## Chiu, Wayne@Waterboards

**From:** Marco Gonzalez <marco@coastlawgroup.com>
**Sent:** Thursday, May 07, 2015 4:00 PM
**To:** Wayne Rosenbaum
**Cc:** Matt O'Malley (matt@sdcoastkeeper.org); Chiu, Wayne@Waterboards; Walsh, Laurie@Waterboards; Becker, Eric@Waterboards; 'Mike McSweeney'; Livia Borak; Marco Gonzalez
**Subject:** RE: Word version of proposed language

Hey Wayne:

As was noted at the workshop, at this point in the process we do not believe it makes sense to develop a definition of PLA or to create a policy-driven solution (in a vacuum) without some better data on the likely implication of a relaxed definition. Therefore, before we propose alternate language, we believe either of the following options should first occur:

(a) The Co-Permittees should be required to provide a database for each of their jurisdictions identifying the projects that might take advantage of the new definition and process for addressing Prior Lawful Approvals; or

(b) General notice should be provided (via newspaper and Co-Permittee websites) to property owners and project applicants that if they believe their project warrants consideration for having achieved a Prior Lawful Approval, they have a limited time (30-60 days) to come forward and make their cases. Once we have that database and arguments, we can more appropriately discern the common circumstances that might warrant application of the 2007/10 standards notwithstanding lack of a grading permit (Avco vested right). So, for instance, based on the timing, number, size, location, and other factors of those projects seeking certification of their PLAs, we might be able to say that all projects with x,y,z conditions or circumstances probably warrant use of the old standards (based on infeasibility, equity, estoppel, proximity to sensitive resources, etc.). This is akin to the methodology used by the County of San Diego when it considered amending its recently approved General Plan in 2012; it considered pleas from more than 137 disgruntled individual property owners at a workshop, after which it agreed to evaluate a limited number of requests for relief from the new zoning constraints. See: http://www.sandiegocounty.gov/pds/gpupdate/docs/BOS_Jun2012/July_25_PSR_GPA_BL.pdf

However, we'd like to make clear that simple economic infeasibility will never be a sufficient reason to allow use of the older standards, as it is well established that lack of funds is typically not a defense to compliance with the Clean Water Act.

-Marco

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**From:** Wayne Rosenbaum [mailto:swr@envirolawyer.com]
**Sent:** Friday, May 01, 2015 11:53 AM
**To:** Marco Gonzalez
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**Subject:** Word version of proposed language

Marco

Attached please find word version of proposed language as promised. We think this language clarifies for all the parties what was intended by the "Prior Lawful Approval" provision in the 2013 order. It recognizes both common law and statutory vested rights while limiting their application only to projects that have clearly demonstrated that they will comply with the 2010 hydromodification requirements as provided in the 2007 order. In order to understand why we think this proposed language is both protective of the environment and feasible I think it would be good to start by looking at some of the differences between the 2007 and 2013 orders:

Order No. R9-2007-0001 provides as follows: "Updated SUSMP and hydromodification requirements shall apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences. **If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SUSMP or hydromodification requirement to the project is infeasible, the updated SUSMP or hydromodification requirement need not apply to the project.** Where feasible, the Copermittees shall utilize the SUSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SUSMP and hydromodification requirements in their plans." [Emphasis Added]. Thus while the footnote in the 2007 order did appear to only recognize the common law standard for vesting it also provided an escape valve for projects with a lawful prior approval where application of an updated SUSMP or hydromodification requirement was infeasible. Whether or not this order intended to also recognize statutory vesting is discussed below.

Order NO. R9-2013-0001 does not provide for projects with lawful prior approvals whereby application of provisions E.3.c.1 and E.3.c.2 are infeasible. Instead it appears that the 2013 order intended that alternative compliance would provide the necessary relief. However, the alternative compliance options proposed in the order are not available at this time and are not likely to be available for some time in the future. Thus, reading the language of the 2013 order

as you suggest creates a dilemma for both private developers and public agencies. A few scenarios might help clarify this dilemma.

City A decides to build a desperately needed fire station. Construction will not commence until January 2016. The soils at the site make infiltration impossible plus the proposed fire house is located in a poor urbanized area where infiltration of urban runoff may negatively impact ground water were it to reach the aquifer. The alternative compliance relief valve is not available and will not be available for some time as it requires the City to pass an ordinance and as you know an ordinance is a project under CEQA requiring CEQA review.

Developer B seeks to build a low and middle income housing project on a site that had been a paved parking lot. The entitlement process began in 2007 and the developer has a Development Agreement but final building permits will not be available until January 2016. The project was designed to the 2007 permit standards. Again the soils will not infiltrate thus retention of the 85$^{th}$ percentile storm is infeasible.

In the first case, I believe your reading of the 2013 order would prevent the construction of needed infrastructure. In the second case, your reading would expose the City to an inverse condemnation claim as the project has a statutorily vested right.

I think we both agree that a prior lawful approval can be usurped without triggering a taking under some situations. For example, if a Federal or state law preempts a vested right there is not taking. However, that is not the case here. There is no mandate from US EPA or the Clean Water Act that projects with prior lawful approvals must meet the requirements of provisions E.3.c.1. and E.3.c.2. when it is infeasible for the project to do so. Thus there is no federal preemption. There is no state preemption either. Provision E.3.e.(1)(a) is permissive in nature. "For project applications that have received prior lawful approval before the effective date of the BMP Design Manual is updated pursuant to Provision E.3.d, the Copermittee **may** allow previous land development requirements to apply. [Emphasis Added] Thus the Order does not command the Copermittees to impose the requirements of E.3.d on projects with prior lawful approvals and, in fact, if it were to do so it would likely be deemed an unfunded mandate.

I also think that we agree that a Copermittee may usurp a project's prior lawful approvals using its police powers when it is necessary to do so for reasons of health and safety on a case by case basis. Thus, if a project with a prior lawful approval really does present a threat to water quality even when it implements the standards in the 2007 permit, the Copermittee always has the authority to revoke the prior lawful approval.

In summary, the proposed language is not a "get out of jail free" card as you seem to think. It is intended to clarify the Copermittees land use discretion while helping to achieve water quality objectives by setting out the following limits:

1. Any project that seeks to take advantage of the prior lawful approval provision must demonstrate that the prior lawful approval on which it relies results in full compliance with the immediately prior MS4 Permit or in our case the design standards established in 2010 based on the 2007 order even where the prior lawful approval predates the 2007 order.
2. The 2007 permit standards will only apply to those portions of the project for which the MS4 system if fully constructed within five years of the adoption of the BMP manual. Thus, we are really talking about a relatively short cycle period from 2020 reaching back to the 2010 standards.

Reversion to the 2007 footnote as you suggest would likely only create more confusion and the potential to slow improvements in water quality. This is because, a project with an older prior lawful approval that can demonstrate infeasibility would not even have to achieve the 2010 standard. "**If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SUSMP or hydromodification requirement to the project is infeasible, the updated SUSMP or hydromodification requirement need not apply to the project**."

Finally, the proposed language can be viewed as stop gap. If alternative compliance becomes available in the future, it will be much more likely that projects will not require these types of provisions because there will be an option that addresses infeasibility. However until alternative compliance becomes a reality for projects with prior lawful approvals, where achieving the 2013 requirements are infeasible the ability to proceed with the project under the standards set forth in the immediately prior MS4 permit is essential to allow needed infrastructure to proceed and to avoid inverse condemnation claims against Copermittees.

Hope this is helpful

Wayne

**I will be out of the office with minimal access to e-mails or phones from May 27th through June 9th. In the event of an emergency please contact my partner Suzanne Varco at svarco@envirolawyer.com (619) 231-5858 or my law clerk Josh Rosenbaum at jrosenb@gmail.com (619) 920-1535**

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