November 19, 2014

Board Chair Henry Abarbanel
San Diego Regional Water Quality Control Board
2375 Northside Drive, Suite 100
San Diego, CA 92108

Re: Response to Workshop Request:Proposed Prior Lawful Approval Language for Regional MS4 Permit

Sent via Email: Laurie.Walsh@waterboards.ca.gov

Dear Chair Abarbanel:

This letter is to follow up on an earlier communication regarding changes in the 2013 MS4 Permit, which removed references to grading from a footnote defining "prior lawful approval." The Coastal Environmental Rights Foundation and San Diego Coastkeeper appreciate the Regional Board taking time to consider the issue.

For the reasons stated below, our organizations do not believe it is necessary to take any action to define "prior lawful approval," or "grandfather" projects into the 2007 MS4 Permit. If, however, the Regional Board does choose to act we urge the Board to reject the straw man language proposed by the Coalition and instead reinsert references to grading in the last iteration of the MS4 permit.

In earlier discussions, the Board indicated the language was changed because "circumstances that legally prevent the imposition of updated requirements" may "differ among jurisdictions." There was concern that either the judicial vested rights doctrine or statutory vested rights could prevent retrospective application. However, it seems clear that correctly applied, neither judicial nor statutory vested rights would prevent the imposition of updated stormwater requirements in any jurisdiction subject to the Regional Board authority.

Avco remains the principal governing case law on the issue of judicial vested rights as applied to development. In *Avco*, the California Supreme Court held that no vested right existed where a plaintiff had not *both* obtained a final building permit *and* begun grading. *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Com*., 17 Cal. 3d 785, 791 (1976). Courts of Appeal continue to follow the *Avco* model, holding that public entities may enforce changes in regulations notwithstanding prior subdivision approval unless the owner or developer "(1) has obtained a building permit for an identifiable structure, and (2) has performed substantial work in reliance thereon." *Hafen v. Cnty. of Orange*, 128 Cal. App. 4th 133, 143 (2005). A leading treatise further explains: "The vested rights rule requires that the government agency exercise its *final discretion* to issue a grant of authority or permit which *specifically describes* a particular approval or work of improvement. Thereafter, *if the developer begins to perform the work described* in the grant or permit, he or she may acquire a vested right to complete the *specific and particular* work that is described. The grant or permit does not give any rights to complete any work not specifically described." (emphasis added) *Miller & Starr, Cal. Real Estate* (3d ed.2001) § 25:70, pp. 324-325, 327-328. Therefore, the Coalition's proposed language would give

developers the right to proceed under an old permit even if they obtained only a preliminary ministerial approval and no work had begun.

If adopted, the proposed language would expand developers' rights beyond what is required by *Avco* and its progeny. Perhaps more importantly, such a provision would be inconsistent with and contrary to federal law. Following *Avco*, the state legislature enacted statutes that allow some development rights to vest earlier when particular conditions are met, such as entry into a development agreement or approval of a subdivision map. These statutory vested rights prevent local governments from applying certain new regulations retroactively. Importantly, however, they do not apply to local actions that are required by state or federal law. Because MS4 requirements are set by a state agency pursuant to the federal Clean Water Act, no statutory vested rights apply.

While Cal. Gov't Code section 65866 provides that, where a development agreement is in place, the regulations and official policies in force at the time of the agreement will be applied, section 65869.5 qualifies the above: "If state or federal laws or regulations, enacted after a development agreement has been entered into, prevent or preclude compliance with one or more provisions of the development agreement, such provisions of the agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations." Thus, even where statutory vested rights are expressly granted, the Legislature has made it clear that compliance with state and federal law is still an overriding concern.

Likewise, pursuant to the Subdivision Map Act, Gov Code section 66498.1(c) limits the scope of vested rights: "Notwithstanding subdivision (b), the local agency may condition or deny a permit, approval, extension, or entitlement" if "required in order to comply with state or federal law."

Thus, where necessary, a copermittee may deny a permit at any stage in the process in order to bring a project into compliance with the state-mandated MS4 requirements. The Coalition's proposed changes thus attempt to create a right where none existed before.

It is important to note that the Coalition/BIA's proposed language would also be inconsistent with other provisions of the MS4 Permit. Section E.1.a of the Permit requires each copermittee to "establish, maintain, and enforce adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4," and adequate legal authority includes, at a minimum, "requiring the use of BMPs to prevent or reduce the discharge of pollutants into MS4s." (*Order No. R9-2013-0001 E.1.a.(7)*). As explained above, it is well within all copermittees' legal authority to apply new BMPs to projects that have not yet begun work. Pursuant to section E.1.a., copermittees are required to use the full extent of that authority to apply updated requirements.

As the Coalition/BIA concedes, it is the municipality that is ultimately responsible for compliance with the MS4 Permit and meeting the MEP standard. As the Regional Board explained in support of its 2007 MS4 Permit, copermittees are responsible for discharges into and out of their MS4s, in part, because they have the legal authority that authorizes the very development and land uses which generate the pollutants and increased flows in the first place. (Fact Sheet, p. 28, Order NO. R9-2007-0001). The copermittees also have the legal authority to ensure all grading activities are protective of water quality – they can withhold issuance of the grading permit. (*Id*.). In the 2007 San Diego MS4 Permit, it was clear that updated SUSMP and hydromodification

requirements would apply to all priority projects which had not begun grading or construction at the time of any update. (Order NO. R9-2007-0001, p. 17, FN 3).

As further noted by the Coalition, MEP is defined in the Permit: "In the absence of a proposal acceptable to the San Diego Water Board, the San Diego Water Board defines MEP." (Order No. R9-2013-0001, p. C-7). The Regional Board has effectively defined MEP by adopting the 2013 MS4 Permit – over a year ago. The Coalition asks the Regional Board to delay implementation of MEP by grandfathering projects under the guise of consistency. If the Coalition seeks a consistent, bright line rule, the more appropriate route is to track the 2007 MS4 Permit language which is consistent with vested rights doctrine. Rather, the Coalition suggests a more complicated approach which includes applying 2007 MS4 Permit standards to any ministerial approval that merely references the old standards. This is inconsistent with the increased stringency of the Regional MS4 Permit and iterative approach. It also runs contrary to MEP and *Avco*.

For the reasons stated above, CERF and San Diego Coastkeeper request that the Board not adopt a policy or amendment that could allow for vested rights or prior lawful approval that run counter to the widely accepted law. Should the Board decide it is necessary to adopt such a policy or amendment for clarity or conformity, we urge the Board to reinstate the prior footnote language from the previous MS4 permit.

Again, we appreciate your careful consideration of this issue.

Sincerely,

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