



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

May 14, 2009

James Smith
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: Draft MS4 Permit for South Orange County (NPDES Permit No. CAS0108740)

Dear Mr. Smith:

Following below are EPA Region 9's comments on the March 13, 2009 Tentative Draft Permit for the South Orange County Municipal Separate Storm Sewer System (MS4) within the jurisdiction of the San Diego Regional Board (NPDES permit No. CAS0108740).

EPA appreciates the efforts made by Regional Board staff to respond to our comments of January 2008 on the previous draft permit. Our comments on the latest draft mainly concern one aspect of the permit, namely the Low Impact Development (LID) requirements. Regarding LID, we still believe the permit needs certain improvements to ensure it contains clear, measurable, and enforceable requirements in this area.

With regards to other issues, we believe a number of clarifications are needed regarding the applicability of TMDLs to the permit. And in response to your request, we are providing comments on two other issues which are the removal of the term "urban runoff" and the use of numeric effluent limits for non-stormwater discharges.

A. Implementation of LID Requirements

First of all, we understand that the Orange County permittees desire consistency between the LID requirements adopted by the Santa Ana and San Diego Regional Boards. As noted in our letter to the Santa Ana Regional Board dated May 8, 2009 (which we provided to you earlier), with a few relatively minor clarifications, we would be comfortable with the requirements of the Santa Ana Regional Board's permit for North Orange County (May 1, 2009 version). As discussed below, however, we have certain concerns with the LID requirements of the March 13, 2009 draft permit proposed by the San Diego Regional Board as well as the tentative update of April 29, 2009. If the adopted Santa Ana Regional Board North Orange County permit satisfactorily addresses EPA's May 8 comments, we would support direct incorporation of the North Orange

County permit's LID provisions into your South Orange County permit. We will continue to consult with you regarding the status of the North Orange County permit.

1) Concerns with the South Orange County draft permit of March 13, 2009

Our concerns with the South Orange County draft permit of March 13, 2009 include the following:

a) We believe the draft permit should be revised to more clearly incorporate numeric criteria for LID implementation. This has been a priority of ours in our review of draft MS4 permits across the State including the recently-reissued permit for Ventura County and for the North Orange County permit.

In the South Orange County permit, numeric LID criteria should be included in section F.1.d.4 of the permit, entitled "Low Impact Development Site Design BMP Requirements." This section of the draft permit describes LID BMPs, but does not include numeric performance criteria. We recognize that in a subsequent section of the permit, section F.1.h which addresses hydromodification, there is a section entitled "Interim Requirements for Large Projects" (section F.1.h.6) which calls for the reduction of Effective Impervious Area (EIA) to less than 5%. While we support including an interim hydromodification requirement, to avoid confusion over the permit's expectations for LID, we believe the permit would be improved by including numeric criteria in the LID section F.1.d.4.

An example of this recommended approach is the permit adopted by the Los Angeles Regional Board for Ventura County on May 7, 2009. This permit includes numeric criteria in the LID sections of the permits, and also contains appropriate, separate criteria for hydromodification.

b) We would also point out that the South Orange County permit lacks storm sizing criteria to use in conjunction with the EIA requirement. The absence of such criteria resulted in criticism of an early version of the draft Ventura County permit.

Additionally, we would note that the latest draft North Orange County permit no longer contains the 5% EIA requirement, but instead establishes numeric LID performance criteria in terms of a design storm volume. We are supportive of both the design storm volume approach proposed by the Santa Ana Regional Board and the 5% EIA approach used by the Los Angeles Regional Board for the Ventura County permit.

c) We believe the South Orange County permit should include specific requirements for alternative programs when permittees conclude that implementation of LID is infeasible. However, the existing provisions in the permit related to waivers (sections F.1.d.7 and F.1.d.8) do not address this concern. Section F.1.d.7 is entitled "Waiver Provision for Numeric Sizing of Treatment Control BMP Requirements" and provides waivers for treatment requirements rather than LID. Further, section F.1.d.8, entitled "LID Site Design BMP Substitution Program" is written to substitute for "some

or all treatment control BMPs." Our concern is with the draft permit's LID section (section F.1.d.4.a.i) which refers to a "finding of infeasibility" that permittees may make if LID implementation is not practical for a given project; additional clarification is needed concerning the circumstances when LID would be considered "infeasible."

2) Concerns with the tentative revisions to the South Orange County permit of April 29, 2009

Our concerns with the tentative revisions to the South Orange County permit of April 29, 2009 include the following:

a) New language would be added in section F.1.d.(4)(a)(i) which would require LID practices or participation in the LID substitution program of F.1.d.(8)(d). However, the permit still does not clarify the circumstances when LID would be considered infeasible (see comment 1.c above) or require the permittees to develop such criteria for submittal to and approval by the Regional Board (as does the current draft of the Santa Ana Regional Board's permit). Further, the revised section F.1.d.(8)(d) seems misplaced (and is confusing) in that it is located within section F.1.d.(8) which sets forth an optional program to substitute LID for treatment controls.

b) A new section F.1.d.(4)(c) would be added to the permit which would require capture of a design storm. However, the permit also provides a rather open-ended list of acceptable LID BMPs. We would recommend that acceptable LID measures be limited as suggested in the first comment in our May 8 letter to the Santa Ana Regional Board on the proposed North Orange County permit, in which LID is defined in terms of the way the BMP performs. The concern in our May 8 letter is that certain BMPs (even biofiltration which is listed in the North Orange County permit) may not necessarily perform consistent with LID principles, unless additional operational requirements are specified. Such concerns would also apply to certain BMPs on the list in your permit such as detention ponds and constructed wetlands.

B. Total Maximum Daily Loads (TMDLs)

We believe that additional clarification is needed concerning the consistency of the draft permit with approved TMDLs. Finding E.12 for the permit indicates the permit includes applicable wasteload allocations (WLAs) that have been adopted by the Regional Board and approved by the State Board, Office of Administration Law and EPA. However, we are not aware of any such WLAs for the MS4s subject to the permit. Table 1 in the fact sheet for the permit notes that certain TMDLs have been adopted by the Regional Board, but have not yet been approved by EPA. There is also a reference in the fact sheet to dry weather TMDLs included in section C of the draft permit, which apparently have received all the necessary approvals. Again, however, we are not aware of these TMDLs and the fact sheet should provide full and clear information concerning the approval status of TMDLs with WLAs applicable to the MS4s.

Even if no applicable WLAs have been approved by EPA, it is helpful for the fact sheet to clarify this matter. Further, if applicable WLAs are approved by EPA prior to Regional Board adoption of the permit, they should be included in the permit. We are also pleased by the apparent intent of the Regional Board as indicated in Finding E.12 and Section I of the draft permit to express permit effluent limits, when necessary to ensure consistency with applicable WLAs, as numeric effluent limits. Numeric limits provide greater assurance of consistency with WLAs than the alternative of BMPs which are sometimes used, given the uncertainty in the performance of many of the BMPs commonly used for stormwater pollution control.

C. Removal of the Term “Urban Runoff”

You had asked for our views on the proposed replacement of the term “urban runoff”, which was commonly used in the previous permit, with the terms “stormwater” and “non-stormwater” as the discharges regulated in the new permit. We would support this revision since it is actually more consistent with the terminology used in the EPA stormwater regulations at 40 CFR 122.26. However, we would point out that the new Finding C.14 and the discussion in the fact sheet incorrectly indicate that industrial stormwater discharges are subject to the maximum extent practicable (MEP) discharge standard in the Clean Water Act (CWA). Section 402(p)(3)(B) of the CWA provides that only municipal stormwater discharges are subject to the MEP standard; section 402(p)(3)(A) provides that industrial runoff is subject to all applicable requirements of sections 402(p) of the CWA, and section 301 of the CWA which includes BAT/BCT effluent limits and water quality standards compliance.

D. Numeric Effluent Limits for Non-Stormwater Discharges

You also asked for our views on whether numeric effluent limits would be appropriate for non-stormwater discharges. As noted above in our comments on LID and TMDLs, we are seeking to ensure that permits include clear, measurable and enforceable requirements. We believe that the use of numeric effluent limits for non-stormwater discharges would be a significant step in the right direction and we support the proposed limits. In previous MS4 permits, the non-stormwater discharges addressed in the permits have typically been regulated through best management practices (BMPs) pursuant to 40 CFR 122.44(k) for the same reason that stormwater discharges themselves are often regulated by BMPs, which is the lack of good information about the discharges and the difficulty in deriving appropriate numeric effluent limits. This issue was recognized in a 1996 EPA guidance on water quality-based effluent limits for stormwater discharges which is cited by the fact sheet. However, the guidance also indicates that as additional information becomes available, more specific limits should be considered. As noted in the fact sheet, additional information has become available to the Board about the discharges over the years, and we agree that the numeric effluent limits are now appropriate.

We appreciate the opportunity to provide input on this draft permit. If you would like to discuss these comments, please contact John Tinger at (415) 972-3518, or Eugene Bromley at 415-972-3510.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas E. Eberhardt". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Douglas E. Eberhardt, Chief
NPDES Permits Office