

## Attachment 2: County of San Diego Guidelines on Establishing Prior Lawful Approval (PLA) to Proceed under Earlier MS4 Permit Provisions

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The effective date of the updated requirements of the Municipal Separate Storm Sewer System Permit (Order No. R9-2013-0001; hereinafter "2013 MS4 Permit") in the unincorporated County of San Diego is **February 26, 2016**. Any development or redevelopment project<sup>1,2</sup> that has not obtained a Prior Lawful Approval (PLA) to proceed under earlier MS4 Permit provisions before that date must fully comply with the 2013 MS4 Permit, and therefore with the applicable requirements of Watershed Protection Ordinance (WPO) Sections 67.811 and 67.812. Under specified conditions, a project may be vested or grandfathered under WPO Section 67.811(c)(1) or (2). To qualify to proceed under any earlier MS4 Permit provision, a PLA must be obtained prior to its effective date.

### 1. Applicability of MS4 Permit Provisions

The effective dates of specific MS4 Permits and provisions are summarized in **Table 2-1**. Options and conditions for obtaining PLAs to proceed under earlier MS4 Permit provisions are described in **Sections 2 and 3** below. The left-hand column of **Table 2-1** lists the effective dates of all land development requirements, beginning with their initial imposition under the 2001 MS4 Permit. The column on the right indicates the applicable MS4 Permit standards for a project obtaining a PLA before each of the effective dates on the left. In any instance where an applicant has established a PLA before the effective date of a newer provision, the project (or portion or phase of the project) may be considered provisionally covered under the earlier standard. So long as all applicable conditions on the PLA have been, and continue to be met (see **Sections 3 and 4** below), the earliest applicable date in **Table 2-1** (i.e., the earliest date after which a PLA is obtained) will normally apply. However, the County may as it determines necessary impose additional conditions that are more restrictive than the minimum requirements of any applicable MS4 Permit provision.

Per WPO Section 67.811(c)(2), the requirements of WPO Sections 67.811(a) and (b) fully apply to all development projects unless a PLA to proceed under the provisions of an earlier MS4 Permit has been obtained from the County. The County may partially or wholly waive these requirements for any project meeting the conditions of either WPO Section 67.811(c)(1) or (2). As described further below, this may occur either because a project applicant<sup>3</sup> has obtained a **vested right** to proceed as a result of the operation of law (PLA Option 1), or because the project is **grandfathered** by satisfying specific conditions of the 2013 MS4 Permit (PLA Option 2).

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<sup>1</sup> **Development** means construction, rehabilitation, redevelopment, or reconstruction of any public or private projects. **Redevelopment** is a subset of development that applies specifically to the creation and/or replacement of impervious surface on an already developed site. Examples of redevelopment include the expansion of a building footprint, road widening, the addition to or replacement of a structure. Replacement of impervious surfaces includes any activity where impervious material(s) are removed, exposing underlying soil during construction. Redevelopment does not include routine maintenance activities, such as trenching and resurfacing associated with utility work; pavement grinding; resurfacing existing roadways, sidewalks, pedestrian ramps, or bike lanes on existing roads; and routine replacement of damaged pavement, such as pothole repair.

<sup>2</sup> For the purposes of this document, further references to development projects are inclusive of both development and redevelopment projects unless a distinction between the two is specifically noted.

<sup>3</sup> "Applicant" may either mean the original project applicant or any successor(s) in interest to all or any portion of a PDP or Standard Project.

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**Table 2-1: Effective Dates of Land Development-Related MS4 Permit Provisions**

Permit Provision Effective Dates	Applicable Standard for Projects Grandfathered Prior to Effective Date
<b>2001 MS4 Permit (Order No. 2001-001)</b>	
<ul style="list-style-type: none"> <li><b>February 10, 2003</b></li> </ul> Initial SUSMP effective date	<ul style="list-style-type: none"> <li>Order No. 90-42 (adopted July 16, 1990) did not contain explicit requirements for land development projects (discuss on a case basis)</li> </ul>
<b>2007 MS4 Permit (Order No. 2007-0001)</b>	
<ul style="list-style-type: none"> <li><b>January 24, 2008</b></li> </ul> All requirements of Order No. 2007-0001 except interim and final hydromodification	<ul style="list-style-type: none"> <li>February 2003 SUSMP</li> </ul>
<ul style="list-style-type: none"> <li><b>March 24, 2008</b></li> </ul> Interim hydromodification requirements (for sites disturbing 50 acres or more)	<ul style="list-style-type: none"> <li>Land development requirements of 2007 MS4 Permit minus hydromodification</li> </ul>
<ul style="list-style-type: none"> <li><b>January 8, 2011</b></li> </ul> Final hydromodification requirements	<ul style="list-style-type: none"> <li>Land development requirements of 2007 MS4 Permit minus hydromodification</li> </ul>
<b>2013 MS4 Permit (Order No. R9-2013-0001 as amended by Order. No. R9-2015-0001 and R9-2015-0100)</b>	
<ul style="list-style-type: none"> <li><b>February 26, 2016</b></li> </ul> All requirements of Provision E.3	<ul style="list-style-type: none"> <li>2007 MS4 Permit land development standards effective on January 24, 2008 (except interim and final hydromodification)</li> <li>Hydromodification requirements apply after March 24, 2008 and January 8, 2011 effective dates</li> </ul>

Applicants should note the following regarding the use of both PLA options:

- The two options are mutually exclusive. An applicant may utilize either PLA Option 1 or PLA Option 2, but not both at the same time. However, in some cases, it may make sense to document compliance with both options in case a change in approach is needed.
- Projects utilizing PLA Option 1 may potentially establish coverage under the requirements of any earlier MS4 Permit; however, PLA Option 2 establishes a “floor” of full compliance with the 2007 MS4 Permit.
- PLA Option 1 may be utilized both for Standard Projects and PDPs. Because the requirements for Standard Projects have changed very little since they were initially imposed under the 2001 MS4 Permit, there is normally little reason to consider the applicability of vested rights to these projects. However, some projects which were previously classified as Standard Projects under the 2007 MS4 Permit may need to be reclassified as PDPs under the 2013 MS4 Permit if they have not established a vested right to proceed under the earlier MS4 Permit. As such, these “newly designated” PDPs would be required to comply with the PDP requirements of the 2013 MS4 Permit.

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### **2. Applicant Responsibilities**

While documentation related to vesting rights (PLA Option 1) and grandfathering (PLA Option 2) determinations will be maintained by the County as part of the project record, the applicant ultimately bears the responsibility for demonstrating that a PLA has been granted or continues to exist. Failure to do so may result in the revocation of that right, in which case a project may be required to partially or wholly meet updated MS4 Permit requirements. Applicants must document the basis for their assertion in a written proposal to County staff that includes a detailed explanation and rationale, including supporting calculations and information requested by the County if applicable. Staff will review the proposal and make a determination as to whether or not a vested right exists, or whether additional analysis is required. The adequacy of submitted documentation will be determined on a case-by-case basis.

Applicants must submit proposals and other required documentation in a timely manner (i.e., allowing sufficient time for County review and comment, resubmittal, and approval prior to applicable deadlines), and to demonstrate and maintain documentation of ongoing compliance with the conditions of a vested right initially recognized by the County.

### **3. PLA Option 1 (Vested Rights; WPO Section 67.811(c)(1))**

In accordance with the 2013 MS4 Permit, WPO Section 67.811(c)(1) provides that: *“Previous land development requirements may be allowed to apply to any portion or phase of a development project for which the Authorized Enforcement Official determines the County lacks the land use authority or legal authority to require the project to implement the requirements of Sections 67.811(a) and/or (b).”*

This means that any project that has obtained a legally vested right to proceed under an existing permit or approval may continue under the MS4 Permit standard applicable at the time that the permit or approval was issued. In most cases, this will mean compliance with the 2007 MS4 Permit (these requirements are described in the *January 2011 Standard Urban Stormwater Mitigation Plan*, or SUSMP<sup>4</sup>). However, under limited circumstances a project may qualify for coverage under the provisions of an earlier MS4 Permit.

Vested rights may initially be established in a number of ways under California law, including the following:

- An applicant substantially relies on an issued permit, but then may be limited to work within the scope of that permit (See, for example, *Avco Community Developers v. South Coast Reg'l Comm'n* (1976) 17 Cal.3'd 785.).
- An applicant has entered into a development agreement restricting the application of new requirements (See, *Gov't Code S 65964 et seq.*).

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<sup>4</sup> Approved January 2011 and updated September 2012; Available at <http://www.sandiegocounty.gov/content/sdc/dpw/watersheds/susmp/susmp.html>.

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- The *Subdivision Map Act, Gov't Code Sec. 66410 et seq.* sets forth circumstances whereby applicants can obtain a vested right to proceed under requirements in effect at the time a tentative map application is deemed complete. (See, for example, *Gov't Code SS 66474.2 & 66498.1-66498.9.*) Vested rights obtained in connection with a tentative map application do not always extend to subsequent discretionary permits or approvals needed to develop the subdivision.
- The County otherwise determines that it lacks the land use authority or legal authority to require the project to implement the requirements of a newer MS4 Permit.

The recognition of vested rights by the County is provisional, and remains valid only so long as all applicable conditions of the applicable PLA(s) continue to be satisfied. Under no circumstances does the mere issuance of a permit or approval guarantee that a vested right will continue to be recognized.

Vested rights granted under any County approval are limited to the conditions of that approval, including the scope and temporal extent of the work authorized under the approval. Applicants are responsible for understanding the specific conditions and limitations of any vested right granted by the County, as well the circumstances under which that right might be modified or revoked. PLA determinations will be periodically reviewed, and updated MS4 provisions applied where necessary.

Per WPO Section 67.803(a) the County may in some instances be required to impose newer requirements at the time that a subsequent permit or approval such as a building or grading permit is sought if it is legally feasible to do so at that time. This may apply in instances where applicable stormwater compliance obligations have either been partially or fully satisfied under the earlier approval.<sup>5</sup>

As noted, applicants must demonstrate, and maintain documentation of, ongoing compliance with the conditions of any vested right initially recognized by the County, including the following:

- Proof of establishment of use and reliance on construction permits. Examples of information that may be acceptable to the County, either as primary or supporting documentation, include:
  - Inspection records,
  - Supervised grading reports
  - Condition satisfaction,
  - Payroll records,
  - Contractor or vendor invoices or payments,
  - Aerial photographs, and
  - Any other form of documentation deemed acceptable by the County.

The adequacy of submitted documentation will be determined on a case-by-case basis. In general, acceptable forms of documentation include only those that are independently verifiable by County

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<sup>5</sup> For example, if treatment control best management practices (TCBMPs) are installed to treat runoff from streets under a grading permit, but treatment has not been provided under that permit for the individual lots in a development, updated treatment standards applicable at the time of building permit issuance for the lots may be applied. In such case, if any BMPs necessary to comply with the newer requirements cannot be accommodated within the confines of existing lots, the applicant may be compelled to remap the subdivision.

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staff. Statements by applicants or contractors (even if written or sworn) are not considered sufficient.

- Satisfaction of all applicable MS4 Permit and other County requirements prior to expiration of the permit(s) under which a right is initially deemed to be vested.
- Other documentation as requested by the County.

#### 4. **PLA Option 2 (Grandfathering Under the 2013 MS4 Permit; WPO Section 67.811(c) (2))**

Provision E.3.e.(1)(a) of the 2013 MS4 Permit allows projects that meet specified criteria to be grandfathered under the requirements of the 2007 MS4 Permit. Under this option, compliance with the 2007 MS4 Permit (e.g., general, source control, low impact development, structural treatment control, and hydromodification management BMP requirements) is established as a minimum compliance standard. Per WPO Section 67.811(c)(2), this option is as follows:

*“(2) At its discretion, the Authorized Enforcement Official may allow the requirements of the immediately prior [2007] MS4 Permit to apply to any portion or phase of a Priority Development Project for which all of the conditions below have been satisfied.*

*(A) Initial Approvals. Prior to the effective date of the current MS4 Permit provisions [i.e., February 26, 2016], the applicant must have:*

- i. Obtained an approval of a design that incorporates the storm water drainage system for the Priority Development Project in its entirety, including all applicable structural and hydromodification management BMPs consistent with the requirements of the prior [2007] MS4 permit. For public projects, a design stamped by the County Engineer or engineer of record for the project is considered an approved design; and*
- ii. Been issued a project permit or approval that authorizes the commencement of construction activities based on the design approved in Section 67.811(c)(2)(A)i;*

*For purpose of Section 67.811(c), the effective date of the 2013 MS4 Permit provisions is February 26, 2016.*

*(B) Demonstrated to the County’s satisfaction that construction activities have commenced on any portion of the Priority Development Project site within 365 days prior to [i.e., February 16, 2015], or 180 days after [i.e., August 14, 2016], the effective date of the current [2013] MS4 Permit provisions, where construction activities are undertaken in reliance on the permit or approval.*

*(C) Subsequent Approvals. Within five years of the effective date of the current MS4 Permit provisions [i.e., prior to February 16, 2021], the applicant must have obtained all subsequent project permits or approvals that are needed to implement the design initially approved in conformance with WPO Section 67.811(c)(2)(A)i. After that time, any portion or phase of a Priority Development Project for which subsequent approvals have not been obtained is required to meet the updated requirements of WPO Section 67.811(a) and (b).*

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- (D) *Substantial Conformity.* The storm water drainage system for the Priority Development Project in its entirety, including all applicable structural pollutant treatment control and hydromodification management BMPs, must remain in substantial conformity with the design initially approved in conformance with WPO Section 67.811(c)(2)(A)i. Any portion or phase of a Priority Development Project not maintaining substantial conformity with this design is required to meet the updated requirements of WPO Sections 67.811(a) and (b)."

Applicants should note that the use of this option requires continued compliance with all of the conditions listed above (i.e., Conditions (A)i through (D)) throughout project completion. **Figure 2-1** summarizes the dates and ranges applicable to each condition. General guidance for complying with them is also provided below. Applicants should work closely with County staff to assess their specific requirements, including checking for the development of updated or more detailed guidance. As noted, applicants must demonstrate, and maintain documentation of, ongoing compliance with the conditions of any grandfathering right initially recognized by the County.

### **Condition (A)i: Initial Design Approvals**

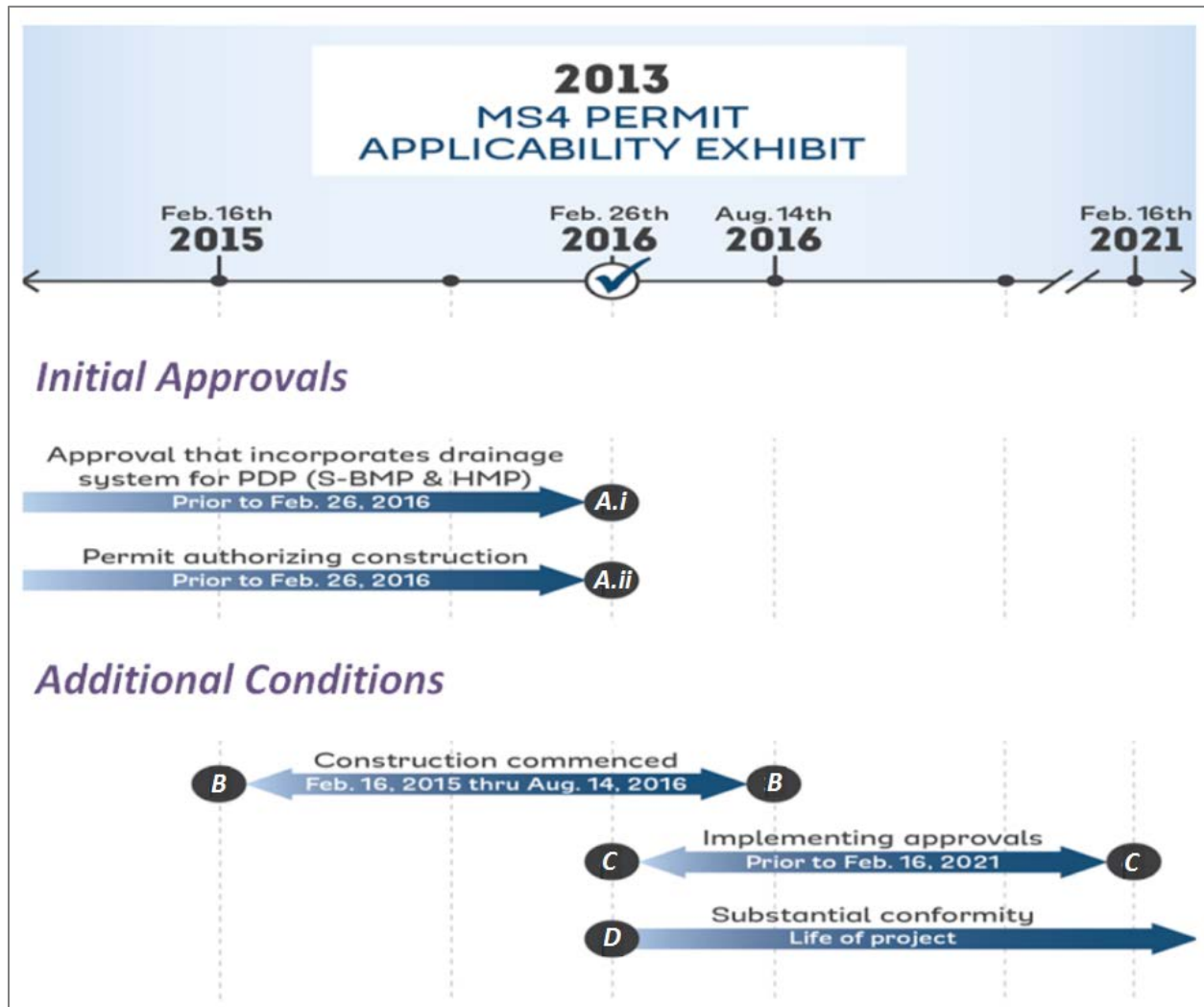
Applicants must initially obtain a County approval that incorporates the design of the storm water drainage system for the PDP in its entirety. Initial designs used to satisfy this requirement will normally be documented in the PDP Stormwater Quality Management Plan (SWQMP), drainage reports, and associated exhibits and plans. These documents may be submitted in support of any of the following types of approvals:

- Major Use Permits,
- Tentative Maps,
- Site Plans,
- Grading or Improvement Plans,
- Tentative Parcel Maps,
- Building Permits, and
- Any other approval deemed acceptable by the County.

The purpose of this provision is to require applicants to obtain early approval of a design that fully satisfies the requirements of the 2007 MS4 Permit for all areas and phases of the project. At a minimum, this includes the following design features:

- Delineation of Drainage Management Areas (DMAs) for the entire PDP,
- Identification of all applicable TCBMPs,
- Identification of all applicable hydromodification BMPs,
- Identification of all site design BMPs that affect the design or performance requirements of TCBMPs and/or hydromodification BMPs, and
- Supporting calculations and assumptions that demonstrate the ability of the PDP to fully meet all applicable treatment and hydromodification requirements for each identified DMA.

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**Figure 2-1: Summary of Deadlines for Complying with 2013 MS4 Permit Grandfathering Provisions (PLA Option 2). Note: Lettering of provisions refers to subsections of WPO Section 67.811(c)(2).**

This requirement must be satisfied for the PDP in its entirety; however, at the County’s discretion it may be met by multiple approvals that collectively address the entire storm water drainage system, so long as all approvals are obtained prior to February 26, 2016. BMPs and other proposed design features must be identified and located with sufficient specificity to allow reviewers to fully evaluate the PDP’s compliance with all applicable performance standards for the projected final buildout.

For projects such as business parks or phased residential developments, where the final design details are not initially known, it is acceptable to propose BMPs and delineate DMAs based on documented assumptions about final build-out (e.g., % imperviousness of individual lots or areas, site drainage patterns, and BMP types, locations, performance, etc.). However, as described under **Condition (D)**, below, substantial conformance with these initial assumptions must be maintained throughout the life of the project. Failure to do so may result in the imposition of updated standards during later stages of development.

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### **Condition (A)ii: Issuance of Construction Permits or Approvals**

Prior to February 26, 2016, the applicant must also have “*been issued a project permit or approval that authorizes the commencement of construction activities<sup>6</sup>*” based on the design approved under **Condition (A)ii** above. Permits and approvals that may be used to satisfy this requirement include:

- Grading permits,
- Building permits,
- Improvement plan permits,
- Clearing and grubbing permits,
- Well permits,
- Construction right of way permits, and
- Any other permit or approval recognized by the County as authorizing the applicant to commence construction activities on the PDP.

This condition is considered satisfied on issuance of a construction permit or approval for any portion or phase of the PDP prior to February 26, 2016. Once satisfied, this one-time condition is not subject to further County review.

Applicants are advised to consult with County staff as early as possible to ensure that a qualifying approval is issued before the effective date.

### **Condition (B): Commencement of Construction**

Not more than 365 days before or 180 days after the BMPDM Effective Date, applicants must commence construction activities under a permit issued per **Condition (A)ii**, above. This is also a one-time condition that, once satisfied, is not subject to further review. Its purpose is twofold: (i) it prevents older inactive projects from being grandfathered under the 2007 MS4 Permit, and (ii) it ensures that newer projects are grandfathered only if they conduct work within six months of the effective date of the 2013 MS4 Permit. Together, they ensure that the grandfathering provisions of the 2013 MS4 Permit are extended only to active projects.

To satisfy this requirement, construction activities on the project site must have commenced between February 16, 2015 and August 14, 2016 under an open construction permit or approval (including modifications and renewals) issued by the County. Applicants are responsible for providing documentation of the commencement of these activities. Examples of information that may be acceptable to the County, either as primary or supporting documentation, include:

- Inspection records,

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<sup>6</sup> Attachment C of the 2013 MS4 Permit defines Construction Activities as “Actions implemented during construction of development or redevelopment projects during the Preliminary Task (including rough grading and/or disking, clearing and grubbing operations, or any soil disturbance prior to mass grading), Grading or Land Development (including topography and slope reconfiguration, alluvium removals, canyon cleanouts, rock undercuts, keyway excavations, land form grading, and stockpiling of select material for capping operations), Streets and Utility Installation (including excavation and street paving, lot grading, curbs, gutters and sidewalks, public utilities, public water facilities including fire hydrants, public sanitary sewer systems, storm sewer systems and/or other drainage improvements), or Vertical Construction (including the build out of structures from foundations to roofing, including rough landscaping).”



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- Supervised grading reports
- Condition satisfaction,
- Payroll records,
- Contractor or vendor invoices or payments,
- Aerial photographs, and
- Any other form of documentation deemed acceptable by the County.

The adequacy of submitted documentation will be determined on a case-by-case basis. In general, acceptable forms of documentation include only those that are independently verifiable by County staff. Statements by applicants or contractors (even if written or sworn) are not considered sufficient.

**Conditions (A)i** through **(B)**, above, provide a means for a PDP to initially be grandfathered under the provisions of the 2007 MS4 Permit. However, as noted, these determinations should always be considered provisional. **Conditions (C)** and **(D)**, below, describe additional requirements that must be met for a project to maintain its grandfathered status. Failure to meet either of these conditions may result in the revocation of a grandfathering right, in which case a project may be required to partially or wholly meet updated MS4 Permit requirements. Grandfathering determinations will be periodically reviewed, and updated MS4 provisions applied where necessary.

Grandfathering rights granted under any County approval are limited to the conditions of that approval, including the scope and temporal extent of the work authorized under the approval. Applicants are responsible for understanding the specific conditions and limitations of any vested right granted by the County, as well the circumstances under which that right might be modified or revoked.

### ***Condition C: Issuance of Implementing Approvals***

This provision establishes a “shelf life” on grandfathering decisions by limiting the time allowed to obtain the approvals needed to fully implement the approved design. To maintain the grandfathered status of a PDP, applicants must also have been issued, by February 16, 2021, all subsequent project permits or approvals needed to implement the design initially approved under **Condition (A)i** above. In essence, only work authorized under permits or approvals issued prior to February 16, 2021 may be grandfathered under the 2007 MS4 Permit. Note that this requirement applies to issuance of permits or other approvals, rather than completion of work under them. As such, work may continue to be conducted under 2007 MS4 Permit standards for the duration of the term of that permit or approval, including allowable modifications and extensions. Depending on the approval type this may be multiple years.

Implementing approvals obtained after February 16, 2021 will be subject to the MS4 Permit provisions applicable at the time that each approval is obtained. In instances where applicable stormwater compliance obligations have only been partially satisfied under earlier approvals, the County may be legally obligated to impose updated MS4 Permit requirements upon subsequent permit issuance<sup>7</sup>.

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<sup>7</sup> For example, see footnote 5.

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The County will review the grandfathering status of PDPs at the time new permits or approvals are issued. All portions or phases of PDPs for which applicable permits or approvals have not been obtained prior to the February 16, 2021 deadline will be reviewed for the applicability of updated MS4 Permit provisions. At that time, applicants may be required to wholly or partially comply with updated MS4 Permit provisions, even where required BMPs cannot be accommodated within the confines of the existing design.

### ***Condition D: Maintaining Substantial Conformity***

The storm water drainage system for the PDP in its entirety, including all applicable structural pollutant treatment control and hydromodification management BMPs, must remain in substantial conformity with the design initially approved under **Condition (A)** above. The intent of this provision is to allow reasonable modifications in the design of a project plan while preserving compliance with the performance standards initially applied to the PDP.

PDPs must always fully comply with the provisions of the 2007 MS4 Permit; however, some changes within the overall project design may be accommodated so long as all applicable narrative and numeric performance standards continue to be met for all portions and phases of the development. As noted above, for projects where initial design parameters were established based on assumptions about final buildout, it is expected that some parameters will be modified as more specific project design details emerge. This is acceptable so long as substantial conformity with all applicable performance standards is maintained over the life of the project. Failure to do so may result in the imposition of updated MS4 Permit standards during later stages of the development.

Proposed design modifications should be presented to and discussed with County staff as early as possible so that feedback and necessary approvals can be provided prior to their implementation. While each proposed change must be evaluated individually, the following will generally be applied to determinations of substantial conformity<sup>8</sup>:

- Ministerial non-substantive changes such as a name change, engineer change, text update, or security/bond change are not considered substantial.
- Changes in the selection, location, or design of individual BMPs or site features that will result in equal or better ability to achieve all applicable narrative and numeric treatment and hydromodification performance standards for the PDP as a whole (including applicable portions of the PDP, such as individual lots or DMAs) may be allowed. However, compliance with all applicable standards must be maintained at all times. That is, a “lesser” standard cannot be approved for one portion of a project unless a corresponding change to offset any potential compliance deficits is also approved at the same time.
- Design changes, including the delineation of DMAs, that increase the overall amount of impervious surface within, or increase the overall footprint of, the PDP may be considered substantial, and will be evaluated on a case-by-case basis.

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<sup>8</sup> Allowable design changes, even if not determined to be substantial, may require a SWQMP Addendum to be processed for the PDP.

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In instances where a PDP has fallen out of compliance with the requirements of **Condition (D)**, County staff will work with the applicant to determine whether the grandfathering status can be restored, or if updated MS4 Permit requirements must be applied.