



DATE: April 22, 2004

TO: Management Committee Representatives

FROM: C.3 Legal Work Group Members
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SUBJECT: Preliminary Recommendations for Implementing Permit Provision
C.3.e - Operation & Maintenance of Treatment Measures

This memorandum summarizes preliminary recommendations developed by the C.3 Legal Work Group and suggests actions that municipalities should begin implementing now.

Background

The C.3 provisions require installation of stormwater treatment BMPs on some new development sites. These treatment BMPs operate by detaining runoff in a pond, basin, or underground tank or by filtering runoff through sand or soil. Similar devices may also be required to control the rate and duration of runoff.

Studies conducted elsewhere in the U.S. attribute poor BMP performance to lack of maintenance. In addition, faulty design or poor maintenance can create breeding habitat for mosquitoes.

Provision C.3.e requires each municipality to implement a BMP operation and maintenance (O&M) verification program. In summary, each municipality must:

- Compile and maintain a list of properties where treatment measures are located.
- Inspect a prioritized subset of this list each year to verify maintenance.
- Report annually (beginning September 2005) on the status of the verification program, including a summary of inspections conducted and results of the inspections.

The permit requires that an O&M verification program be in place by **July 1, 2004**. (This early implementation precedes the February 15, 2005 deadline to modify

development approval processes and require treatment BMPs; it applies to treatment BMPs that may be in place now.)

Issues Considered by the Legal Work Group

The Legal Work Group considered the following issues related to O&M of stormwater treatment BMPs:

- How to ensure reliable O&M of stormwater treatment BMPs over the life of a private development project.
- How to ensure access to private property to verify that stormwater treatment BMPs are maintained.
- How to recover municipalities' costs of inspecting and verifying maintenance of stormwater treatment BMPs.
- How municipalities can compel a property owner to remedy inadequate maintenance, or else abate the problem and recover costs.
- How to avoid a situation where the municipality is forced to assume responsibility for maintaining stormwater treatment BMPs after private property owners fail to do so.

Options for Stormwater Treatment BMP Operation & Maintenance

No single scenario for owning, operating, and inspecting treatment BMPs is likely to work for all jurisdictions or for all sites within a jurisdiction.

The following discussion examines the advantages and disadvantages of various scenarios.

Scenario #1: Public Ownership.

As part of a development agreement, the project proponent builds a BMP to treat runoff from one or more parcels and dedicates a parcel or easement within a public right-of-way or common area.

The municipality maintains the BMP in perpetuity as part of the storm drainage system. In compliance with Provision C.3.e, the municipality documents this maintenance in annual reports to the Regional Board.

The municipality recoups the cost of maintenance through a special tax, assessment district, or similar mechanism. Various such mechanisms are provided by California law.

The advantages of the public ownership scenario are:

- The municipality can insure that BMPs are adequately maintained and do not

- create a nuisance.
- The municipality doesn't need to inspect private property, nor must it compel the owner to remedy maintenance problems.

Potential disadvantages of this scenario are:

- BMPs must be located in publicly accessible areas. This constrains the site and drainage design and may conflict with the Program's recommendation to integrate small, low-maintenance BMPs into site landscaping.
- A funding mechanism must be established. Over the long term, the municipality may not be able to increase revenues enough to keep up with increases in maintenance costs.
- It expands the amount of public works the municipality must maintain.

The public ownership scenario seems most appropriate to residential subdivisions and small commercial subdivisions. In these situations, the advantage of avoiding conflicts with future owners of the property may outweigh the difficulty of establishing a funding mechanism.

Scenario #2a: Private Ownership Using Existing Funding and Authorities.

The project proponent incorporates treatment BMPs into the project.

As part of the development review process, the municipality requires the applicant to submit a plan specifying periodic BMP maintenance to be carried out by the manager or occupant of the property. Implementation of the BMP maintenance plan is a condition of development approval and may also be specified in a use permit, if one is required.

The municipality prioritizes the site for inspection and periodically inspects the site to insure that maintenance is adequate. For industrial and commercial sites, this is coordinated with an inspection, mandated under separate provisions of the stormwater NPDES permit, of potential pollutant sources and source control measures. (Many municipalities have contracted industrial/commercial inspections to the local sanitary district.)

The inspection is funded through existing stormwater fees.

The municipality uses the authority provided by its existing stormwater ordinance to compel corrective action, if needed. (The existing ordinance provides that failure to implement BMPs is a public nuisance.) Enforcement may be expedited by administrative fines.

The advantages of this private ownership scenario are:

- It simply extends the existing inspection program for commercial and industrial facilities.
- It requires no new legal agreements, ordinances, or revenue sources.

The disadvantages are:

- It depends on the municipality's ability to compel a facility operator, as opposed to a property owner, to conduct maintenance. For example, a lessee could refuse to maintain a BMP that served portions of the site outside his lease.
- Authority to access and inspect BMPs on private property is limited to the authority currently used by code enforcement officers for similar types of inspections (e.g. fire prevention, hazardous materials, industrial sewage discharge).
- If applied to BMPs on single-family lots, the implications of enforcement against a homeowner could get politically messy.
- If applied to BMPs serving multiple single-family lots (e.g. in a private common area) there may be no functioning homeowners association or other entity to enforce against. The municipality could end up having to conduct maintenance on private property at its own expense.
- The municipality must fund the new inspection program mandated by Provision C.3.e. from existing revenues.

This option seems most applicable to commercial/industrial facilities and multi-family residences where responsibility for site maintenance (e.g. paving, landscaping, utilities) is clearly defined.

Scenario #2b: Private Ownership with Maintenance Agreement.

The project proponent incorporates treatment BMPs into the project and submits a BMP O&M maintenance plan as described in the preceding scenario. However, the municipality requires the project proponent to execute an agreement that also binds future owners and lessees to maintain the BMPs. The agreement may also require owners or lessees to allow inspections and to pay a fee for inspection. Agreements developed by municipalities in California and elsewhere can be used as a model.

The municipality conducts an inspection program. Enforcement may be compelled through the existing stormwater ordinance or by civil action pursuant to the provisions of the agreement.

Advantages:

- In comparison to the previous scenario, the addition of an agreement makes it possible to more clearly delineate the responsibilities of the property owner, future owners, and lessees.

- The agreement makes it possible to collect a fee to offset the costs of the inspection.
- The agreement can be packaged with other development approvals to be acted on by the municipality's decision-making body. No ordinance changes would be required.

Disadvantages:

- Over time, the municipality could become party to a large number of individual agreements that are to be in force in perpetuity.
- Agreements covering BMPs on single-family lots or in a private common area serving more than one single-family lot may not be enforceable for political or practical reasons.

Scenario #2c: Private Ownership with Permit to Operate.

As with the preceding two scenarios, the project proponent incorporates treatment BMPs into the project and submits a BMP O&M maintenance plan. However, the maintenance plan becomes a condition of a standard permit. The permit conditions state the obligation of the permit holder to request periodic inspections and possibly, to pay a fee for those inspections.

Advantages:

- In comparison to the previous scenario, no individual agreement is required, simplifying the municipality's administration of its BMP O&M verification program.

Disadvantages:

- A new ordinance provision would probably be required to establish the permit system and to charge new fees for inspections.
- As with an agreement or with "public nuisance" provisions, it may prove difficult to enforce permit conditions against homeowners.

Summary of BMP O&M Options

There is no simple, consistent way for municipalities to implement the O&M verification program required by Provision C.3.e at all applicable sites.

It seems likely that each municipality will need to adopt policies and procedures to implement both publicly and privately owned treatment BMPs. Within each of these two categories, municipalities may strive to implement consistent policies; however, it is likely that special cases and conditions will arise from time to time that will require arrangements specific to a given site.

Coordination with the Mosquito and Vector Control District (MVCD)

Program guidance for the design, operation, and maintenance of stormwater treatment BMPs will include MVCD recommendations and will be reviewed by the MVCD.

The municipalities/Program will periodically provide an updated list of BMPs to the MVCD.

In addition, there is the potential for information-sharing, cross-training, and in-the-field coordination between MVCD inspectors and staff inspecting and maintaining stormwater treatment BMPs.

Forthcoming Program Guidance and Resources

The Program's forthcoming *Stormwater C.3 Guidebook* will incorporate guidance on the siting, design, and maintenance requirements of stormwater treatment BMPs.

Other Program guidance and resources may include:

- Information on the applicability of various property taxes to fund the maintenance of stormwater BMPs.
- Revisions to the Program's model stormwater ordinance to authorize inspections and reimbursement of costs of inspections.
- A model agreement between a municipality and property owner providing for maintenance of stormwater treatment BMPs.

What Cities, Towns, and the County Need to Do Now

- Compile a list of existing stormwater treatment BMPs, including locations, descriptions, and maintenance responsibility.
- Consider how maintenance of publicly owned BMPs will be integrated into current public works maintenance activities.
- Review options for funding maintenance of publicly owned BMPs.
- Begin planning how stormwater treatment BMP inspections will be conducted and open interdepartmental or interagency discussions regarding funding and implementing these inspections.