



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

May 8, 2009

Mark Smythe  
Santa Ana Regional Water Quality Control Board  
3737 Main Street, Suite 500  
Riverside, CA 92501-3338

Dear Mr. Smythe:

Pursuant to the Santa Ana Regional Water Board's May 1, 2009 notice, the following are EPA's comments on section XII.C.2 of the May 1 "Fourth Draft" Orange County Municipal Stormwater permit.

We appreciate that there has been extremely valuable progress on this permit. A few additional changes to the permit's Low Impact Development (LID) provisions are necessary in order to provide clarity and avoid future disputes over the interpretation of these LID requirements.

1. As you know, on April 21, 2009, EPA provided suggested revisions to section XII.C.2 of the April 10 "Third Draft." Based on some of the questions raised about the edited text, in the interest of clarity, we believe section XII.C.2 should be revised to:

"The permittees shall reflect in the WQMP and otherwise require that each priority development project infiltrate, harvest and reuse, capture or evapotranspire the 85th percentile storm event ('design capture volume'), as specified in Section XII.B.4.A.1 above. Compliance with the permit's LID requirements may also be achieved by implementation of the alternatives specified in section XII.C.7 or by implementation of an approved waiver under section XII.E."

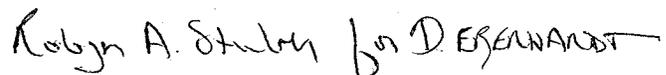
2. Section XII.C.2 of the May 1 Fourth Draft uses the term "bio-filter." The exact meaning of this term is unclear, and its use may not be necessary. For example, in some circumstances there is not a distinction between infiltration and biofiltration. In some EPA guidance, "bioretention" is used as an example of an infiltration technique. While we would support the text in footnote 56, we believe additional clarification is needed if the term "bio-filter" is included. Footnote 56 refers to "properly engineered and maintained" biofiltration systems. Criteria for the design and operation of these systems should be specified to ensure that the permit does not create a loophole which allows the use of systems that are inconsistent with LID principles. These specific design and operation criteria could be included in the permit. Alternatively, the permit could be revised to require the preparation of these biofiltration criteria as part of the feasibility criteria required pursuant to section XII.E.

3. The text in section XII.C.2 refers to section XII.C.7 as a means for compliance. Sections XII.C.7.b, c, and d require that pervious areas have the capacity to "infiltrate, harvest and re-use, evapotranspire or treat at least the design capture volume." (emphasis added) The term "or treat," is not clear, and may not be necessary. Again, this could create a loophole that would allow the use of systems inconsistent with LID principles. We believe "or treat" should either be deleted from this section, or it should be defined. Should the Board decide to retain this concept, the word "treat" could be revised to "biotreat." Under this scenario, the hierarchy included in footnote 56 should be applied to the use of the term "biotreat" in this section, and the design and operation criteria described in comment #2 would apply.

4. Section XII.C.2 includes references to section XII.E. We understand some parties may have concerns with the project-specific waiver provisions in section XII.E. As a fundamental matter, we believe that the number of projects requiring waivers will be relatively small. If a project cannot manage the design capture volume as described in section XII.C.2; there generally should be broad opportunities to take advantage of the compliance opportunities available under section XII.C.7 to implement LID on a sub-regional or regional basis. As currently drafted, the permit requires that waivers issued pursuant to section XII.E be approved by the Executive Officer. Although we are supportive of the existing text in section XII.E, we would be open to revisions that do not require Executive Officer approval for waivers. It would still be necessary for the principal permittee to submit feasibility criteria for the Executive Officer's approval, and for individual projects to undergo a rigorous feasibility analysis pursuant to the approved feasibility criteria. The permit could be revised to provide the responsibility for approving project-specific waivers to the principal permittee. The permit would need to require that all requests for waivers, feasibility analyses, waiver justification documentation, and waiver conclusions be included in the principal permittee's annual report to the Regional Board.

Thank you for your continued efforts to develop a clear and protective permit. If you'd like to discuss these comments, please contact John Tinger at (415) 972-3518, or Eugene Bromley at 415-972-3510.

Sincerely,



Douglas E. Eberhardt, Chief  
NPDES Permits Office