to include all of the Monterey region Permittees—including small MS4s never contemplated to be governed by Attachment 4 in the Permit adopted by the State Board. Through this rewrite, the Regional Board is going beyond the scope of the Permit and beyond the federal National Pollutant Discharge Elimination System program implemented by the Permit. This rewrite has both procedural and substantive implications.

*Procedural Implications:* Application of the Attachment 4 programs as is being proposed for the whole Monterey region goes beyond the MEP standard set forth in the Permit.<sup>7</sup> By exceeding the Permit requirements, the Regional Board is not simply processing Notices of Intent for coverage under the Permit; rather, the Regional Board is rewriting the Permit terms.

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<sup>6</sup> In adjudicatory decisions, such as the present Permit matter, the Regional Board is required to present findings in order to bridge the analytic gap between the raw evidence and ultimate decision. Such findings must be supported by substantial evidence in the record. United States v. State Water Res. Control Bd., 182 Cal. App. 3d 82 (1986) citing in part Topanga Assn. For a Scenic Cmty. V. County of Los Angeles, 11 Cal. 3d 506, 514 (1974). Especially in instances such as the present one, when the Regional Board is exceeding the scope of the statewide Permit, the Regional Board must sufficiently justify this decision through additional findings. To date, no such findings have been provided. To the contrary, the findings in the Permit do not support applying Attachment 4 to all of the Monterey area Permittees, as Attachment 4 requirements are “similar to requirements for Medium and Large MS4s (Phase I), and are appropriate because larger Small MS4s are able to have more robust storm water programs and fast-growing Small MS4s may cause greater impacts to water quality.” Permit, Finding 18.

<sup>7</sup> The permit requires all permittees implement BMPs meeting the MEP standard (§C) and requires additional requirements beyond the general terms (through Attachment 4) only in the limited circumstances discussed in §E (see discussion in §A, above).

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This Permit revision requires specific public notice and other procedural protections, which, to date, have not been carried out by the Regional Board.<sup>8</sup>

*Substantive Implications:* Before it can exceed the scope of the Permit to apply the Attachment 4 design standards to all of the Permittees and, further, to the business community who would be required to implement the BMPs required of the design standards, the Regional Board must consider the factors contained in sections 13241 and 13242 of the California Water Code, including the economic impacts and the impacts of the proposal on the housing needs of the region.<sup>9</sup> Also, because the “rewritten” provisions of the proposed Permit go beyond the federal program the original Permit implemented, the Regional Board would need to undertake an environmental impacts review pursuant to the California Environmental Quality Act (“CEQA”) prior to approving any revised Permit terms. This CEQA analysis is necessary to fully assess the significant implications to the regulated community—both the Permittees who must expend valuable resources to administer the program and to the business community who will have to implement the BMPs imposed by the municipalities.

*Recommendation: Reserve imposition of the Attachment 4 design standard program for a future permit term or for such a time when the Permittees meet the triggering factors of population size or growth potential discussed in the Permit.*

2. Potential Incorporation of Attachment 4 Receiving Water Limitations into MRSWMP

We understand that the Regional Board may be considering recommending changes to the MRSWMP not reflected in the publicly noticed document or its errata. We further believe that these changes may include incorporating the receiving water limitations language from Section A of Attachment 4 of the Permit into the MRSWMP either broadly or related to areas associated with Areas of Special Biological Significance (“ASBS”). If such changes are indeed being considered, these changes would represent a dramatic and significant proposal for the MRSWMP.

It is unclear if the Regional Board is or is not proposing to impose receiving water limitations from Attachment 4 upon the Permittees. However, if such a change is being considered, there has been a lack of public notice for such a substantial change to the MRSWMP. Furthermore, the State Water Resources Control Board is currently involved in a rulemaking process regarding ASBS which proposes to specify a new permit program for ASBSs. The California Public Resources Code specifies a “special protection” program for ASBS watersheds

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<sup>8</sup> Cal. Water Code §§13263, 13378.

<sup>9</sup> The California State Supreme Court has spoken on this issue finding that when requirements of a permit program exceed what would be required under the federal Clean Water Act, the plain language of sections 13263 and 13241 of the California Water Code mandate consideration of factors including the cost of compliance with the proposed permit terms. City of Burbank v. State Water Resources Control Board, 35 Cal. 4th 613, 625, 627 (2005).

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as determined by the State Board and through the California Water Code's permitting program.<sup>10</sup> The Regional Board should allow the State Board to continue to take the regulatory lead on ASBS issues given the State Board has primary jurisdiction over ASBS as part of the California Ocean Plan and governance of the coastal environment, and the Regional Board should not preempt the State Board's ongoing rulemaking. Also, there is considerable potential for any ASBS-related provisions which may be proposed by the Regional Board to conflict with the State Board rulemaking. For the same reasons discussed above regarding the design standards of Attachment 4, inclusion of the Attachment 4 receiving water limitations within the MRSWMP would be inappropriate; these provisions were never intended and are not required to be imposed upon all the Permittees in the Monterey region. Furthermore, imposition of the Attachment 4 receiving water limitations to Permittees not subject to Attachment 4 would go beyond the MEP standard of the Permit; therefore, any such decision by the Regional Board would require consideration of economic and other environmental factors pursuant to the Water Code and Public Resources Code lest the agency's decision be deemed arbitrary and capricious.<sup>11</sup>

The Regional Board should not expand the Attachment 4 receiving water limitations to ASBS watersheds in the Monterey region on the misapprehension that all storm water flows to ASBS are *per se* violations of the California Ocean Plan, and must be prohibited or otherwise regulated by the Regional Board through the Permit. This is not the case. The California Ocean Plan's prohibitions on "waste" discharges into ASBS do not prohibit storm water flows *per se*.<sup>12</sup> The Regional Board is not required to prohibit storm flow to ASBSs in advance of issuing the Permit.<sup>13</sup> If the Regional Board is contemplating regulation of ASBS through the Permit as an accommodation to a mistaken assumption that one molecule renders storm water a "waste," the agency should understand that such an accommodation is not appropriate (given that it would rewrite the Permit), not required (by California law or the Permit terms), and would be inappropriate (given the State Board's ongoing governance of ASBSs).

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<sup>10</sup> Cal. Pub. Res. Code §§ 36700(f), 36710(f).

<sup>11</sup> The Section A of Attachment 4 contains no MEP qualifying statement related to the receiving water limitations. Also, for reasons similar to those discussed above related to the Attachment 4 design standards, application of Attachment 4 programs to entities not contemplated by the Permit in and of itself exceeds the MEP standard established by the Permit. Expansion of the Permit outside the federal Clean Water Act program would trigger the need to assess Cal. Water Code §13241 and 13241 factors, assess economic impacts pursuant to the Burbank case, and conduct a CEQA analysis prior to any agency adoption of such a modified Permit.

<sup>12</sup> Storm water is not defined as "waste" under the California Water Code §13050(d). Storm water may contain waste, but it is the degree to which runoff contains pollutants that marks the dividing line between water, on the one hand, and waste on the other. See e.g., Cal. Water Code §13050(n) (discussing recycled water as "water" not "waste"). See also, Cal. Water Code §13142.5 (discussing treatment of wastewater discharges but not requiring categorical elimination of flows even in biologically sensitive areas, such as ASBS). Even if runoff to an ASBS contains waste, the State Board has the discretion, through its "special conditions" authority, to regulate this flow; the State Board is currently proceeding through a rulemaking specifying a new permit program for discharges to ASBS that will address these issues specifically.

<sup>13</sup> See text accompanying note 10, supra.

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*Recommendation: Issue the Permit without inclusion of Attachment 4 receiving water limitations for all Permittees or for areas associated with ASBS, leaving ASBS issues to be resolved through the ongoing State Board process.*

3. Inappropriate Restrictions on Grading

We understand from the Errata Sheet (circulated by the Permittees but not yet publicly noticed by the Regional Board) that provisions are being proposed for the MRSWMP that would place ten new burdens upon all construction projects in the Monterey region, including substantial restrictions on grading. With specific regard to the grading restrictions, the Errata Sheet proposes modifications to the construction program required to be implemented by Permittees (MRSWMP page E-128) that would severely restrict wet season grading unless BMPs were employed consistent with the "draft Monterey Proposal and General Permit [the Small MS4 Permit] to meet MEP." It is unclear from where this proposal has originated, as it is not contemplated as a BMP required by the Permit, has never been contained in any prior iteration of the MRSWMP, and is not even included in the "more stringent" provisions of Attachment 4. The proposed revisions to the MRSWMP construction program, including the proposed restriction on grading, have not been demonstrated to meet either the technology standards governing construction sites—the BAT and BCT standards<sup>14</sup>—or the Permit's MEP standard; the Regional Board is obligated to assess economic and other environmental factors per the Water and Public Resources Codes prior to allowing their inclusion in the MRSWMP.<sup>15</sup> The statewide general permit for construction site discharges is currently undergoing reissuance proceedings through the State Board. The proposed new BMPs contained in the Errata Sheet appear to be adding to the BMP program contained in the statewide permit. The Regional Board should not preempt State Board proceedings on the general construction permit by adding new BMPs to the program through the present Permit proceeding. Also, it is unclear how the MEP determination required of the proposed new grading provision would be made by Permittees overseeing the grading and construction permit programs in the future when construction projects proponents seek to conduct winter grading. Additionally, it is unclear what the "draft Monterey Proposal" referenced in the Errata Sheet is, rendering it impossible to make informed comments about the implications of this as-yet-unknown document to which the business community would be required to adhere.

*Recommendation: Do not include the construction program revisions from the Errata Sheet, including the proposed restriction on grading, in the final MRSWMP.*

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<sup>14</sup> The BAT and BCT (Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology) standards are contained in the statewide general construction storm water permit (State Board Order No. 99-08-DWQ) and apply to all construction sites throughout the state one acre or greater in size.

<sup>15</sup> See further section B.1.e, *supra*.



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We thank you for this opportunity to comment on the MRSWMP and the proposed Small MS4 Permit for the Monterey region. We feel this regulatory program is extremely important and will guide the municipalities' water quality programs and impact the business community in the region for many years to come. Should you have any questions regarding these comments or if we can be of any further assistance, please do not hesitate to contact us.

Kind regards

A handwritten signature in black ink, appearing to read "Shanda M. Beltran", with a long horizontal flourish extending to the right.

Shanda M. Beltran, Esq.  
of LATHAM & WATKINS LLP

cc: Mr. Mark Stilwell  
Ms. Roxayne Spruance