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December 19, 2012

VIA EMAIL AND U.S. MAIL

Catherine Hagen, Esq.
San Diego Regional Water Quality Control Board
9174 Sky Park Ct., Suite 100
San Diego, CA 92123-4340

RE: Hydromodification Management Requirements of Draft Tentative Order No. R9-2013-0001 (San Diego Regional MS4 Permit)

Dear Ms. Hagen:

The purpose of this letter is to further address the nexus issue raised by members of the Regional Board at the Municipal Separate Storm Sewer Systems (MS4) permit workshop held on December 12, 2012. As the Copermittees commented at the workshop, we are concerned that the hydromodification management requirements would expose the Copermittees to significant litigation risk and may be unenforceable. Specifically, we are concerned with the provisions: (1) requiring Copermittees to compel development projects that have no impact on hydromodification to implement on-site or "alternative compliance" hydromodification mitigation measures; and (2) using "pre-development (naturally occurring)" runoff reference condition as applied to sites that are, in fact, developed. These requirements are located in Provision E(3)(c) of the Draft Tentative Order.

We are concerned that implementing these requirements would subject the Copermittees to liability under the takings clauses of the U.S. and California Constitutions and the Mitigation Fee Act because of the questionable nexus between a project's impacts on hydromodification and the hydromodification management measures in the Draft Tentative Order. When imposing a condition on a development permit, a local government is required under the federal and state constitutions to establish that the condition bears a reasonable relationship to the impacts of the project. This rule applies even to legislatively enacted requirements and impact fees or exactions.[1] Moreover, fees imposed on a discretionary ad hoc basis are subject to heightened scrutiny under a two-part test. First, local governments must show that there is a substantial relationship between the burden created by the impact of development and any fee or exaction.[2] Second, a project's impacts must bear a "rough proportionality" to any development fee or

[1] *Building Indus. Ass'n v. City of Patterson*, 171 Cal. App. 4th 886, 898 (2009).
[2] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

exaction.[3] Under California law, the *Nollan/Dolan* heightened scrutiny test also applies to in-lieu fees.[4]

The Legislature has memorialized these requirements in the Mitigation Fee Act which establishes procedures that local governments must follow to impose impact fees.[5] Irrespective of whether the hydromodification management requirements are implemented by legislative act or on an ad hoc basis, the Copermittees' attempt to enforce them as proposed in the Tentative Order would likely result in claims alleging unconstitutional takings of private property and violations of the Mitigation Fee Act. This is because a developer could argue that limiting hydromodification impacts of already developed property to its "naturally occurring" state, or requiring hydromodification mitigation measures for impacts not imposed by the project, would not have a legally sufficient nexus to the impact of the development project.

Based on these concerns, we respectfully request that these provisions be modified. The Copermittees will be submitting comments on this issue and a redline of the Draft Tentative Order prior to the close of the public comment period on January 11, 2013. In the meantime, we are available to meet with you to discuss this important issue.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

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[3] *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).
[4] *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996).
[5] Cal. Gov't Code §§ 66000-66025.

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