



ORANGE COUNTY
COASTKEEPER
EDUCATION / ADVOCACY / RESTORATION / ENFORCEMENT

3151 Airway Avenue, Suite F-110
Costa Mesa, CA 92626
Phone 714-850-1965
Fax 714-850-1592
Website www.Coastkeeper.org

January 22, 2010

Via Electronic Mail: richard.boon@ocpw.ocgov.com
jennifer.weiland@ocpw.ocgov.com

Richard Boon
Jennifer Weiland
OC Watersheds
2301 North Glassell Street
Orange, CA 92865

RE: Comments on Orange County Stormwater Program NPDES Land Development Technical Advisory Group (TAG) – Geosyntec Consultants Draft Memorandum

Dear Mr. Boon and Ms. Weiland,

Orange County Coastkeeper (“Coastkeeper”) and the Natural Resources Defense Council (“NRDC”) appreciate the efforts of the Orange County Stormwater Program and Geosyntec staff in developing materials presented at the inaugural TAG meeting. We sincerely hope to continue to work together in making Orange County’s coastal environment sustainable. We appreciate the opportunity now to comment on the January 7 Draft Memorandum re: North Orange County and South Orange County NPDES Permit LID Requirements – Interpretation and Comparison (“Draft Memo”). As public interest representatives our organizations seek to encourage the development of ideas and ensure proper application of the Permit’s mandates and requirements. In cooperation with other TAG members, Coastkeeper and NRDC believe this Permit could serve to improve the quality of and protect Orange County Waters, and encourage all participants to embrace this opportunity.

Previously, our organizations’ comment letters have focused on the development and implementation of effective Low-Impact Development (“LID”) practices utilizing progressive standards and reviews in order to ensure the integrity Orange County’s water quality. LID provides an environmentally preferred and cost-effective avenue for the reduction of harmful pollutants from the waterways of southern California as well as providing for groundwater recharge and a reduction in our region’s reliance on imported water. In as much as we support the incorporation of LID principles into every regional MS4 permit, we are also dedicated towards the adoption of permits which accurately reflect the various LID best management practices (“BMPs”) in a way which maximizes their utility.

PERMIT COMPARISON

LID Prioritization – Specific requirements held within the North Orange County permit regarding the prioritization of onsite retention prior to the utilization of “Bio-treatment” were omitted or minimized in the description of this section by the memorandum (see, e.g., North Orange County Permit section XII.C.4). This section makes clear the actual prioritization of incorporated LID principles by expressly ranking each from highest to lowest. The chief priority remains preventative measures followed by

mitigation. The types of mitigation are also prioritized with infiltration, harvesting and re-use, and bio-treatment ranked in priority as well, and these practices are expressly required by the permits absent a finding of infeasibility (See, e.g., North Orange County Permit section XII.C.2.) The permit makes a clear distinction between onsite retention and the utilization of biofiltration or bio-treatment that we believe should be reflected in this memorandum and during the TAG meetings.

Moreover, the Draft Memo asserts that the North Orange County Permit allows project proponents subject to a Watershed Master Plan (Draft Memo at 2, 4 (citing North Orange County Permit at section XII.D.5) to employ treatment systems or “options more technically appropriate for the watershed,” in place of on-site LID. Section XII.D.5 sets out provisions related to hydromodification in the identified watersheds, and does not except any project proponents from the Permit’s otherwise applicable LID requirements for projects under section XII.C. Though section XII.D.5 states that the plans shall “integrate water quality, hydromodification,” and other concerns, the section explicitly states it is established to “address the hydrologic conditions of concern,” and does not provide an exemption from the requirement that, for example, priority development projects retain runoff from the 85th percentile storm event onsite. It should not be read by the TAG or in the Draft Memo as providing such an exemption.

SELECTED EXCERPTS FROM NORTH OC HEARING TRANSCRIPTS

Intent of Prioritization of BMP Types – Coastkeeper and NRDC agree that both the North and South Orange County permits anticipate the utilization of a variety of effective LID principles and controls which are adaptable to the unique circumstances of the property and the development. However, each permit explicitly incorporated a detailed prioritization, and under section XII.C.2, requirements, for BMP types to be referenced for each priority development project. We encourage the participants of the TAG to reflect on the permits and recognize that we start from a position of onsite retention (through, in order of preference, infiltration, evapotranspiration, and harvest and reuse) and *only* after a finding of infeasibility does a project move from that type of BMP.¹

In determining the metrics for infeasibility the TAG should reflect on Mr. Thibeault’s analysis of the MEP standard. According to Mr. Thibeault, “this permit is based on a MEP compliance metric” and although the use of BMPs like bioswales and grass medians are easy to incorporate, “that’s not a high enough level of compliance....[and] just doing the easiest thing in not MEP.” (See Draft Memo at 6.) The prioritization or indeed, requirements, for BMPs was intended to provide a series of choices in descending order starting with infiltration and assertions in the memorandum that permit footnotes provide an “enormous amount of flexibility” may be inconsistent with the actual intent of the Regional Boards when adopting the Orders.

¹ See North Orange County Permit, Footnote 56: “A properly engineered and maintained bio-treatment system may be considered *only if* infiltration, harvesting and evapotranspiration cannot be feasibly implemented at the project site (feasibility criteria will be established in the model WQMP [Section XII.C.1] and the technically-based feasibility criteria [Section XII.E.1]. Specific design, operation and maintenance criteria for bio-treatment systems shall be part of the model WQMP that will be produced by the permittees.” (*emphasis added*); South Orange County Permit, section F.1.d(4)(d). We note that the Draft memo states, on page 9, that “Feasibility criteria analysis only applies when you are moving from on-site to off-site solutions.” We emphasize that any failure to retain onsite the full capture volume through infiltration, evapotranspiration, or harvest and re-use will trigger a requirement that the project conduct a feasibility analysis, and the only off-site solution allowed by the permit after a finding of infeasibility is use of a bio-treatment system, as stated above. All other treatment options would require participation in the waiver and in-lieu or offsite mitigation programs.

Coastkeeper and NRDC believe the provisions of the permit are clearly and expressly stated regarding this issue and reference to Regional Board testimony is unnecessary to interpret these provisions.

Description of “Feasibility” – Coastkeeper and NRDC anticipate the discussion concerning the creation of the criteria for a determination of “infeasibility” will appropriately limit the scope of economic considerations in any formula. We remind TAG members that “feasible” has been interpreted to mean “capable of being done” or “physically possible” as a matter of law.² The definition of “feasibility” should not be “overly restrictive and contrary to the clear [Regional Board] intent and the plain meaning of the word ‘feasible.’”³

In conclusion, Coastkeeper and NRDC appreciate the effort staff has put towards developing an effective mechanism for New Development/Significant Redevelopment between the MS4 permits for South and North Orange County which effectively and efficiently addresses the environmental concerns of the watershed in a transparent and comprehensive approach. We look forward to a constructive relationship with the various TAG members and hope our comments will assist in the development of a thoughtful and progressive product.

Sincerely,



Garry Brown
Executive Director
Orange County Coastkeeper



Noah Garrison
Project Attorney
Natural Resources Defense Council

² Friends of Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 885 (8th Cir. 1995).

³ Id.