

San Diego Regional Water Quality Control Board
Definition of Prior Lawful Approval for Priority Development Projects and
Alternative Compliance Pathway for Receiving Water Limitations
Public Wrap-up Workshop Summary
June 30, 2015
9:30 a.m. to 12:00 p.m.

Summary of Audience Comments/Questions

Prior Lawful Approval Draft Permit Language

- **BIA:** This new language provides good clarification for both public and private projects
- **SANDAG:** We are a regional planning agency so we cross into many jurisdictions. Also, we often have a two year lag time between an environmental document and commencement of construction. So we feel like we're in a Catch-22. We might have to incur more expense and lose time having to redesign. How do these regulations apply to projects that might have a multiyear lead time?
 - **Water Board Response:** What has been described is what we have been talking about the last several months. This process started with a footnote in the previous San Diego County MS4 Permit and we have been discussing ever since. This language tries to clarify the intent of the footnote. It now is stated clearly to say that approvals should be tied to the issuance of a permit and the commencement of construction. At some point there has to be a cut off, but you can submit your concerns in comments on the tentative order.
- **Pardee Homes:** What is the reason vested tentative maps and development agreements have not been included. Example: A project that has been in process for ten years. The project is ready for a grading permit and it has all the discretionary approvals. The cake is baked, but there is no ability to proceed until we get 401 permits, over which we have no control and which can drag on.
 - **Water Board Response:** When we first started out in this process we were looking at clarifying that footnote. We were asked to consider other approvals, such as vested tentative maps and development agreements. However, as we learned what vested tentative maps and development agreements really are, we realized that those types of approvals were not in line with the intent of the footnote. It is also a matter of timing. We are trying to write permits for the long term, not just to address short term issues.
 - **BIA Comment:** Since this is basically devised from federal law this is why it basically trumps vested tentative maps and development agreements. The final authority is going to rest with the Copermittee. Unfortunately, they have to draw a line somewhere in the sand.

- **BIA:** Does the language give the Copermittees discretion in land use authority?
 - **Water Board Response:** Yes, the language maintains a Copermittee's land use authority. When we were looking at the comments and the discussions from the previous workshops, one of the comments was to maintain a Copermittee's land use authority.
- **BIA:** Has staff thought about extending the timeline so the Board can adopt and we can all understand what the Board is adopting?
 - **Water Board Response:** We are aware of the timing issues. We are hoping to release the tentative order in July. On the other hand, it should already be clear to you what the direction is. Please submit your comments about timing on the tentative order.
- **City of Escondido:** For clarification, not only does the project applicant have to have the permit, but they have to act on it within 6 months of the effective date of the BMP design manual, correct? So we will have to check that these sites have active construction or else they'll have to redesign?
 - **Water Board Response:** Correct

Alternative Compliance Pathway Draft Permit Language

- **County of San Diego:** Overall we are really happy with the language and about 90% of the way there. The Copermittees would like to thank staff for meeting and working with us.
- **San Diego Coastkeeper:** Under Provision B.3.c.(1)(b), the requirement for the analysis to utilize a watershed model and watershed analytical tools was removed. What is the basis? Or is everyone just going to wing it here? Will the Board be providing further guidance, perhaps like the Los Angeles Water Board?
 - **Water Board Response:** With the incorporation of the public process we are going to look at whether we believe what has been provided by the Copermittee is sufficient. Part of the reasoning is that we received some cautions about specifically requiring modeling, both because of the cost and because models do not guarantee you get a good answer. We do not agree with the Los Angeles Water Board approach in this case.
- **San Diego Coastkeeper:** For Provision B.3.c.(2)(c), there seems to be a level of subjectivity to accepting modifications to annual milestones.
 - **Water Board Response:** The key words are "acceptable" and "appropriate." We have to have some real rationale of why they didn't achieve their annual milestones and real recommendations to improve achievement of milestones. We wanted the ability to have some discretion to determine compliance. Ultimately that annual milestone is to gauge how well that program is working.

- **City of Laguna Beach:** Why was Provision A.3.a not included as part of the Alternative Compliance Pathway?
 - **Water Board Response:** We are not certain it is appropriate to include Provision A.2.b as part of the Alternative Compliance Pathway. We still need to do a little more legal analysis on whether or not that is justified.
- **County of Orange:** Does the footnote for annual milestones accommodate changes in direction or things that you pursue but don't always come to fruition? There can be legitimate false starts that can't be claimed to "build towards" the next step or the alternative that is adopted.
 - **Water Board Response:** Building upon a milestone doesn't always have to be in a linear fashion. It can be logarithmic or asymptotic.
- **County of Orange:** We are not talking about the shape of the curve, but actually abandoning something that isn't working and starting on a completely different tack. How could that be considered "building upon" even though that will undoubtedly happen at times?
- **City of Dana Point:** Are you able to use new technology?
 - **Water Board Response:** Milestones are not necessarily numeric. Milestones are what you are planning to do that are supposed to result in some kind of achievement in improving water quality. We tried to structure this permit so the Copermittees can be a little more assertive.
- **County of Orange:** How do annual milestones work with multi-year phasing?
 - **Water Board Response:** Any pollutant you're going to be looking at will likely involve a suite of strategies. You can pick a milestone the first year that corresponds to near-term actions and pick milestones in later years for actions that may not be initiated or achieved until later.
- **Surfrider:** Our biggest concern is the Copermittees not meeting those milestones and just hanging out there forever. Are you open to having some type of time certain for when one moves from compliance to non-compliance?
 - **Water Board Response:** After one year of missing a milestone we can determine that a Copermittee is out of compliance. The question is what triggers noncompliance. We don't want to lose the discretion to say that a Copermittee is out of or in compliance. An annual trigger point is now in the language, but we cannot craft language that is going to provide certainty for what will constitute that trigger until we look at the reasons for why a milestone was missed and the modifications that are being offered to rectify it.

- **Riverside County Flood Control:** How many annual milestones do we need to have to give you? It could be very difficult to predict milestones beyond a five-year permit term.
- **County of San Diego Comment:** The County could have up to 60 annual goals per year given we are in 8 watersheds. So many annual goals might have the effect of lowering the bar.
 - **Water Board Response:** You need to propose annual milestones until you get to the final numeric goal. Please submit these are comments on the tentative order.
- **City of San Diego:** Can you explain why Provision A.2.b was not included as part of the Alternative Compliance Pathway?
 - **Water Board Response:** We are not certain we have the authority to include Provision A.2.b as part of the Alternative Compliance Pathway. Our draft language still has to go through a legal review before issuing the tentative order.

Next Steps

The tentative order to amend the Regional MS4 Permit is anticipated to be released by the end of July, which will start the public written comment period. The plan is to go before the Board in November for adoption of the tentative order.