Response to Coastkeeper Letter Regarding Prior Lawful Approval dated October 8, 2014

On October 8, 2014 the San Diego Regional Water Quality Control Board ("RWQCB") conducted a workshop to accept public testimony regarding possible amendments to the Regional MS4 Permit ("Permit"). During the workshop testimony was presented by the County of San Diego and the Coalition[1] regarding Permit section E.3.e.(1)(a). Coastkeeper and the Coastal Environmental Rights Foundation submitted a comment letter ("Coastkeeper Letter').

After the presentations and questions by various board members, Chairman Abarbanel requested that the Coalition prepare further briefing concerning its views on the Coastkeeper letter and specifically on what issues it agrees with the Coastkeeper Letter. This briefing paper constitutes both that response as well as the Coalition's comments on suggested revisions to the Permit.

Purpose of Workshop

The Coastkeeper Letter states "it would be inappropriate for the Board to take any action on un-agenized matters at the workshop, CERF and Coastkeeper believe interested parties may urge the Board to consider amendments to the MS4 Permit to redefine "prior lawful approval"". The Coalition agrees.

The Coalition understands that the purpose of the workshop was to take testimony from interested parties and, while it failed to do so, direct RWQCB staff to draft revised language where appropriate for insertion into the Draft MS4 permit. The Coalition further understands that any amendments to the current permit would be subject to public review and comment prior to the RWQCB taking any formal action.

[1] The Coalition consists of environmental groups and associations representing various private stakeholders who have a keen interest in achieving water quality objectives within the San Diego region in the most efficient and cost effective manner. Coalition members include: San Diego Building Industry Association, Building Industry Association of Southern California; Associated General Contractors; Associated Builders and Contractors; San Diego Regional Chamber of Commerce; Business Leadership Alliance; San Diego Association of Realtors; San Diego Apartment Association; NAIOP (National Association of Industrial & Office Properties); BOMA (Building Office & Management Association; San Diego Chapter of the American Society of Landscape Architects.

Purpose of the Prior Lawful Approval Provision

Both the MS4 Permit and its associated fact sheet are silent on the rationale behind Permit section E.3.e.(1)(a). The Coastkeeper Letter states "If the Regional Board is interested in specifically defining prior lawful approval, a reconsideration should focus on traditional vested rights doctrines". The Coalition agrees that this is part of the rationale behind the PLA provision but disagrees that this is its entire purpose.

While the provisions that constitute Permit section E.3.e.(1)(a) has been modified over the last several permit cycles, the Coalition believes the purpose of the provision has always remained the same. That is, to allow Copermittees to use their land use authority to appropriately balance their obligation to achieve water quality objectives to the Maximum Extent Practical ("MEP") while honoring the property rights associated with public and private development projects whose entitlement cycles do not coincide with the MS4 permit cycles. The Coalition further believes that section E.3.e.(1)(a) is also intended to recognize that MEP is not a fixed standard but will vary based on the circumstances. The Coalition believes that by clarifying the intent of the Permit section E.3.e.(1)(a) the RWQCB will assist all of the interested parties in understanding the factors that the Copermittees need to balance in applying this provision of the Permit.

Maximum Extent Practical

The Permit explains the concept of Maximum Extent Practical ("MEP") as follows:

> The technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) for storm water that operators of MS4s must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of source control and treatment control BMPs. MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their runoff management programs. Their total collective and individual activities conducted pursuant to the runoff management programs becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for MS4 maintenance). In the absence of a proposal acceptable to the San Diego Water Board, the San Diego Water Board defines MEP.

As described above, the concept of MEP includes consideration of:

- Economic feasibility;
- Technically feasibility of various source controls and treatment controls; and
- The impact that any single project may have on the collective and individual activities to address water quality objectives.

As applied to sectionE.3.e.(1)(a), the Coalition believes that MEP provides an overarching standard of review when considering when and how a Copermittee should use its discretion when allowing previous land development requirements to apply where the project has a recognized PLA. While the Coalition believes that it is the intent of the RWQCB to allow Copermittees to apply these factors on a case by case basis, the Coalition also believes that some additional guidance would be helpful for all parties concerned in two areas. These are:

- What constitutes a PLA?
- How should a Copermittee apply its discretion to projects that have a PLA?

The Coalition does not believe that providing such a clarification is antithetical to the position taken by the Coastkeeper Letter.

What constitutes a PLA

On May 8, 2013 the RWQCB, adopted the Permit. Section E.3.e.(1)(a) of the New MS4 Permit states:

> Each Copermittee must require and confirm that for all Priority Development Project applications **that have not received 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. 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. [Emphasis added.]

The Coalition interprets the intent of section E.3.e.(1)(a) to ensure that projects which have been granted a PLA that incorporates a final, or substantially final, drainage concept and site layout that includes water quality treatment based on the performance criteria set forth in the Copermittee' s storm water ordinances, regulations and manuals at the time the PLA was granted, are not required to redesign their proposed projects for the purposes of complying with the Permit unless doing so is necessary for the Copermittee to remain in compliance with the Maximum Extent Practicable standard as described in the Permit.

The Permit does not define the term "Prior Lawful Approval". Therefore, the Coalition relies on the plain meaning rule of statutory and regulatory interpretation. The plain meaning rule dictates that permit language is to be interpreted using the ordinary meaning of the language. In other words, Section E.3.e.(1)(a) is to be read word for word and is to be interpreted according to the ordinary meaning of the language, unless a statute explicitly defines some of its terms otherwise or unless the result would be cruel or absurd. Ordinary words are given their ordinary meaning, technical terms are given their technical meaning, and local, cultural terms are recognized as applicable. The Coalition relies on Merriam Webster for the plain meaning of each word.

- Prior – existing earlier in time.
- Lawful – constituted, authorized, or established by law
- Approval – an act or instance of approving.

Based on the plain meaning rule and the definitions above the Coalition defines a Prior Lawful Approval as any ministerial or discretionary approval granted to a project by a Copermittee prior to the Effective Date. Thus, PLAs include, but are not limited to, the approval or issuance of, building permits, grading permits, development agreements, tentative maps, vesting tentative maps, CEQA Notices of Determination, and conditional use permits. However, as discussed in further detail below, the Coalition considers a PLA as a necessary, but not determinative criterion, for granting an exemption from the requirements of section E.3 pursuant to section E.3.e.(1)(a). The Coalition believes that there are three situations in which a Copermittee should recognize a project as having a PLA. These are:

- Where the project has a statutory vested right to proceed under the prior permit. These include projects with Development Agreements or Vesting Tentative Maps pursuant to government code section 65864 et seq and 66498.1 et seq.
- Where the project is so far advanced by performing substantial work and incurring substantial liabilities in good faith reliance on the permit prior to the effective date of the new law. (Avco Community Developers, Inc. v. South Coast Reg'l Comm'n, 17 Cal. 3d. 785, 791 (1976)).
- Where the project has received some other form of approval which addresses water quality objectives and where it would be economically or technically infeasible to fully comply with the MS4 permit standard described in section E.3.e and remain in substantial conformity with the previously granted approval.

The Coastkeeper Letter seems to imply that recognizing anything other than common law vested rights as discussed in Avco would constitute "backsliding". The Coalition respectfully

disagrees. The term backsliding refers to an action taken to diminish a water quality objective necessary to achieve a beneficial use.[2] The recognition of other vested rights or discretionary permits is not backsliding where the discretion to do so is balanced against the MEP standard.

How should the Copermittees apply their discretion?

Where a project has a statutorily vested right to proceed under a prior permit, the Copermittee must still use its discretionary authority to determine whether to allow previous land development requirements to apply. However, that discretionary authority is limited to situations in which the imposition of new permit requirements is necessary for reasons of health and safety or where the Copermittee chooses to use its eminent domain powers. As such, the Coalition believes that Copermittees should be provided with guidance that the use of its discretionary authority to allow a project with a statutorily vested right to proceed under previous land development requirements would be presumed to meet the MEP standard.

Where a project is so far advanced by performing substantial work and incurring substantial liabilities in good faith reliance on the permit prior to the effective date of Permit section E.3.e.(1)(a), the Coalition believes that Copermittees should be provided with guidance that the use of its discretionary authority to allow a project with a statutorily vested right to proceed under previous land development requirements would be presumed to meet the MEP standard. The Coalition believes that this suggestion is in harmony with the Coastkeeper Letter.

Where a project has received some other form of approval which addresses water quality objectives and where it would be economically or technically infeasible to fully comply with the MS4 permit standard described in section E.3.e and remain in substantial conformity with the previously granted approval, the Coalition believes that the presumption must shift. That is, the project proponent must demonstrate with substantial evidence the following:

1. The project design complies with the previous land development requirements.
2. It is not economically or technically feasible to fully comply with the new Permit requirements.
3. By allowing the project to comply with less than the new Permit requirements the Copermittee will still be in compliance with the MEP standard as described in the new Permit.

[2] In the Water Quality Act of 1987, Congress statutorily approved the antibacksliding policy adopted by EPA through regulations prohibiting backsliding from water quality based permit limits under sections 301(b)(1)(C) or 303(d) or (e). It is not clear that Congress intended to apply the antibacksliding policy to strategies intended to implement the MEP standard.

Proposed Guidance

The Coalition suggests that in order to provide the Copermittees, RWQCB staff and interested parties with clear guidance on this matter, the following language be incorporated into the draft permit for consideration and comment by all parties. While the Coalition believes that this language should be adopted as proposed, it also recognizes the importance of providing all interested parties with an opportunity to address this issue if they so see fit and, therefore presents this language as a "straw man" and a place to begin the discussions.

Proposed Clarifying Language

(Replaces Section E.3.e(1)(a); does not alter (b) through (d)

(a) Each Copermittee must require and confirm that for all Priority Development Project applications that have not received prior lawful approval by the Copermittee by the time the BMP Design Manual is implemented pursuant to Provision E3.d, the requirements of Provision E.3 are implemented. For project applications that have received prior lawful approval before the BMP Design Manual is implemented pursuant to Provision E.3.d, the Copermittee may allow previous land development requirements to apply.

i. For private development project, "Prior Lawful Approval" means projects that have entered into a development agreement as defined by the California Government Code or have received a first discretionary approval or ministerial permit which incorporates by design or reference the applicable water quality and hydromodification standards prior to the time the BMP Design Manual is implemented. A Prior Lawful Approval shall include any subsequent discretionary or ministerial entitlements necessary to implement the initial Prior Lawful Approval.

ii. For public projects, the Copermittee shall develop and adopt as part of its JURMP an equivalent approach to that for private projects described in Section i above.

iii. For project application that have obtained a Prior Lawful Approval before the BMP Design Manual is implemented pursuant to Provision E.3.d, the Copermittee shall use its discretion to allow previous land development requirements to apply provided that the Copermittee does not determine that to do so would prevent the Copermittee from achieving water quality objectives to the MEP.

iv. Projects with Prior Lawful Approvals that predate the water quality and hydromodification requirements of Order No. R9-2007-0001 for San Diego Copermittees, Order No. R9-2009-0002 for Orange County Copermittees, and Order

No. R9-2010-0016 for Riverside County Copermittees shall be required to incorporate Treatment Control BMPs necessary to achieve water quality standards set forth in the applicable Orders identified above to the Maximum Extent Practicable, as determined by the Copermittee on a case by case basis.