



California Regional Water Quality Control Board

Central Coast Region



Alan C. Lloyd, Ph.D.
Agency Secretary

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Arnold Schwarzenegger
Governor

April 14, 2005

Neal Maguire
Latham & Watkins, LLP
600 W. Broadway, Suite 1800
San Diego, CA 92101-7419

Dear Mr. Maguire:

RE: SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) PERMIT WAIVER FOR CITY OF CARMEL-BY-THE-SEA; MONTEREY COUNTY

We received your March 22, 2005 letter which outlines your justification for a waiver of the municipal storm water permitting requirements or obtain an individual storm water permit. You also request that the City of Carmel-by-the-Sea (City) be withdrawn from the Monterey Regional Storm Water Management Program (MRSWMP).

In order for the Water Board staff to issue a municipal storm water permit waiver, the City will need to provide all pertinent data to support the criteria listed in the Code of Federal Regulations (CFR), Title 40 Section 123.35(d)(2). Because the City discharges to multiple water bodies, including the Carmel Bay Area of Special Biological Significance (ASBS), the Carmel River, and tributaries to both water bodies, waiver considerations must include impacts to all of these water bodies, not just the ASBS. The City will have to submit water quality data to the Water Board characterizing storm water and non-storm water (dry season) discharges from the Carmel-by-the-Sea MS4. This data must demonstrate that the discharge meets 40 CFR 123.35(d)(2)(iii) and (iv) criteria. In order to meet these criteria¹, the effluent discharging to the ASBS must meet the applicable standards in the 2001 California Ocean Plan, including but not necessarily limited to Table C "Background Seawater Concentrations" because the 2001 California Ocean Plan allows no waste to be discharged to the ASBS². You may also wish to consider the USEPA guidance recommending criteria for determining significant water quality impacts (40 CFR 122.35(d)(v)). EPA suggests applying these criteria "on a watershed or other local basis" rather than by jurisdictional boundaries. Since Carmel is located within an urbanized area, we believe it is appropriate to consider these criteria.

- Your letter discussed the City's intention to apply for an individual permit instead of the Small MS4 Storm Water General Permit, should a waiver be denied. 40 CFR 123.35(h)(2)(i) encourages permitting authorities to regulate small municipalities utilizing a general permit. The City must justify why the General Permit for Storm Water Discharges from Small MS4s (General Permit) is inappropriate.

¹ 40 CFR 123.35(d)(2)(iv) states, "...current and future discharges from the MS4 do not have the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts."

² The 2001 California Ocean Plan, published by the State Board, includes section III.E, "Implementation Provisions For Areas of Special Biological Significance". Item III.E.1 states, "Waste shall not be discharged to areas designated as being of special biological significance. Dischargers shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas."

California Environmental Protection Agency



Item No. 4 Attachment No. 6
March 12-13, 2005 Meeting
Monterey Regional Storm Water
Management Plan

Your March 22, 2005 letter states that it rescinds the City's Notice of Intent (NOI) and Monterey Regional Storm Water Management Plan (MRSWMP), and that Carmel intends to request an individual permit if the Water Board denies the waiver. Your April 1, 2005 letter states that your March 22 letter was intended to convert the NOI into an application for an individual permit. The City is discharging without a permit and is potentially subject to third party law suits and Water Board enforcement action for all storm water discharges to any waters of the United States, including all those listed above.

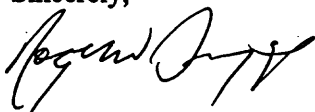
The federal regulations allow the Water Board to enroll dischargers under general permits without having received NOIs or applications. (40 CFR 122.21(e), 122.28(b)(2)(i) and (b)(2)(vi). After being enrolled in a general permit, the discharger may request coverage under an individual permit (40 CFR 122.28(b)(3)(iii)) within 90 days of "publication of the general permit." Since the General Permit was published in 2003, it may be too late for Carmel to invoke this procedure. However, we believe the better interpretation of this provision allows Carmel 90 days from enrollment in the General Permit to apply for an individual permit. However, a discharger must have adequate reasons why the General Permit is inappropriate, in order to obtain an individual permit. (40 CFR 122.28(b)(3)(iii).) Although Water Board staff does not plan to enroll Carmel in the General Permit without a NOI at this time, Sections 122.28(b)(3)(iii) and 123.35(h)(2)(i) make it clear that Carmel has the burden to show why the General Permit is not appropriate. A request for site-specific findings is insufficient justification.

The NOI is not an adequate substitute for an individual permit application. Please submit a Form 200 (available on our website under Applications); a storm water management plan that satisfies the requirements of 40 CFR 122.34, or confirmation that Carmel will fully comply with the MRSWMP; and Form 2F modified to describe storm water runoff from the municipality. You should include any other information that justifies why the General Permit is not appropriate for Carmel.

Several of your letters stated your understanding that Carmel will not be a party to the May hearing regarding the MRSWMP. Our attorney, Lori Okun, already responded to this in a March 31, 2005 e-mail. Water Board approval of the MRSWMP in May will not have the effect of enrolling Carmel in the General Permit. If you have other concerns about your status at the May hearing, please call Ms. Okun.

We hope that this letter adequately addresses the concerns and comments stated in your letter. If you have questions, please call Lori Okun at (916) 341-5165, or email at lokun@waterboards.ca.gov.

Sincerely,



Roger W. Briggs
Executive Officer

Cc: Lori Okun, Esq., Office of Chief Counsel, State Water Resources Control Board
Rich Guillen, City Administrator, City of Carmel-by-the-Sea
Donald G. Freeman, Esq., City Attorney, City of Carmel-by-the-Sea
Paul Singarella, Esq., Latham & Watkins LLP
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