San Diego Regional Water Quality Control Board
Definition of Prior Lawful Approval for Priority Development Projects
Workshop Summary
May 21, 2015
9:30 a.m. to 12:00 p.m.

Participants

David Barker, San Diego Water Board
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Wayne Chiu, San Diego Water Board
Tomas Morales, San Diego Water Board
Wayne Rosenbaum, Building Industry Association
Guy Asaro, Building Industry Association/McMillan Homes
Michael McSweeney, Building Industry Association
Brendan Hastie, Rick Engineering
David Garcia, Riverside County Flood Control & Water Conservation District
Jon Van Rhyn, County of San Diego
Sumer Hasenin, City of San Diego
Helen Davies, City of Escondido
Boushra Salem, City of Chula Vista
Matt O'Malley, San Diego Coastkeeper
Marco Gonzalez, Coastal Environmental Rights Foundation
Lewis Michaelson, Katz & Associates
Courtney Holowach, Katz & Associates

Summary of Revised Draft Permit Language

- Based on previous workshop discussions, some changes were made to define prior lawful approval, including:
  - Added clear language.
  - Requirements added for prior lawful approval:
    - A fully designed storm water drainage system, including applicable structural pollutant treatment control and hydromodification management BMPs approved by the Copermittee; and
    - A building permit prior to the BMP design manual effective date; and
    - Start construction activities within 180 days after the BMP effective date.

Summary of Comments

Copermittees

- County of San Diego: County of San Diego is not necessarily in agreement with the revised prior lawful approval language. There was other language that was

proposed during the last workshop and the County's position is that they still want to entertain that version of the language or parts of that language. Subparagraph 3 is problematic in that if it refers to the turning of dirt that does not line up with our permit cycle which makes it unenforceable. Clarification requested on sunset provision. The language as written now appears to grandfather in almost any project.

- City of San Diego: Language should refer to grading permit that allows construction or process equivalent rather than building permit. The City does not want to be in a position of having to make findings of infeasibility. It opens City up to litigation. Desire language that is enforceable and clear. Prolonged uncertainty regarding prior lawful approval determination and deciding on final language is unfair to permit applicants.
- City of Escondido: Permit cycle does not line up with the current language presented. Need to be able to give applicants clear direction.

Environmental Community

- Overall, we're pleased that the current language is consistent with *Avco*, which is what we were seeking. The words "functional equivalent" are ripe for litigation though. *Avco* is our standard. We want clarity, not to give discretion. Discretion is not clarity.
- The language can't address every statutory right, but it does a good job of being clear.

Development/Business Community

- As it pertains to the *Avco* standard, this language appears to be pretty good. Or it is pretty clear at least. There is a duty to review the projects with vesting rights. The problem is the proposed language may ignore certain rights. The language appears to place the responsibility and the authority with the agencies to not recognize a statutory right --- basically requiring a Copermittee not to recognize the statutory right.
- The language should recognize vested rights where they exist (e.g. vested tentative map). Language is trying to get as many folks into this process as possible. The building industry is not trying to get away with anything, just trying to assert a legal position. Regardless of the permit language, there are going to be people who are going to argue. The attempt was made to make this process simpler for the jurisdictions and our [the building] community.
    - San Diego Water Board Response: Our mission is to make sure that water quality is protected as soon as possible and that water quality is restored as quickly as possible. Other statutory vested rights are not as much of a concern. What is included in the revised draft language is based on *Avco*.
- The permit is to protect water, and that's what we should be doing. It is unclear whether the Copermittees have authority to make findings and allow exceptions (for building to the 2007 standards). It's not the permits going forward; it's the permits that have already been issued. Permits typically last 1 to 2 years with a possible 1 year extension. Can vary by jurisdiction.

  - San Diego Water Board Response: The way the permit is currently written, it does not provide discretion. We are open to giving more discretion as long as there are clear limitations.
- Understand trying to give flexibility with the phrase "functional equivalent" but perhaps use "permit that allows construction" instead. Building permit is the *Avco* language.
- BIA responded to a request for clarification on how many projects could potentially be grandfathered in when it comes to other statutory rights. Although it is hard to quantify, an estimate is between 200 to 500 projects. BIA is not trying to get away with something or do an end run. The intent is *not* to get as many projects as possible grandfathered.

Final Comments

- Copermitees should submit proposed language for the clarifications with regards to the *Avco* standard and the duration for starting construction activities to try and address existing development permit durations.
- Board staff will review suggested language changes and post revised language out before the next meeting on June 30, 2015.