



City of Salinas

Office of the City Attorney - 200 Lincoln Avenue, Salinas, California 93901 - (831) 758-7256 - Fax (831) 758-7257

Vanessa W. Vallarta, City Attorney
Susan J. Matcham, Asst. City Attorney
Christopher A. Callihan, Sr. Deputy City Attorney
Georgina B. Mendoza, Deputy City Attorney

October 31, 2008

Via Electronic Mail and U.S. Mail

Roger W. Briggs
Executive Officer
California Regional Water Quality Control Board
Central Coast Region
895 Aerovista Place, Suite 101
San Luis Obispo, California 93401-0397

**Re: City of Salinas Storm Water Development Standards; Notice of Water Board
Hearing Regarding Required Revision No. 3 Table of Required Revisions**

Dear Mr. Briggs:

This letter is written in response to your letter dated October 8, 2008 in which you indicate you will ask the Central Coast Regional Water Quality Control Board ("Regional Board") "to clarify its intent regarding Required Revision No. 3" at the Regional Board's December 5, 2008 meeting in San Luis Obispo. In that letter you request the City of Salinas provide by October 31, 2008 any "further written comments, evidence, or legal arguments" the City would like the Regional Board to consider prior to their December 5 meeting. The following comments are thus timely submitted in accordance with your October 8 letter and I request this letter be forwarded to the Regional Board prior to their December 5 meeting for their review and consideration. The City, however, reserves the right to provide additional comments and additional correspondence to the Regional Board and its staff in advance of the December 5 meeting and to respond to any other comment letters or correspondence submitted to the Regional Board or its staff on this matter. The City will not be placed in the disadvantageous position of having to present its "comments, evidence, [and] legal arguments" more than a month before the proposed action without being afforded the opportunity to provide additional information and to respond to other comments submitted. To attempt to foreclose the City's right to be heard with respect to this serious matter is wholly inappropriate and unacceptable. And, with this letter, I formally request that Regional Board staff provide me with a copy of any and all written letters or other correspondence received by the Regional Board and its staff regarding this matter.

1. The Regional Board May Not Properly Reconsider its Original Action Two Months After the Fact.

While I am not yet certain in what form or manner you plan to bring this matter back to the Regional Board for further consideration, it appears you intend to agendize this item on the

Regional Board's December 5, 2008 agenda so they may "clarify [their] intent regarding Required Revision No. 3." Under the Regional Board's own rules of practice and procedure, generally a motion for reconsideration of an item already adopted must be made by a member who voted in favor of the original motion and such motion for reconsideration must be made either at that same meeting or at the immediately succeeding meeting. There is no authority under the law, or under the rules of practice and procedure, for the Executive Officer to unilaterally set this item for reconsideration or even for "clarification." The Regional Board has already considered the City's Stormwater Development Standards (the "Standards") and has already adopted a Resolution approving the City's Standards, with revisions.

Even assuming it is legal and appropriate for you to administratively and unilaterally bring this matter back to the Regional Board and ask them to clarify or to reconsider their September 4, 2008 approval of the City's Standards, any attempt at clarification or reconsideration of the Regional Board's motion on this item is complicated and the City extremely prejudiced by the fact that the maker of the motion, Dr. Press, is no longer a member of the Regional Board and thus will not be present in December. With Dr. Press's absence, it will be impossible to truly and accurately "clarify the intent" of the Regional Board's motion.

2. Regional Board Staff May Not Arbitrarily Amend or "Clarify" the Regional Board's September 4, 2008 Action.

Your explanation "that the [Regional Board] adopted a motion to remove certain sections of the proposed Required Revisions, but indicated its intent was to remove any language in [the Storm Water] Development Standards Section 1.5.3 that may be redundant with other sections of the document, while preserving all the hydromodification control requirements [Regional Board] staff proposed" is unsupported by the record. Further, your conclusion that the Regional Board vested you with administrative discretion to modify the list of Required Revisions by relying upon Dr. Press's comment to "make it so" is also unsupported by the record and is an egregious abuse of administrative discretion.¹

I agree that with its final motion on the City's Standards the Regional Board removed certain sections of the proposed Required Revisions. And, I agree that the Regional Board was concerned there not be inconsistencies among the different sections of the City's Standards. I completely disagree, however, that the Regional Board's final motion on the City's Standards included a direction to Regional Board staff to "preserv[e] all the hydromodification control requirements [Regional Board] staff proposed." I also completely disagree that the Regional Board's final "motion included the directive to have the Executive Officer 'make it so'." My conclusion does not stem from one of a variety of interpretations of the Regional Board's final action, as you suggest, but from a simple and plain reading of the record of the proceeding. To elucidate this point for you, provided below is a full transcription of the final motion made by

¹ All references made in this letter to the list of Required Revisions are to that list titled "Revised September 3, 2008."

then Regional Board member Dr. Press, beginning at minute 46:00 of the audio recording, then continuing to the Regional Board's discussion and vote thereon:²

Board Member Dr. Press: "I have moved that we are adopting Staff's September 3 revision, alright? With the following change to reference number 3, page 2, section 3 after part B, that staff add language to the effect that the flow and volume treatments will be calculated as outlined in chapter 4; section 4: 4.4.2 and 4.4.3. And, that we then strike further on in that section part 4 on pages 2 and 3 and that then at the top of page 4 in section 4, 2 that staff add on a sentence or modify the last sentence specifying that a combination of appropriate source control BMPs and low impact development treatment BMPs would be selected from the CASQA Standards handbook, hereby attached and as amended. That's it."

Chairman Young: "That's the motion."

Board Member Hayashi: "I'll second."

Following the second by Board Member Hayashi, the Board Members present and voting voted unanimously in favor of the motion.

Listening to and then reading the transcript of the proceeding I find it impossible to understand how you continue to defy the Regional Board's final action and how you continue to insist that the Regional Board's final motion somehow vests with you the authority to reinsert portions of the Required Revisions *expressly excluded* by Dr. Press's motion from the final list of Required Revisions. Nowhere in the Regional Board's final motion is it even implied that the hydromodification control requirements be maintained; rather, Dr. Press acknowledged the City's Standards already incorporate such requirements and there was no longer a need for what was being proposed at Required Revision No. 4. Dr. Press was very clear, deliberate, and specific in making his final motion. Had he intended to maintain any part of Required Revision No. 4 I am confident he would have specified which part of that Required Revision he wanted to maintain. The fact that Dr. Press did not specifically identify *any* part of Required Revision No. 4 to be maintained and carried forward to the final list of Required Revisions speaks directly to his intent to delete the entirety of that Required Revision.

As evidenced by the record of the nearly three hours of presentation, discussion, and Regional Board deliberation on this item, the Regional Board's final motion expressly deleting the hydromodification requirements came about by way of the Regional Board's reconciliation of the Regional Board staff and City staff's opposing positions on the need for and validity of the hydromodification requirements. At one point during the discussion, the Regional Board proposed the deletion from the list of Required Revisions and asked for the City staff's

² All references made in this letter to the audio recording are to the third of the three cd's provided to the City by the Clerk to the Regional Board entitled "Audio 3-Item 8-Staff Response, Board Discussion, Board Vote." This corresponds to the link titled "Audio 4-staff response-Board discussion-vote" posted on the Regional Board's website.

concurrence, which City staff provided. In fact, at least two points during the Regional Board's deliberation, Board Member Jeffries asked for confirmation from City staff of their understanding of the final motion. With the Regional Board's deletion of Required Revision No. 4, the City confirmed its understanding and City staff's main objection to the list of Required Revisions became null.

Your exercise of discretion in this matter to reinsert portions of the Required Revisions expressly struck from that list by the Regional Board is an egregious abuse of discretion. I understand there was a point in the Regional Board's discussion and deliberation at which, as you suggest, you indicated that Regional Board staff would "make it so in terms of the exact wording;" however, what is missing from this statement made in your September 22 letter, October 1 e-mail, and October 8 letter is your immediately succeeding statement: "But it will have to be consistent with your motion." To again elucidate what occurred at this point in the discussion, provided for you here is a complete and accurate transcription of that dialogue which begins at minute 45:07 of the audio recording:

Roger Briggs: "Mr. Chair. I think the motion is asking staff to make it so in terms of the exact working. And, what I would suggest is that we will do that and we will share it with the City prior to finalizing it and see if there is something that we missed. But, it will have to be consistent with your motion."

Dr. Press: "I am comfortable with that."

Your statement was made before Dr. Press clarified his final motion on this matter and, therefore, as you suggested to the Regional Board, Regional Board staff was to "make it so," but only to the extent that the final Resolution and list of Required Revisions would be "consistent with [the Regional Board's] motion." Reinserting what was expressly and intentionally removed by the Regional Board from the final list of Required Revisions is wholly inconsistent with the Regional Board's motion. If there was anything for you to "make so," it was to draft a final set of Required Revisions consistent with the Regional Board's action, which includes deletion of Required Revision No. 4, Ref. No. 3 "on pages 2 and 3 and that then at the top of page 4" as moved by Dr. Press. That is the only action you could take that would be consistent with the Regional Board's motion.

Moreover, your attempt to rewrite the Regional Board's motion is inconsistent with Board Member Hayashi's admonition that the Regional Board not dictate to the City how certain criteria are to be met. In fact, out of an apparent concern for liability associated with the Regional Board's dictating methodology and implementation to the City, Board Member Hayashi suggested that the City be left to meet the requirements and to figure out how to achieve the goals of those requirements. Dr. Press expressly agreed with that notion. Beginning at minute 26:55 of the audio recording, the discussion on this specific point was as follows:

Mr. Hayashi: "I have only one problem with this 4.A. It's that, you know, in the way we do in other situations, you know, we're basically telling them how to do this when we're telling them they have to have eighteen inches of soil. And even though it may be alright

for us to do that. I don't think that it's our job to tell them how to do it. They just need to achieve it. Because if we tell them they need 18-inches of soil minimum or whatever to do this and they do it and it doesn't work then I think they're off the hook. So I think maybe if we just go with the way Dr. Press has suggested we go with the formula...And then if anything comes back it's not on our backs because we told them how to do it...They have to achieve it. And they can figure out how to achieve it...And then we're done. I think just for simplicity. And let's just get this thing done."

Mr. Briggs (to Matt Thompson): "Does that work?"

Matt Thompson: "Yeah. I regret that I didn't hear everything that he said."

Mr. Briggs: "Well, he was basically reiterating what Dr. Press was suggesting. The reference to the section in chapter 4..."

Dr. Press: "I guess what we're saying is that...at least several of us on the Board are saying...that we feel like your requirements are already specified in three. And that a clear reference to section 4.4.2 and the subsequent section tells you how to demonstrate that you're in compliance with this piece. Enough said. Move on."

To reinsert what was expressly struck by Dr. Press's motion would create a situation where you are supplanting your decision-making for that of the Regional Board and telling the City not only what to do, but how to do it, and that is exactly what Board Member Hayashi and Dr. Press suggested the Regional Board not do. City staff knows what we have to do—the requirements imposed upon the City are enumerated in the City's NPDES Permit—and we can figure out how to achieve it.

3. The Proposed Hydromodification Requirement Exceeds the Requirements of the City's NPDES Permit and Exceeds Regulatory Requirements.

Assuming the Regional Board supports your position on reinserting all of Required Revision No. 4 under Ref. No. 3 of the August 12, 2008 list of Required Revisions, the City objects to this action as the imposition of that requirement exceeds the requirements of the City's NPDES Permit and applicable regulatory requirements.

The Maximum Extent Practicable (MEP) standard is defined at number 16 in the City's NPDES Permit as an "ever evolving, flexible, and advancing concept, which considers technical and economic feasibility." The proposed Required Revision No. 4, which the Regional Board struck and which you are attempting to reinsert, exceeds MEP because it imposes specific numeric standards that do not take into account economic feasibility and site-specific considerations or allow for local flexibility. For Salinas, the numeric hydromodification control standards are not practicable in part because the source and the reasons for the hydromodification standards are unknown. Regardless, the requirements on their face exceed MEP because they are not flexible nor are they site-specific.

I understand that Regional Board staff are relying upon Section III.a.i.8 of Attachment 4 to the City's NPDES Permit as justification for the imposition of hydromodification requirements for development within the City. The Regional Board staff's reliance on this provision as justification for the hydromodification requirement demonstrates a fundamental misunderstanding of the local conditions and further demonstrates how this requirement fails to meet the MEP standard.

Imposing this new requirement upon the City of Salinas without a clear understanding of the local conditions, without consideration of the public interest factors, and without an appreciation of the significant economic burden placed upon the community is inappropriate and inconsistent with the City's NPDES Permit and with the law. The burden will be felt not only in the administration of requirements that lack clear interpretation, but also in the potential for loss of commercial and industrial development within the City, as business owners and investors find it too onerous to comply with the Regional Board's requirements for developing within the City. Affordable housing, which is integral to supporting the local economy will likely become unattainable as the cost of developing consistent with the Regional Board's requirements rises beyond what is economically feasible. This will only serve to further depress the local economy and further chill economic investment in the community. Before any such requirements are imposed, the Regional Board must consider and balance such factors to determine if the requirements are reasonable. That balancing has not occurred in this instance.

4. The City of Salinas and its Residents Should Not Be Used By the Regional Board Staff As Leverage in their Attempt to Impose Hydromodification Requirements on Other Jurisdictions.

We are aware that the Regional Board seeks to impose hydromodification requirements on other jurisdictions across the state, particularly Phase II jurisdictions. The Regional Board's February 15, 2008 letter to the Phase II's makes that clear. We are also aware that the Phase II's object to these new requirements, in part for the same reasons the City of Salinas continues to object to such requirements, but also in part because the requirements are not being imposed upon larger Phase I jurisdictions. We know that some jurisdictions have voluntarily chosen to require hydromodification for development projects, but to our knowledge it has yet to be imposed by the Regional Board as a requirement. This puts the City of Salinas in the unfair and prejudicial situation of being a test case: If the Regional Board is successful in imposing this requirement upon the City of Salinas then the Regional Board can use this success as leverage against the other jurisdictions.

5. The Salinas City Council Has Considered and Adopted Final Storm Water Development Standards Consistent With the Regional Board's September 4, 2008 Final Action.

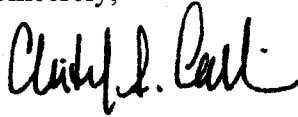
On October 21, 2008, consistent with the timeline you mandated upon the City, the Salinas City Council considered and approved the 2008 version of the City's Standards. The Standards adopted by the Salinas City Council include all the Required Revisions included in the final list of Required Revisions approved by final action of the Regional Board on September 4, 2008, including deletion of Required Revision No. 4 at Ref. No. 3, in its entirety. This action by the

Roger W. Briggs, Executive Officer
October 31, 2008
Page 7 of 8

Salinas City Council fulfills the City's obligation under Section III.b of the City's NPDES Permit to adopt local development standards.

I appreciate your consideration of these comments and your forwarding these comments to the Regional Board for their review and consideration. City staff would be happy to meet with you and to discuss this matter further prior to the December 4, 2008 meeting, if necessary.

Sincerely,



Christopher A. Callihan
Sr. Deputy City Attorney

CAC/ns

cc: Mayor and City Council
City Manager
City Attorney
Deputy City Manager
Deputy City Manager/City Engineer
Deputy City Engineer
Maintenance Services Director
Planning Manager, Current Planning

cc via e-mail only:

Harvey Oslick, P.E., CFM, RBF Consulting
Kennedy/Jenks Consultants

Salinas Valley Chamber of Commerce
Salinas Valley Builders Exchange
Tunstall Engineering Consultants

The Sausedo Company Consulting
Brian Finegan, Esq.
Tony Lombardo, Esq.
Harrod Construction Company
Chris MacDonald
CreekBridge Homes

Larry Seeman
John Bailey, Esq.
Ruggeri Jensen Azar

Roger W. Briggs, Executive Officer
October 31, 2008
Page 8 of 8

Lisa McCann, Environmental Programs Manager
Matt Thompson, Senior Water Resources Control Engineer
Jennifer Epp, Water Resources Control Engineer
Michael Thomas, Assistant Executive Officer
Frances McChesney, Senior Staff Counsel