

DEPARTMENT OF PUBLIC WORKS

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February 21, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Electronic delivery to commentletters@waterboards.ca.gov

Subject: Comment Letter – ASBS Special Protections

Dear Ms. Townsend:

The County of Marin (County) appreciates this opportunity to provide comments on the revised draft Special Protections dated February 3, 2012. The enclosed comments build upon - and incorporate by reference - comments previously submitted by the County on earlier drafts of the policy¹.

We are concerned that the revisions to the Special Protections do not address critical issues raised in our comments. We are also concerned about the fiscal and logistical implications of the new language added to the monitoring section of the policy. Our specific concerns with the revised draft policy are listed below:

1. No changes were made to the policy to scale the requirements based on characteristics of watersheds draining to Areas of Special Biological Significance (ASBS). For example, the policy does not scale requirements based on population size, density, or land use and it continues to employ a one-size-fits-all urban oriented approach.

The County of Marin owns and manages land on the Bolinas Mesa within the Duxbury Reef ASBS Reserve and Extension (Duxbury Reef ASBS) Watershed. No more than 1000 people live within the entire ASBS watershed and the southern quarter of the watershed (i.e. the Bolinas Mesa) is dominated by rural residential land uses. The County requests that the policy be revised to include a set of compliance tiers that are based on population density, land use and identified water quality problems.

¹ The County submitted comments on August 15, 2006, on the first draft of the Special Protections policy titled *Working Draft – Staff Proposal: Special Protections – Areas of Special Biological Significance – Storm Water and Nonpoint Source Discharges – Jun 14, 2006*. In addition, the County submitted comments on May 18, 2011, on the Program Draft Environmental Impact Report Exception to the California Ocean Plan for Areas of Special Biological Significance (ASBS) Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges, with Special Protections (PDEIR) dated January 18, 2011.



Rural residential areas do not have the same pollutant discharge potential as densely populated urban areas and do not require the same level of inspection, reporting, or water quality monitoring.

No changes were made to the policy to address the scientific issues associated with determining and complying with the undefined standard known as "natural water quality". The policy will require the County to characterize natural water quality (NWQ), pre- and post-storm, in ocean reference areas and compare results to samples collected in the receiving water near the County's discharge location. A meaningful comparison of 'reference' and discharge sites is likely impossible due to the statistical invalidity of simply comparing one reference site with one discharge site (i.e., no statistical power), and the high degree of natural variability in the ecosystem. And in the Duxbury Reef ASBS, interpretation of receiving water quality results are confounded by the significant uncontrollable influence of outgoing flows from San Francisco Bay being conveyed to and through the ASBS depending on prevailing winds, tides, and currents. We recommend that a state-funded panel is convened to define NWQ in each ASBS and to provide guidance and protocols for determining whether a stormwater runoff is causing and contributing to degraded receiving water quality prior to the release of the final policy. NWQ and reference site monitoring should be conducted by the Water Board prior to implementation of the policy rather than concurrently.

2. Section I.A.2.f of the revised policy includes the following new language: "To control storm water runoff discharges (at the end-of-pipe) during a design storm, permittees must first consider using LID practices to infiltrate, use, or evapotranspire storm water runoff on-site". It should be acknowledged that infiltration on steep bluffs in the Duxbury Reef Watershed could lead to an increased risk for slope instability and bluff erosion, which could in turn lead to a myriad of problems including increased sediment inputs to the ASBS.
3. Section I.A.3.f of the revised policy includes changes and additions that add to the inflexibility of the policy. In the January 18, 2011 version of the policy, additional time to comply with the special conditions could be granted, for "good causes", by the Regional Water Board. The new language imposes a prescriptive and difficult method for obtaining additional time for compliance. The new language should be changed to allow more flexibility.

The County currently does not have a Storm Water Fee to fund new requirements that would be set forth by the policy. The County's General Fund is used for all NPDES-related expenses. Proposition 218, passed in 1996, amended the California Constitution to include Article XIII D, Section 6(c), which requires voter approval for new or increased fees and charges: "Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." The revised language of the policy requires a demonstration of a significant hardship to the ratepayers by showing the relationship of storm water fees to annual household income for residents within the discharger's jurisdictional area. We recommend that this section be revised to acknowledge that municipalities may not be able to increase or create fees to fund the requirements in the policy if the rate payers, regardless of annual household income, do not approve.

The deadlines in the policy will be difficult to achieve and should be amended to allow more time for acquiring grant funds and for completing the planning, permitting, and implementation that may be required based on water quality monitoring results. In addition, we feel strongly that flexibility must be added or restored to the Compliance Schedule since NWQ has not yet been defined.

4. Section IV.A.1. of the revised policy, Core Discharge Monitoring Program, includes the following new language: "Runoff samples shall be collected when post-storm receiving water is sampled". Please add language to this section that clarifies the length of time that is allowed between sample collection of receiving water and stormwater outfall runoff. We recommend that at least 12 hours be allowed between sample collection times to minimize the logistical challenge of coordinating separate sample collection teams.
5. We recommend that sections IV.A.3.a.(1) and (2) and IV.A.3.b.(1) and (2) of the revised policy, Core Discharge Monitoring Program, be revised to state "samples of storm water runoff shall be ~~analyzed~~ collected during the same storm as receiving water samples annually and analyzed for oil and grease...". The previous version required that samples be collected "annually". The new language makes it difficult to determine the required stormwater runoff sampling frequency.
6. Section IV.A.3.b.(3) of the policy was revised to require stormwater runoff toxicity testing annually as opposed to once every five years. This will increase monitoring costs and may not be necessary. If the results show no toxicity after one year of sampling, we recommend that the sampling frequency be reduced to once every five years.
7. Section IV.B.2, Regional Integrated Monitoring Program, also contains revised language in need of clarification. Section IV.B.2.a states that "A minimum of one reference location shall be sampled for each ASBS receiving water site sampled per responsible party." We recommend that language be added to make it clear that participants in a Regional Integrated Monitoring Program will be allowed to co-sample or share reference locations.
8. Section IV., Monitoring Requirements, contains substantial revisions that will increase monitoring costs (e.g. annual toxicity testing for runoff samples as opposed to once every five years, pre- and post-storm monitoring three times per year for the Regional Integrated Monitoring Programs). It is not clear if the increased costs associated with the revised monitoring requirements were included in CEQA Economic Analysis. If the Special Protections is adopted on March 6, 2012, as planned, the County of Marin will need time to assess the full cost of the monitoring program. By the time of adoption, preliminary budgeting will be complete for the 2012-2013 fiscal year. The County is already faced with difficult fiscal constraints requiring substantial budget reductions across the board. We recommend that water quality monitoring not be required until the 2013-2014 rainy season to allow time to assess and budget for the cost of compliance once the Special Protections are adopted. The water quality monitoring results are critical to the design of effective BMPs. So, we also request that the Compliance Plan and BMP Implementation Schedule be adjusted accordingly.
9. Section IV.B.1.a.requires that reference stations will be determined by the State Water Board's Division of Water Quality and the applicable Regional Water Board. Section IV.B.2.a states that a minimum of one reference location shall be sampled for each ASBS receiving water site sampled per responsible party. We recommend that Regional Integrated Monitoring Programs be allowed to work with the Water Boards to establish reference sites that can be shared by multiple responsible parties within the same Regional Water Quality Control Board region. This would be the most cost-effective approach and would reduce redundant data collection.
10. We request that the State and Regional Water Board allow Regional Integrated Monitoring Programs to be formed by two or more responsible parties and that the State Water Board provide financial and technical assistance to a potential Regional Integrated Monitoring Program in Region 2 if necessary.

As of Friday, February 17, 2012, a revised PEIR and completed Response to Comments were not available for public review. Based upon the timeline for the consideration of adopting the General Exception, including Special Protections (Water Board March 6, 2012 meeting), it is clear that the Water Board does not intend to recirculate a revised PEIR and that significant new information was therefore not added to the PEIR, as it would have warranted recirculation of the PEIR (per CEQA Section 15088.5 Recirculation of an EIR Prior to Certification). This is concerning and indicates that our previous comments, as well as other comments received by testimony from dischargers throughout the State at the October 18, 2011 hearing, have not been adequately addressed. CEQA Section 15088 Evaluation of and Response to Comments requires the lead agency to evaluate comments on environmental issues and prepare written responses to the public at large and public agencies. CEQA requires that a good faith, reasoned analysis must be provided in the Response to Comments and that conclusory statements in response that are unsupported by factual information will not suffice. We request that the Water Board first address the comments received through written and verbal public comment according to the CEQA standards and then revise and recirculate the PEIR accordingly before proceeding with adoption of the General Exception.

Finally, the County submitted changes to the List of Drainages to ASBS that identify discharges that the County is responsible for (Appendix 5 to the Draft PEIR). The Response to Comments indicated that editorial changes will be made with no additional detail regarding the disposition or treatment of the comments in the Final PEIR. We would like the opportunity to review how staff decides to incorporate these editorial changes prior to the adoption of the Final PEIR and Special Protections policy. The County should only be responsible for discharges that are on County property.

The County remains committed to protecting beneficial uses and ensuring that County discharges are not degrading water quality or negatively impacting biological resources within the Duxbury Reef ASBS. However, the policy must be both achievable and based on sound science. We appreciate the opportunity to provide these comments. Please contact me (415-473-6583) if you have any questions.

Sincerely,



Terri Fashing
Stormwater Program Administrator

Ec: Bob Beaumont, Director of Public Works
Craig Tackabery, Assistant Director of Public Works
Tracy Clay, Principal Civil Engineer, Public Works
Liz Lewis, Principal Planner, Public Works
Linda Dahl, Director, Marin County Parks
Jennifer Blackman, General Manager, Bolinas Community Public Utility District
Natalie Gates, Chief of Natural Resources, Point Reyes National Seashore