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## Comments on the Tentative MS4 permit for Sac County

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We have reviewed the draft MS4 permit for Sacramento County and its co-permittees (NPDES permit No. CAS083470) public noticed on May 16, 2008 and we would like to offer the following comments regarding four aspects of the permit: (1) *Planning and New Development (Provisions D.13, D.14 and D.15)*, (2) *TMDL provisions (D.17)*, *permit enforceability (various provisions)*, and (4) *permit clarity (various provisions)*.

### **(1) Planning and New Development**

In April 2007, EPA entered into an agreement with several national organizations to promote green infrastructure (which is very similar to low impact development (LID)) to improve stormwater quality management for MS4s. In January 2008, EPA also published an action strategy for the new initiative which is available at [http://cfpub.epa.gov/npdes/whatsnew.cfm?program\\_id=6](http://cfpub.epa.gov/npdes/whatsnew.cfm?program_id=6)). The strategy encourages green infrastructure/LID requirements (such as bioretention, green roofs) in MS4 permits and we are trying to ensure that MS4 permits in Region 9 include appropriate requirements to promote green infrastructure/LID. The effectiveness of vegetation-based treatment for storm water is superior\* to conventional treatment (such as detention basins, drain inlet inserts) which is the focus of Provision D.14.b of the permit; landscape-based treatment also has greater capacity to reduce the impact of spills. A wide range of other benefits of green infrastructure/LID was identified in our action strategy (such as energy efficiency, cleaner air and moderating climate change), and again we believe it is important that this be emphasized in permits.

We are also interested in ensuring that green infrastructure/LID permit requirements are as quantitative as possible to ensure clarity and enforceability. Some possible approaches (but not necessarily the only approaches) which have been suggested for quantitative requirements are the following:

Requirements similar to the draft Ventura County MS4 permit which includes a 5% limit on effective impervious area for new development and redevelopment (Provision E.III.1.(a)). It may also be necessary to develop exceptions provisions for some projects such as found in Provision E.IV.4 of the draft Ventura County permit. The draft Ventura County permit is available on the Los Angeles Regional Board's website.

Requirements for LID management measures that address a particular design storm (such as the first 1" or rain), but with reduced requirements for certain types of projects such as brownfield developments, infill, or transit oriented developments.

Currently, the draft permit for the Sacramento area only requires that general LID principles be incorporated into new developments and redevelopments. For example, Provision D.15.a.i requires that impervious surfaces be minimized, but it does not specify a measurable objective. From our perspective, inclusion of explicit requirements in the permit at this time for implementation of LID techniques would be ideal. However, in the interest of avoiding potential delays in permit reissuance, if the permit were to include clear expectations in Provision D.15.b.i for the development of quantitative LID requirements by the permittees, our objectives could also be met.

\*See for example the analysis prepared by Dr. Richard Horner entitled "Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID") for Ventura County" submitted to the Los Angeles Regional Board by NRDC. This report is attached below:

(See attached file: venturaMS4LID.pdf)

## **(2) TMDL Provisions**

The fact sheet (pages 11-12) includes only a brief discussion of how the permit ensures compliance with applicable TMDLs. The findings accompanying the permit include somewhat more information, but we believe further explanation should be provided, particularly in the fact sheet.

The only information in the fact sheet is that there are a number of TMDLs (which are not identified) in various stages of development. The fact sheet should list all the TMDLs which are in effect and which include a wasteload allocation (WLA) applicable to the MS4 discharges. There is apparently only one such TMDL - the diazinon/chlorpyrifos TMDL, which was approved by EPA in 2004. The fact sheet should also provide information concerning the WLAs for the MS4s and how the permit ensures compliance with the WLAs. EPA's guidance memorandum of November 22, 2002 concerning compliance with TMDLs for Stormwater permits (available at: [http://cfpub.epa.gov/npdes/pubs.cfm?program\\_id=6](http://cfpub.epa.gov/npdes/pubs.cfm?program_id=6)) indicates that the effluent limits in a permit may consist of BMPs (rather than numeric effluent limits), provided the fact sheet demonstrates that the BMPs will be sufficient to comply with the WLAs. Apparently the permit relies primarily on the phase-out of these pesticides in urban areas to comply with the WLAs - the findings (Finding 91) suggest that the WLA has already been achieved, but it's not entirely clear - this issue should be clarified in the fact sheet. The fact sheet should also discuss other TMDLs under development (such as the mercury TMDL) which may include WLAs for the MS4s, and what the Board's intent would be if they were adopted within the term of the next permit.

## **(3) Permit Enforceability**

In reviewing the permit, EPA focused on how each permit provision would be enforced and found that the wording or assumptions in certain provisions were

problematic. Accordingly, we suggest the following changes:

1. Define the term “feasible” and provide that the permitting authority will determine feasibility. This term is used in different permit provisions and it raises concerns regarding who determines the feasibility of a measure. For instance, in Provision D.15.a.i, it is unclear who would determine whether it is feasible to minimize the amount of impervious surfaces. EPA believes that it would be preferable for the permit to require such minimization but allow the permittees to seek an exception from the permitting authority. See also Provision D.15.b (“Low Impact Development Strategies’), which apparently allows the permittee to decide the feasibility of implementing these strategies without permitting authority oversight. The same concern applies to D.15.b.i, 15.c.i.(d) and (e).

2. Define the term “practical” and provide that the permitting authority will determine practicality. There is a similar concern with this term. For instance, Provision D.15.a.ii. suggests that the permittee would decide when it is practical to use strategies that control the sources of pollutants. In EPA’s view, this should be decided by the permitting authority.

3. Define the term “minimal” and provide that the permitting authority will determine when the condition is met. Under D.15.c.ii, it is unclear whether the permittees will determine if “the potential for erosion, or other impacts to beneficial uses, is minimal.” While some examples are given, this decision should be made by the permitting authority, not the permittees, who could arguably claim that they deem the erosion potential to be minimal and thus avoid applying the Hydromodification Management Plan (HMP) to new development and redevelopment projects. See also D.15.c.ii.(d), which raises a similar concern.

4. Avoid vague provisions. In particular, we suggest that you change D.15.a.vi, which states: “Identify and avoid development in areas that are particularly susceptible to erosion and sediment loss; or establish development guidance that protects areas from erosion and sediment loss.” (emphasis added) Permittees may completely disregard the first part of the provision (i.e., the need to identify priority areas), as long as they create some kind of guidance. This second part of the provision is rather vague and unclear because the use and implementation of the guidance are not prescribed.

5. Maintain consistency. The Industrial/Commercial Program requires compliance with the objectives listed under D.9.a. Similar provisions can be found for the Illicit Discharge, Public Outreach, and Planning and New Development Programs. However, the Municipal program is inconsistent; it should require in D.10.b compliance with the objectives listed under D.10.a.

6. Use “shall” instead of “should” in D.22.c.i.

7. Delete “or” in D.28, which states “permittees shall develop and/or implement the storm water monitoring program.” As written, this provision allows

permits to merely create a program without having to do the actual monitoring.

#### **(4) Permit Clarity**

EPA notes that the permit contains many specific and clear requirements, such as provisions D.3.c (SQIP implementation) and D.3.d (public notice). We suggest the following changes to further improve the permit.

1. Use “minimize” instead of "reduce" or "limit" to ensure maximum environmental protection. In particular we suggest this change to the following provisions where MEP is not specified as the required degree of reduction.

D.10.a.ix (firefighting runoff)

D.12.a (public outreach)

D.15.a.iv (disturbance of natural water bodies and natural drainage systems)

D.15.a.vii (water quality planning and design)

D.15.a.ix (water quality planning and design)

D.27.a (pesticides)

2. Clarify the public notice process. The permit is not clear on how the public may review and comment on the current SQIP, although EPA notes that public notice and comment is required for revisions of the SQIP (D.3.d). Similarly, the public should be able to review and comment on the New and Revised Development Standards (D.14.b), Low Impact Development Strategies (D.15.b.i), Hydromodification Management Plan (D.15.c), and General Plan Update (D.16). In this version, it is unclear whether the public notice process applies to these documents.

3. Clarify the waiver program. The current description in D.20 raises questions as to who will determine whether structural treatment control measures are deemed “infeasible” as well as how fees will be used, given the permit’s rather vague provision that “funds shall be used for regional or alternative solutions within the Sacramento watershed.” It is unclear whether the permitting authority or public have any oversight regarding issuance or applicability of a waiver and/or use of the fees.

4. Clarify the meanings and purpose of the following provisions

D.16.e “Each permittee shall review and modify the development goals and policies, open space goals and policies including preservation or integration with natural features, and when defined need for specific urban runoff and storm

water pollution protection policies are deficient.”

D.19 “Mitigation Funding: The Permittees may propose a management framework, for endorsement by the Regional Water Board Executive Officer, to support regional or sub-regional solutions to storm water pollution, where any of the following situations occur:

- a. a waiver for impracticability is granted;
- b. legislative funds become available;
- c. off-site mitigation is required because of loss of environmental habitat; or an approved watershed management plan or a regional storm water plan exists that incorporates an equivalent or improved strategy for storm water mitigation.”

Thank you for the opportunity to comment on the draft permit. If there are questions, you should call Eugene Bromley at (415) 972-3510, or Marcela Vonvacano at (415) 972-3905.