September 11, 2015

San Diego Regional Water Quality Control Board
2375 Northside Drive, Suite 100
San Diego, CA 92108-2700
Attn: Wayne Chiu
sandiego@waterboards.ca.gov

Sent via email

Re: Environmental Groups Comments on Tentative Order R9-2015-0100; Prior Lawful Approval Language

Dear Wayne Chiu, Laurie Walsh, and Christina Arias:

Thank you for the opportunity to comment on Tentative Order R9-2015-0100 ("Tentative Order", "San Diego Order", or "TO". San Diego Coastkeeper and Coastal Environmental Rights Foundation ("Environmental Groups") are local non-profit organizations dedicated to the protection and restoration of regional waters and related environmental issues in San Diego. Our groups represent numerous San Diegans, act through community involvement, regulatory participation, and legal action to ensure the protection and restoration of our region's ocean, bays, and inland waters.

The Tentative Order aims to more accurately define when land development requirements from earlier MS4 permits would apply to Priority Development Projects ("PDPs"). In doing so, the Order allows Copermittees to apply earlier permit requirements to PDPs under two scenarios.

The second scenario is straightforward in that it allows previous permit requirements if a, "Copermittee demonstrates that it lacks the land use authority or legal authority to require a Priority Development Project to implement the requirements of Provision E.3." Environmental Groups read this section, in conjunction with Section E.3.[1] and the TO Fact Sheet[2] to mean the Copermittee must be legally prevented from requiring compliance with the 2013 development requirements. Further, even if a Copermittee is legally prevented from requiring *some* development requirements under E.3., they must enforce those provisions that they are not legally prevented from requiring.

The first scenario, however, is more precise and includes a set of distinct conditions. That language reads:

[1] Order R9-2013-001 as amended by Order R9-2015-0001.
[2] Attachment 2 to TO R9-2015-0100, p. F-110.

(i) The Copermittee has, prior to the effective date of the BMP Design Manual required to be developed pursuant to Provision E.3.d:

[a] Approved a design that incorporates the storm water drainage system for the Priority Development Project in its entirety, including all applicable structural pollutant treatment control and hydromodification management BMPs consistent with the previous applicable MS4 permit requirements; AND

[b] Issued a private project permit or approval, or functional equivalent for public projects, that authorizes the Priority Development Project applicant to commence construction activities based on a design that incorporates the storm water drainage system approved in conformance with Provision E.3.e.(1)(a)(i)[a]; AND

[c] Confirmed that there have been construction activities on the Priority Development Project site within the 365 days prior to the effective date of the BMP Design Manual, *OR* the Copermittee confirms that construction activities have commenced on the Priority Development Project site within the 180 days after the effective date of the BMP Design Manual, where construction activities are undertaken in reliance on the permit or approval, or functional equivalent for public projects, issued by the Copermittee in conformance with Provision E.3.e.(1)(a)(i)[b]; AND

[d] Issued all subsequent private project permits or approvals, or functional equivalent for public projects, that are needed to implement the design initially approved in conformance with Provision E.3.e.(1)(a)(i)[a] within 5 years of the effective date of the BMP Design Manual. The storm water drainage system for the Priority Development Project in its entirety, including all applicable structural pollutant treatment control and hydromodification management BMPs must remain in substantial conformity with the design initially approved in conformance with Provision E.3.e.(1)(a)(i)[a].

The language essentially states that a PDP proponent must have received approval of its *specific* stormwater plans draft under the 2007 permit and must have begun construction activities within a year of the BMP manual taking effect or 180 after it takes effect. Finally, any additional approvals must be in substantial conformance and must be issued within 5 years of the BMP manual's effective date (December 24, 2015).

We appreciate the time and effort Board staff have put into researching and understanding the governing law on this issue. We believe the language has come a long way to more closely match the prevailing law that governs this issue. That said Environmental Groups continue to have a few concerns, discussed below in more detail.

Analysis

While more closely mirroring the governing law on this issue than previous drafts the Tentative Order, in seeking to reach a clear and concise definition, appears to some degree to back track on requirements of the existing MS4 permit and the law.

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.

If adopted, the proposed language would expand developers' rights beyond what is required by *Avco* and its progeny. By allowing for up to 6 months after the BMP manual, plus up to an additional 5 years for subsequent approvals, PDP proponents could have until 2021 to implement the requirements of the 2007 permit. The MEP standard is - and should be - more rigorous than a 14 year implementation schedule of an expired permit.

As written the Order's new provisions would be inconsistent with, and contrary to, the existing permit's requirements and federal law. While it certainly is legally permissible for the Regional Board to define prior lawful approval as requiring both a final permit and the commencement of work, it is actually inconsistent with other provisions of the MS4 to define it as anything short of that. Section E.1.a. 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 begun substantial work and expended "hard costs"[3]. And, under the existing E.1.a. standard they would be required to use the full extent of that authority to apply updated requirements.

To that end Environmental Groups respectfully requests that the Tentative Order language be amended to require that construction activities have begun and substantial hard costs have been expended *prior* to the effective date of the BMP Design Manual. To achieve that result we respectfully request the removal of the following language, starting with [c]:

> *…OR* the Copermittee confirms that construction activities have commenced on the Priority Development Project site within the 180 days after the effective date of the BMP Design Manual, where construction activities are undertaken in reliance on the permit or approval, or functional equivalent for public projects, issued by the Copermittee in conformance with Provision E.3.e.(1)(a)(i)[b]; AND
> [d] Issued all subsequent private project permits or approvals, or functional equivalent for public projects, that are needed to implement the design initially approved in conformance with Provision E.3.e.(1)(a)(i)[a] within 5 years of the effective date of the BMP Design Manual. The storm water drainage system for the Priority Development Project in its entirety, including all applicable structural pollutant treatment control and

[3] *Hermosa Beach Stop Oil Coalition vs City of Hermosa Beach* (2001), 86 Cal.App.4th 534

hydromodification management BMPs must remain in substantial conformity with the design initially approved in conformance with Provision E.3.e.(1)(a)(i)[a].

This amendment would bring the new language in line with prevailing law on vested rights while preserving the requirements under the current permit for Copermittees to use their full legal authority to implement the Provisions of E.3.

Thank you for the opportunity to comment on the Tentative Order's Prior Lawful Approval amendments. Please feel free to contact me with any questions or for additional feedback.

Sincerely,

Livia Borak
Legal Advisor
Coastal Environmental Rights Foundation

Matt O'Malley
Legal & Policy Director
San Diego Environmental Groups