



June 7, 2011

Via electronic mail

Executive Officer and Members of the Board
California Regional Water Quality Control Board
San Francisco Region
1515 Clay Street, Suite 1400
Oakland, CA 94612
dbowyer@waterboards.ca.gov

**Re: *Comments on Feasibility/Infeasibility Criteria Report – MRP Provisions
C.3.c.i.(2)(b)(iv) and C.3.c.ii.(1)***

Dear Mr. Wolfe and Members of the Board:

We write on behalf of the Natural Resources Defense Council (“NRDC”). We have reviewed the April 29, 2011 Draft *Feasibility/Infeasibility Criteria Report – MRP Provisions C.3.c.i.(2)(b)(iv) and C.3.c.ii.(1)* (“Draft Criteria”) submitted by BASMAA on behalf of the Permittees to the San Francisco Municipal Regional Permit (Order No. R2-2009-0074) (“MRP”). We appreciate the opportunity to submit the following comments to the Regional Board.

We are concerned that the Draft Criteria, as currently written, is inconsistent with both the MRP and the Clean Water Act’s maximum extent practicable (“MEP”) standard. The Draft Criteria properly points out that the MRP requires that each regulated project must, where feasible, retain “100 percent of the amount of runoff identified in Provision C.3.d” of the MRP (identified throughout the Draft Criteria as 80 percent of the average annual runoff volume). (Draft Criteria, at 1, 4.) However, the Draft Criteria improperly appears to propose infeasibility criteria that would allow for a regulated project to declare any specific retention practice (e.g., infiltration, harvest and reuse, or evapotranspiration) to be infeasible if that specific practice, *by itself*, is unable to retain the full volume of 80 percent of average annual stormwater runoff. Neither the MRP nor the MEP standard contemplate such a narrow definition of infeasibility; where it is technically feasible to retain any portion of the required volume of runoff, whether the full volume or some lesser amount, the regulated project is required to do so. Merely because the *entire* required volume of 80 percent of average annual runoff cannot be feasibly retained at a given project does not relieve the project of its legal responsibility to retain runoff onsite to the MEP.

For example, the Draft Criteria states that to “assess the feasibility of infiltration using bioinfiltration on a project site, one must evaluate whether infiltration of the required 80 percent of average annual stormwater runoff can be achieved.” (Draft Criteria, at 19.) The Draft Criteria also states that “[r]easonably sized infiltration measures and devices cannot achieve the 80 percent capture objective for all . . . locations within the MRP area.” (Draft Criteria, at 22.) Further, the Draft Criteria states that “[t]o determine if rainwater harvesting is feasible for the project or DMA, an assessment of use demand for harvested stormwater that will achieve 80 percent capture of the average annual runoff volume is required.” (*Id.*) While we do not comment on the ability of every site to meet the capture objective using any of these practices (or other practices that achieve retention of stormwater runoff), it is clear that the MRP and MEP standard require each project to retain the full capture objective where feasible, or where it is infeasible to meet the full capture objective, to retain as much runoff onsite as can feasibly be retained. To retain less than is feasible would flatly fail to meet the Clean Water Act’s requirement to control pollutants to the maximum extent practicable, and would contravene the direct requirements of the MRP’s LID requirements under section C.3.c.i.(2)(b).

In order to correct this issue, the Board should revise the Draft Criteria to clearly state that retention practices are required to be implemented to address any volume, up to and including the full capture objective, that can be feasibly retained onsite.

Further, the Draft Criteria must make clear that, where no one specific practice, by itself, can feasibly achieve retention of the full capture objective, the project must implement whatever combination of retention practices are available to it to achieve the maximum feasible onsite retention. The MRP does not authorize projects to use one practice alone, to meet only a portion of retention of 80 percent of the average annual runoff, when using a combination of available practices (e.g., infiltration *and* harvest, or infiltration *and* evapotranspiration) would achieve a greater volume of stormwater runoff retention. The MRP and the Clean Water Act fully contemplate that retention practices will be used in combination, where feasible, to the maximum extent practicable.

Finally, we note that the Draft Criteria’s discussion of factors affecting the infeasibility of stormwater retention practices would incorrectly restrict opportunities for retention. First, the Draft Criteria overstates the claimed separation between irrigation demand and availability of harvested rainwater (Draft Criteria, at 9), as irrigation occurs year round in California, even in wetter winter months. Second, the Draft Criteria fails to adequately consider the use of amended soils as a means of increasing infiltration potential at a given site.¹ The Draft Criteria should be revised to accurately consider these issues, in order to ensure that practices resulting in the retention of stormwater runoff are properly used to the MEP.

¹ See, R. Horner (2007) *Initial Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices (“LID”) for the San Francisco Bay Area*; R. Horner (2007) *Supplementary Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices (“LID”) for the San Francisco Bay Area*.

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Thank you for your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Noah Garrison". The signature is fluid and cursive, with the first name "Noah" being more prominent than the last name "Garrison".

Noah Garrison
Natural Resources Defense Council