



April 9, 2009

Michael Adackapara
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**RE: Order No. R8-2009-0030 (NPDES Permit No. CAS618030)
Waste Discharge Requirements for the County of Orange, Orange
County Resources and Development Management Department, and
the Incorporated Cities of Orange County Within the Santa Ana
Region Areawide Urban Storm Water Runoff, Orange County**

Dear Mr. Adackapara:

Thank you for this opportunity to response to the draft tentative Orange County Municipal Separate Storm Sewer System Permit, Tentative Order No. R8-2009-0030 ("Draft Permit") released on March 24, 2009. The comments herein are those of (i) Building Industry Association of Southern California, Inc. ("BIA/SC"); and Building Industry Legal Defense Foundation ("BILD"), each of which represents the homebuilding industry or related construction and land development industries within the Southern California region that includes north Orange County.

BIA/SC is a nonprofit trade association representing more than 1,700 member companies, which together have more than 100,000 employees. BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of BIA/SC. BILD's purposes are to monitor legal and regulatory conditions for the construction industry in Southern California and intervene as appropriate. BILD focuses particularly on litigation and regulatory matters with a regional or statewide significance to its mission.

We remain very concerned about some key aspects the Draft Permit. Even though some objectionable aspects of the earlier drafts have been removed or corrected, we remain concerned that the tentative permit would in fact damage the land use development process and substantially harm the overall economy of north Orange County. Therefore, we must express our disappointment that the Draft Permit still fails to reflect the best policy options, despite our industry's efforts to bring science, reason and experience to help craft reasonable and practicable requirements in the new MS4 permit.

Our comments are as follows:

Antelope Valley Chapter
Baldy View Chapter
Desert Chapter
Greater L.A./Ventura Chapter
Los Angeles County East Chapter
Orange County Chapter
Riverside County Chapter

1. Some stakeholders have persistently distorted the meaning of the “hortatory” (i.e., merely *encouraging* or *exhorting*) “maximum extent practicable” language from 33 U.S.C. section 1342(p)(3)(B)(iii).

Some stakeholders, and in particular representatives of Natural Resources Defense Council, Inc. (“NRDC”), have made representations in connection with the formulation of and debate about the Draft Permit, effectively saying that the Board’s rejection of particular control measures would not meet the “maximum extent practicable” mandate set forth in 33 U.S.C. section 1342(p)(3)(B)(iii). Sometimes, NRDC will point to the conclusions of an academic from one corner of the nation, or to the regulatory experiments in another part of the nation, and essentially argue that any and all measures thus indicated are proven “practicable,” and therefore must be imposed by the Board here.

It is true that the federal law at issue – 33 U.S.C. section 1342(p)(3)(B)(iii) – generally directs the Board (as the U.S. E.P.A. Administrator’s surrogate) to “require controls to reduce the discharge of pollutants to the maximum extent practicable....” However, this introductory “maximum extent practicable” directive is merely “hortatory” (meaning it merely *encourages* or *exhorts* action) rather than mandatory (indicating any legally enforceable mandate). *See Rodriguez v. West*, 189 F.3d 1351, 1355 (Fed. Cir. 1999) (holding that the express “maximum extent possible” directive of former 38 U.S.C. section 7722(d) was “hortatory rather than to impose enforceable legal obligations”). Because the language is introductory and hortatory, it does not require the Board to impose any and all possible requirements. Instead, the directive is merely a charge to go forth, balance interests, and require *some* reasonable controls.¹

Our reading of the relevant federal statute is bolstered by the remainder of 33 U.S.C. section 1342(p)(3)(B)(iii). Immediately following the introductory “maximum extent practicable” language is this: “including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State [here, the Board] **determines appropriate** for the control of such pollutants.” (Emphasis added.) Thus, the federal statute merely instructs the Board here, as the E.P.A.’s surrogate, to *exercise its broad discretion* (within bounds of reason – of course).

¹ *See Conservation Law Foundation v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004):

[The environmentalist plaintiffs] essentially call for an interpretation of the statute that equates “practicability” with “possibility,” requiring [the agency] to implement virtually any measure ... so long as it is feasible. Although the distinction between the two may sometimes be fine, there is indeed a distinction. *The closer one gets to the [environmentalists’] interpretation, the less weighing and balancing is permitted.* We think by using the term “practicable” Congress intended rather to allow for the application of agency expertise and discretion in determining how best to manage ... resources.

(Emphasis added.)

The federal courts consistently have ruled that the 33 U.S.C. section 1342(p)(3)(B)(iii) directive is one mandating only the reasonable exercise of broad discretion – nothing more. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) (“Congress has vested in the [EPA or a surrogate state] broad discretion to establish conditions for NPDES permits.”); *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 96 F.2d 1292, 1308 (9th Cir. 1992) (“NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. *Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails.... Congress did not mandate a minimum standards approach or specify ... minimal performance requirements.*” (emphasis added)); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999) (“Under [the MEP standard set forth in Clear Water Act section 402(p)(3)(B)(iii)], the EPA's choice to include [or exclude] ... limitations in [NPDES] permits [for MS4s] was within its discretion.”); *City of Abilene v. U.S. E.P.A.*, 325 F.3d 657, (5th Cir. 2003) (“The plain language of [CWA section 402(p)] clearly confers broad discretion on the EPA [or a surrogate state agency] to impose pollution control requirements when issuing NPDES permits”).

Given a proper understanding of the law, 33 U.S.C. section 1342(p)(3)(B)(iii) merely mandates that the Board here must take evidence and then exercise its *broad discretion* concerning permit conditions. Certainly, the Board and staff do not need to bow to every whim transported here from far away.

2. The Draft Permit's failure to recognize and countenance Low Impact Development filtration practices is seemingly a radical and unsound departure from Clean Water Act goals and established land use doctrines.

One aspect of the Draft Permit is especially radical and objectionable – at least it could possibly be read as such if not properly clarified. That is the low impact development criteria discussed in Section XII.C (5) and (7) on page 53. Particularly, these provisions can be read to indicate that the permit requirements for development or redevelopment could be met only by designing and constructing for the on-site retention – for infiltration, evapotranspiration or on-site reuse – of the volume of a design storm. Notwithstanding the appendage of mitigation options where infeasibility exists, as proposed, the cited provisions would seemingly impose, for the first time, a generally-applicable requirement that ***no water (from a design storm) should leave a parcel that has been developed or redeveloped.***

This requirement seemingly flies in the face of recognized low impact development (LID) strategies, which generally aim to have LID undertaken so that the pre-construction flows of storm waters are maintained, matched, or reasonably approximated. For example, the U.S. E.P.A. last month issued its new definition of LID, which states clearly that the use of LID best management practices (BMPs) for ***filtration (i.e., not merely infiltration)*** is appropriate – and repeats the basic goal of trying to maintain pre-construction hydrology. As proposed, however, the language of the Draft Permit generally rules out the use of LID BMPs for *filtration*, and requires instead designs for the *retention* of all storm water for a design storm.

Therefore (again, unless the Draft Permit is better clarified), the draft provisions seemingly rule out the use of LID BMPs for filtration – and instead require, as a general proposition, that no storm water (except in the largest rains) can leave a developed or redeveloped parcel. If this is indeed intended, it is a radical measure that should not be undertaken. It would violate millennia (literally) of civil law concerning the unconstrained flow of rain water (called “diffuse surface water”). Specifically, the law in California – which itself is derived from the laws of the ancient Roman Empire – generally favors what is called the “*natural flow doctrine*,” which states that diffuse surface flows should be permitted to flow to their natural water course. *See Gdowski v. Louie*, 84 Cal.App.4th 1395, 1402 (2000) (“California has always followed the civil law rule. That principle meant ‘the owner of an upper ... estate is entitled to discharge surface water from his land *as the water naturally flows*. As a corollary to this, the upper owner is liable for any damage he causes to adjacent property *in an unnatural manner*.... In essence each property owner’s duty is to leave the natural flow of water undisturbed.” – emphasis added by the court, quoting *Keys v. Romley*, 64 Cal.2d 396, 405-06 (1966)).

The “natural flow doctrine” has been altered by the California courts in recent decades – in order to facilitate reasonable land development and protect local governments and land owners. Replacing the natural flow doctrine is a *modern reasonableness test*. Property owners (both public and private) may alter the natural flow of diffuse and/or discrete surface water, but only if they are reasonable when doing so and downstream owners can effectively trump the reasonable efforts of the upstream owner only if they (the downstream owners) in turn take reasonable defensive steps. *See, e.g., Locklin v. City of Lafayette*, 7 Cal.4th 327, 337 (1994).

Juxtaposed against both the natural flow doctrine and the modern reasonableness test is a third, less favored doctrine, called the “*common enemy doctrine*.” The common enemy doctrine stands for three propositions, that (i) individual property (development) rights are paramount, (ii) in developed and developing areas, both diffuse and discrete surface water is a common scourge, and (iii) each property owner may act “for herself or himself” and take steps to alter the natural or unnatural flow of such waters for the protection of his or her property, without regard for the effect on neighbors. *See Skoumbas v. City of Orinda*, 165 Cal.App.4th 783, 792 (2008). Although the common enemy doctrine is sometimes still applied other states – particularly in urbanized and suburban areas, the common enemy doctrine has been the focus of strong criticism from progressive courts, environmentalists, academics, and concerned policy makers because of the obvious and very negative implications for the broader community and for the preservation and restoration of natural flows. *See, e.g., Keys v. Romley*, 64 Cal.2d 396, 400-03 (1966) (Mosk, J., concurring).

Of these three doctrines (the *natural flow* doctrine, the *common enemy* doctrine, and the *modern reasonableness* test), the natural flow doctrine – which seeks to *maintain the natural flows* of diffuse and discrete surface water – is the doctrine that conforms best to the federal Clean Water Act’s overarching objective to “restore and *maintain*” the natural integrity of waters.² *See* 33 U.S.C. section 1251. Accordingly, we would, of course, expect the Board and

² *See* S. Rep. No. 92-414, 92 Cong. 2d Sess., 2 U.S. Code Cong. & Adm. News ‘72 3668,

the non-governmental organizations that purport to defend natural resources to strongly prefer the *natural flow doctrine*, and to deviate from it (if at all) only as reasonably necessary to accommodate competing societal goals.

Rather than favor the natural flow doctrine, however, the Draft Permit – with its seeming refusal to allow the *filtration* of diffuse surface water and its discharge across property lines – could be read to establish a brand new and entirely different doctrine, a “***universal retention doctrine***,” standing for the strange proposition that no diffuse surface water should leave any parcel that has been developed or redeveloped, except in very large storms. (Or, alternatively, if that standard cannot be met for feasibility reasons, then the land owner must pay to mitigate off-site by applying the same new universal retention doctrine to someone else’s land.)

If it were the intent of the Board’s staff to propose such a universal retention doctrine, such a radical step should not be taken without much more discussion, study, and major revision. Nonetheless, we see the hint of such a doctrine both in the Draft Permit language – Section XII.C(5) and (7) are at best ambiguous in this regard – and certainly in the urgings of NRDC. We are baffled by the fact that any group such as NRDC, which purports by its very name to *defend natural resources*, would turn its back on the *natural flow doctrine*, rather than seek to maintain or approximate the natural flows or diffuse and discrete surface waters to the extent and wherever practicable. But that is what has happened here, even though the U.S. E.P.A. and others are presently urging that suburban and exurban developers should seek to maintain or approximate – to the extent practicable – natural flows. Most notably, the US EPA defines LID as follows:

A comprehensive stormwater management and site-design technique. Within the LID framework, the goal of any construction project is to design a hydrologically functional site that mimics predevelopment conditions. This is achieved by using design techniques that infiltrate, filter, evaporate, and store runoff close to its source. (emphasis added)

<http://cfpub1.epa.gov/npdes/greeninfrastructure/information.cfm#glossary>

We respectfully urge the Board and staff to reject any embrace (ambiguous or otherwise) of a new *universal retention doctrine*. We urge instead appreciation of the *natural flow doctrine* or, better yet, the *modern reasonableness test* applied with ever-evolving and progressive standards of reasonableness. We suspect that the U.S. E.P.A. would similarly urge abandonment of a universal retention proposition (assuming the E.P.A. representatives are fully aware and fathom the policy implications of the proposal). In addition, we have only barely discussed this new, general universal retention doctrine with the appropriate individuals at the California Department of Fish and Game and the U.S. Fish and Wildlife Service. We found that they were not aware of the implications of the Draft Permit. The few officials with whom we spoke

3674 (1992) (“The Committee believes the restoration of the natural chemical, physical, and biological integrity of the Nation's waters is essential.”); H.R.Rep. No. 92-911, p. 76 (1972) (“the word ‘integrity’ ... refers to a condition in which the natural structure and function of ecosystems is [are] maintained.”).

indicated their view that any lack of attention to natural flows would raise issues about stream health, especially where water courses might be starved of storm flows in all but the larger storms. Therefore, we urge the Board's staff to thoroughly discuss the new and generally-applicable universal retention policy with your fellow agency counterparts, and then remove any preference for or generally-applicable use of the universal retention doctrine from the eventual permit revisions.

3. We continue to seek more and better integration between the MS4 permit requirements and the land planning and approval processes required by the California Environmental Quality Act (CEQA).

As our industry representatives have noted before, California law has long established CEQA as the mechanism for evaluating – and mitigating – the environmental impacts of land development. The CEQA process evaluates all environmental impacts and provides a consistent process for their mitigation, with opportunity for input from a wide cross-section of agencies and public interests. Moreover, CEQA continues to evolve as science and policy imperatives drive it to do so. For example, several years ago, green house gas emissions were never a focus of CEQA; now they certainly are.

By establishing any fixed, inflexible numeric standards for low impact development, the Draft Permit trumps all other considerations (environmental and otherwise) and improperly shifts land use approval authority to the Regional Water Quality Control Board. Although the Draft Permit may refer to waivers or exceptions for infeasibility, the Draft Permit provides no clear process for this site-specific evaluation by the co-permittees and exceptions where the permit requirements are unreasonable, infeasible or suboptimal.

CEQA could – and we maintain should – be utilized to integrate low impact development and grading considerations into the project approval process in ways heretofore not applied. This would allow for the appropriate evaluation of water quality impacts in the context of all other environmental impacts. Perhaps more significantly, it would integrate the consideration of low impact development techniques into the land use planning process at the time of project design and development – rather than the all-too-common current occurrence where these techniques are evaluated after substantial approvals are in place and changes are difficult to retro-fit. Using CEQA as the tool to accomplish the integration of low impact development techniques would be achieved if the numeric standards were established as presumptive thresholds of environmental significance, which would significantly increase the level of analysis of water quality impacts – at the time when changes are most likely to be accommodated. We offer more detailed analysis of this approach in the accompanying attachment, which is – again – the CEQA integration proposal that we have lodged before. The CEQA integration approach would achieve the Board's goals of appropriate attentiveness and reasonable consistency between jurisdictions and permits, while maintaining the ability to make local decisions appropriate for the jurisdiction's environmental circumstance.

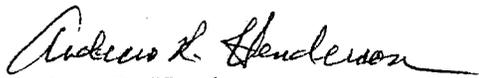
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Since the first draft was released, the BIA and its industry affiliates have been active participants and contributors to the creation of new and improved MS4 permit. We continue to believe that rational, *implementable* permit requirements are critical to achieving great progress concerning water quality and our environment. We hope that these comments are received in the manner in which they are intended – to continue the discussion of how we can create a workable permit that improves water quality to the maximum extent practicable. We remain committed to a positive dialog with the Board and its staff – one that will result in an informed, balanced and effective permit.

Thank you for your consideration of these comments.

Sincerely,



Andrew R. Henderson
Vice President and General Counsel,
Building Industry Association of Southern California
and General Counsel,
Building Industry Legal Defense Foundation

cc: Dr. Mark Grey