



September 9, 2009

Via electronic mail

Ms. Carole H. Beswick and Members of the Board
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348

Re: *Draft NPDES Stormwater Permit for San Bernardino County, Tentative Order No. R8-2009-0036*

Dear Chair Beswick and Members of the Board:

We write on behalf of the Natural Resources Defense Council (“NRDC”). We have reviewed the July 10, 2009 Draft of Tentative Order No. R8-2009-0036, NPDES Permit No. CAS618036—the draft of the Waste Discharge Requirements for the San Bernardino County Flood Control District, the County of San Bernardino, and the Incorporated Cities of San Bernardino County within the Santa Ana Region Area-Wide Urban Storm Water Runoff Management Program NPDES Permit (“Permit”). We appreciate the opportunity to submit the following comments.

Onsite Retention Standard

As an initial matter, we are glad to see the Regional Board has included an onsite retention standard for LID BMPs in the draft Permit, in order to meet the requirements of the Clean Water Act’s maximum extent practicable (“MEP”) standard. However, we are concerned that the draft LID language in the Permit, which reflects similar language in the MS4 permit for North Orange County adopted by this Regional board on May 22, 2009,¹ allows for non-retention-based practices (*i.e.*, “bio-treatment” or “biofiltration”) to count towards demonstrating compliance with a site’s LID obligations.

NRDC believes that both law and good policy require that the Permit include a standard to retain onsite the design storm whenever possible, and to provide offsite mitigation for any volume of the design storm not retained onsite. The language in the

¹ Order No. R8-2009-0030, NPDES Permit No. CAS618030.

July 10 draft of the Permit (as well as in the recently adopted North Orange County Permit) would require onsite retention, but allow “bio-treatment” to qualify toward meeting the design storm volume obligation when onsite retention is technically infeasible. (Permit at ¶ XI.E.5.) As we have discussed in our previous comments to this Board,² we do not support allowing water treated or filtered through bio-treatment BMPs to count toward the onsite, 85th percentile storm retention obligation that otherwise applies to projects under Permit ¶ XI.E.5. For the reasons explained below, the use of bio-treatment (which we do not oppose when onsite retention of the design storm is technically infeasible) should trigger the requirement to provide offsite mitigation or in-lieu funds under Permit ¶ XI.F.

Critically in this connection, on May 7, 2009, the Los Angeles Regional Water Quality Control Board adopted NPDES No. CAS00402, a new MS4 permit for Ventura County and the incorporated cities therein. The adopted Ventura County MS4 permit requires onsite infiltration, harvesting and reuse, or evapotranspiration of the 85th percentile design storm, with no runoff. The critical difference between the Ventura County MS4 permit and the LID performance standard in the draft Permit is that, in Ventura County, bio-treatment cannot count toward a site’s LID volumetric obligations. As currently drafted, the Permit would allow a site that demonstrated technical infeasibility to discharge potentially *all* of its stormwater to the storm sewer system without undertaking any offsite mitigation. As bio-treatment BMPs are almost undoubtedly not 100% effective at removing pollutants from runoff, a site employing bio-treatment will discharge more pollution than a site that meets the onsite retention standard. For this reason, offsite mitigation should be required in such situations.

Requiring offsite mitigation or in-lieu payment would also mean that San Bernardino County would get the benefit of a no pollution discharge standard whenever that could be feasibly implemented—a critical step forward because the water retained could be infiltrated or otherwise reused. Such an approach mirrors similar ones now being implemented or considered in locations as diverse as Washington D.C., Philadelphia, West Virginia (which recently finalized a standard stricter than any now applicable in California) and, through new federal buildings requirements, everywhere in the United States.³ Infiltration or reuse not only implements the MEP requirement contained in the Clean Water Act, it is also inarguably wise policy in drought-stricken California. Earlier this year Governor Schwarzenegger declared a state of emergency in California due to severe drought. Notably, the Governor’s Proclamation ordered public water agencies to essentially “find” more water

² See Correspondence from NRDC to Santa Ana regional Water Quality Control Board, April 8, 2009; May 8, 2009 (Commenting on Draft North Orange County MS4 Permit).

³ *Id.*

through a variety of activities, including "...efforts to protect water quality or water supply."⁴ As such, a standard that requires retention of the design storm with no runoff when possible is directly responsive to the Governor.

We appreciate that the footnotes in this Section attempt to circumscribe the use of bio-treatment and require "properly engineered and maintained" systems. However, as written, the allowable use of bio-treatment serves merely as an "out" from the onsite retention standard that will minimize environmental performance. In contrast to objectively clear requirements to "infiltrate, harvest and reuse, or evapotranspire," "bio-treat" is a subjective term open to interpretation—as is the requirement to "properly" engineer or maintain the systems.

Indeed, while we oppose the allowance for bio-treatment as part of the main LID standard, we believe that if this language remains over our objections, clarifying language in footnote 85 should close the loopholes we have identified.⁵ If the Board does not delete references to bio-treatment in Permit ¶ XI.E.5, or require that use of bio-treatment BMPs at a site to meet the Permit's LID standards trigger the offsite mitigation or in-lieu payment requirements, it should at minimum, make the following clarifications:

1. Footnote 85 should state, in addition to stipulating that bio-treatment only be considered if infiltration, harvesting and reuse, and evapotranspiration are not feasible, as follows:

"LID bio-treatment BMPs shall be designed to accommodate the design flow at a surface loading rate no greater than 5 inches per hour and shall have a total volume, including pore spaces and prefilter detention volume, no less than the runoff volume generated by the design storm depth times 0.75. Runoff from impervious areas also may be dispersed to pervious landscaped areas in a ratio not to exceed 2 parts impervious area to one part pervious landscaped area. Pervious landscaped areas must be designed to pond and infiltrate runoff produced by the design storm depth."

At Minimum, the North Orange County Permit Should Serve as a "Floor"

We urge the Regional Board to improve the Permit in the ways specified prior to its adoption. In this connection, we do not agree with those who argue that the permit should require less in San Bernardino than that which this Board included in the recently adopted

⁴ Office of the Governor of the State of California, Gov. Schwarzenegger Takes Action to Address California's Water Shortage, February 27, 2009, available at, <http://gov.ca.gov/index.php?/print-version/press-release/11556/>.

⁵ We reserve our rights to challenge this provision irrespective of any such clarifications.

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North Orange County Permit. Indeed, if anything, conditions in San Bernardino allow for greater implementation of LID approaches, making the North Orange County approach applied to San Bernardino less than “MEP”—even assuming for the sake of argument it were sufficient in the developed conditions of northern Orange County.

Conclusion

We appreciate the efforts made to date to implement sound LID standards in the Permit, and would be pleased to respond to any questions you may have about our comments. We believe important but limited improvements will significantly improve the effectiveness of the permit, and we urge that the Board implement these modifications before it is adopted.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Beckman", with a long horizontal flourish extending to the right.

David S. Beckman
Noah Garrison
Natural Resources Defense Council