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Sent: Tuesday, September 09, 2014 7:23 AM
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Subject: Proposed Prior Lawful Approval Language for the MS4 Permit
Attachments: 2014-09-09Proposed Prior Lawful Approval Language for the MS4 Permit.docx

Jon,

Thanks for all of your help in facilitating a solution to the Prior Lawful Approval (PLA) conundrum and the coordination of the meeting yesterday.

As promised, I have attached a redline version of language which I believe address the last remaining concern. That is, to provide the Copermittees clear authority to use their land use discretion to protect water quality. I believe that this revised language accomplishes the four goals we set out for ourselves and for which I believe there was consensus among all the parties at yesterday's meeting.

- Provide a clear minimum standard that each Copermittee can rely on as a basis for MS4 permit compliance.
- Recognize and honor vested rights in order to protect Copermittees from takings claims and to avoid budgetary crisis for CIP, FPPF and assessment district financing.
- Protect Copermittee land use authority by allowing each Copermittee to impose higher standards where required to protect water quality.

- Reflect statewide trends in addressing the meaning and implementation of PLA provisions, which are not unique to this permit.
- Develop a strategy and language to address PLA that can be carried forward to future MS4 permits.

I believe we all agreed that the optimal way to memorialize this clarification to PLA was through an amendment to the Permit. I have made minor revisions to the language to make it possible to simply insert the language into the permit. Given the exigencies of time, if there is any hope of having this language incorporated into the permit amendments currently being drafted by RWQCB staff, I have taken the liberty of copying all the stakeholders. I suggest that each of us poll our constituencies and report back to Eric regarding any objections to the proposed language by Friday.

Please note that I made one other minor revision at the request of Brendan Hastie. The previous draft included the phrase “last ministerial permit”. Brendan believes that what is intended is “first ministerial permit” as the last ministerial permit would general be a certificate of occupancy and would make the provision meaningless. If the group concurs than we would like to make this change as well.

Thanks again. Let me know what else we can do the expedite this process.

Wayne

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Proposed Prior Lawful Approval Language for the MS4 Permit

- (1) Structural BMP Approval and Verification Process
 - a. Each Copermittee must require and confirm that for all Priority Development Project applications that have not receive prior lawful approval by the Copermittee by the time the BMP Design Manual is updated pursuant to Provision E.3.d, the requirements of Provision E.3 are implemented.
 - i. For private development projects, Prior Lawful Approval is defined to be projects that have entered into a development agreement as defined by the California Government Code or have received a discretionary or the ~~last~~ first ministerial entitlement prior to the effective date of Section E.3.e.(1)(a) are subject to the storm water requirements in effect at the time of the initial project approval and that includes the ultimate design or performance standards of the storm water drainage system for the project as accepted by the Copermittee. Project design plans, specifications, and storm water management details must comply with the standards in effect at the time of the initial approval including all discretionary entitlements, CEQA reviews or statutorily vested rights per the California Government Code. Projects shall include any subsequent discretionary or ministerial entitlement necessary to implement the initial project approval.
 - ii. For public projects, the Copermittee shall develop and adopt through ordinance an equivalent approach to that for private projects.
 - iii. For project applications that have received prior lawful approval before the BMP Design Manual is updated pursuant to Provision E.3.d, the Copermittee may allow previous land development requirements to apply provided that a Copermittee may modify or suspend the provisions of a development agreement, discretionary permit or ministerial permit regarding Section E.3.e.(1)(a) of ~~the 2013 MS4 Permit~~ this Order if the Copermittee determines, in its reasonable discretion, ~~a~~ that failure to suspend or modify the provisions of a development agreement, discretionary permit or ministerial permit will result in a violation of the prohibitions and limitations described in Provision A of this Order. ~~create a condition that is dangerous to the health or safety of residents, or both per Government Code sections 65865.3(b), 66498.1(c)(1), and 66498.6 or constitutes a nuisance as that term is defined by this permit.~~