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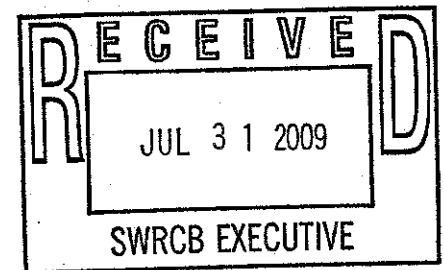
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July 31, 2009

Via E-Mail and Facsimile

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100



Re: Comments To A-1780 – August 4, 2009 Board Meeting

Dear Ms. Townsend:

I am forwarding herewith the following documents for inclusion into the record and for consideration by the State Water Resources Control Board in the above-referenced matter, A-1780, scheduled for hearing at the August 4, 2009 Board meeting:

1. Comments of Petitioners the County of Los Angeles and the Los Angeles County Flood Control District;
2. Powerpoint presentation; and
3. Petitioners' Request That the State Board Consider Supplemental Evidence; Declaration of Gary Hildebrand, P.E.

Please forward the attached documents to the Chair and Members of the Board. This letter and the attached documents are being sent to you via e-mail and facsimile.

In addition, Petitioners request 20 minutes to address the Board on this matter at the hearing on August 4.

BURHENN & GEST LLP

Ms. Jeanine Townsend

July 31, 2009

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Please call me or e-mail if you have any questions regarding this letter or the attached documents.

Very truly yours,



David W. Burhenn

Encl.

cc: (all w/encl. and via E-mail)
Tracy Egoscue, Esq., Executive Officer
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I. INTRODUCTION

Petitioners County of Los Angeles and the Los Angeles County Flood Control District submit these comments on the Revised Draft Order and respond to a question raised at the last hearing, whether releases from dams and detention basins are considered "storm water" within the regulatory definition of that term.

This petition seeks review of a Los Angeles Regional Water Quality Control Board ("Regional Board") order amending the Los Angeles County Municipal Storm Water Permit ("Permit"). In adopting this amendment, the Regional Board for the first time required municipal dischargers to strictly comply with a set of water quality objectives outside of the "iterative process." The Regional Board took this action without regard to this State Board's prior precedents, the recommendation of the State Board's panel of experts, and EPA guidance. Significantly, it appears that the Regional Board took these steps without regard to the hydrology of the watersheds in the Los Angeles Basin during dry weather. The Revised Draft Order perpetuates that error.

Six deficiencies still remain with respect to the Permit amendment and the procedure used to adopt it. Indeed, the Revised Draft Order still fails even to address four of these six deficiencies. They are:

1. The Regional Board failed to clearly state that the amendment applied solely to non-storm water discharges.
2. The Regional Board erroneously excluded the amendment's requirements from the iterative process that governs compliance with receiving water quality limitations.

3. The amendment is inconsistent with two other TMDLs adopted by the Regional Board, those for the Malibu Creek and Ballona Creek Bacteria TMDLs.

4. The amendment appears to make petitioners responsible for discharges of other permittees, in direct contradiction of this Board's order approving the Dry Weather Santa Monica Bay Beaches Bacteria TMDL ("SMB TMDL").

5. The amendment is not supported by the findings and evidence at the hearing. Specifically, there is no finding that it is technically feasible to comply with the terms of the amendment, that the amendment can be achieved through the adoption of controls or programs that reduce pollutants to the maximum extent practicable ("MEP"), or that compliance is reasonably achievable. Also there was no evidence before the Regional Board to support such findings.

6. The Regional Board hearing was not conducted in compliance with the California Administrative Procedure Act and the California Code of Regulations.

II. THE REVISED DRAFT ORDER STILL ERRONEOUSLY ASSUMES THAT DRY WEATHER FLOWS ARE THE EQUIVALENT OF "NON-STORM WATER"

Petitioners have requested the State Board to set aside the Permit amendment and remand the matter to the Regional Board for further proceedings. Alternatively, should the State Board revise the Permit itself, petitioners have requested that the words "non-storm water" be added to Part 2.5 and, if the Part is not deleted, to Part 1.B, on the grounds that Parts 1.B and 2.5 are ambiguous and there is no evidence in the record to support these parts as written. The Revised Draft Order still fails to come to grips with this issue.

As in the original Order, the Revised Draft Order recognizes that Parts 1.B and 2.5 apply solely to non-storm water. According to the Revised Draft Order, "the

challenged permit provisions do not apply to storm water flows." (Revised Draft Order at 7.) The Revised Draft Order still declines to order the Regional Board to make the requested changes, instead concluding that the amendment's provisions "are sufficiently clear." (*Id.* at 6.) The Revised Draft Order essentially asserts that "dry weather flows" are the equivalent of "non-storm water." (*Id.* at 7.)

As petitioners set forth at the last hearing, this assertion is both factually and legally erroneous. As a factual matter, "dry weather" flows under the SMB TMDL could include storm water. Petitioners have requested this Board to consider the evidence set forth in the Declaration of Oliver Galang, submitted at the first hearing. Mr. Galang verified that there can be storm water flows from precipitation events in storm drains in the Los Angeles basin even on a day defined to be a "dry weather" day within the meaning of the TMDL.

At the last hearing, a question was raised as to whether releases from dams or detention basins fall within the regulatory definition of "storm water" and, if so, whether such releases occur during summer dry weather. EPA addressed this question in the Federal Register preamble that accompanied the issuance of the storm water regulations. EPA clearly stated that discharges from detention and retention basins are subject to the storm water program. EPA said:

One commentator questioned the status of discharges from detention and retention basins used to collect storm water. This regulation covers discharges of storm water associated with industrial activity and discharges from municipal separate storm sewers serving a population of 100,000 or more into waters of the United States. Therefore, discharges from basins that are part of a conveyance system for a storm water discharge associated with industrial activity or part of a municipal separate storm sewer system serving a population of 100,000 or more are covered by this regulation.

55 Fed. Reg. 47990, 47996 (1990). Thus, it is clear that EPA intended to regulate releases from detention and retention basins, including dams, under the storm water regulations.

In this regard, petitioners request this Board to consider the supplemental evidence set forth in the Declaration of Gary Hildebrand, P.E., submitted herewith. That declaration establishes that releases from dams do occur in the Los Angeles and San Gabriel River watersheds during summer dry weather. Although the Los Angeles and San Gabriel Rivers do not flow to Santa Monica Bay, the fact that there can be flows of storm water during summer dry weather is pertinent if the State Board intends to make its decision on the Revised Draft Order precedential with respect to the incorporation of TMDLs for water bodies other than Santa Monica Bay. Certainly, it is factually erroneous to simply equate dry weather flows to non-storm water flows without examining the source of the flows at issue.

It also is legally erroneous to equate dry weather flows with non-storm water. "Storm water" is defined in the federal regulations to include "surface runoff and drainage." The full definition, in 40 C.F.R. § 122.26(b)(13), defines "storm water" to mean "storm water runoff, snow melt runoff, and surface runoff and drainage." If the regulatory definition of "storm water" were meant to include only rainfall, the reference to "surface runoff" and "drainage" would be superfluous.

At the hearing before the Regional Board, petitioners argued that the board must consider whether the amendment can be achieved through the application of the MEP standard and that the amendment must be subject to the iterative process because the SMB TMDL wasteload allocation covered more than non-storm water. Both the

Regional Board and Regional Board staff rejected that position, insisting that the amendment was intended to apply solely to non-storm water. Indeed, staff was very clear that the amendment was intended to address only non-storm water discharges. (R.T. 74:14-22; 79:2-7; 79:22-80:2.)

In order to make the amendment consistent with the Regional Board's findings, staff's stated intent, and the evidence presented at the hearing, the word "non-storm water" must be added to Parts 1.B and 2.5. Alternatively, the resolution should be vacated and the matter remanded to the Regional Board for further proceedings.¹

III. UNDER THIS BOARD'S PRIOR PRECEDENTS AND EPA GUIDANCE, THE AMENDMENT TO PARTS 1.B AND 2.5 SHOULD BE SUBJECT TO THE PERMIT'S ITERATIVE PROCESS

At the hearing before the Regional Board and in this petition, petitioners requested that compliance with the amendment be achieved through the Permit's iterative process. The Revised Draft Order still declines to apply the iterative process and declines to recognize that the amendment imposes numeric effluent limits. The Revised Draft Order remains erroneous in both respects.

In In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association, State Board Order No. WQ 2001-15

¹ The Revised Draft Order continues to decline to add the word "non-storm water" on the grounds that the language would deviate from the underlying SMB TMDL wasteload allocation. That would only be the case, however, if the wasteload allocation under the SMB TMDL includes something more than "non-storm water." Moreover, adding the word "non-storm water" is *not* inconsistent with the wasteload allocation. At most, non-storm water would be a subset of the wasteload allocation.

It must be recalled that it was Regional Board staff that intentionally chose to limit the evidence at the Regional Board hearing to non-storm water. As a legal matter, the permit amendment is limited to the record that was before the Regional Board and that is before the State Board.

("BIA"), the State Board was called upon to address the incorporation of water quality objectives into municipal storm water permits. In that decision, this Board held:

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs is appropriate. *We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.* The iterative approach is protective of water quality, but at the same time considers the difficulty of achieving full compliance through BMPs that must be enforced throughout large and medium storm sewer systems.

Id. at 8 (emphasis added; footnotes omitted).

EPA, in guidance entitled "*Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) For Storm Water Sources and NPDES Permit Requirements Based on Those WLAs*" and issued on November 22, 2002, recommended the same approach. EPA recognized that numeric limits are neither feasible nor appropriate given the variability of storm water runoff and the lack of knowledge as to sources of pollutants and the effective treatment for those pollutants. *Id.* at 4-5.

The Revised Draft Order proposes to find these authorities inapplicable on the grounds that Parts 1.B and 2.5 apply solely to non-storm water and that they are receiving water limitations, not numeric effluent limitations (Revised Draft Order at 9-10). The Revised Draft Order does so without regard to the dry weather hydrology of the watersheds in the Los Angeles Basin.

The Revised Draft Order appears to reason that, because non-storm water is supposed to be "effectively prohibited," there should be no variable and difficult-to-control flows to Santa Monica Bay on summer dry weather days, one of the main reasons for the application of an iterative process. In the Los Angeles Basin, however, the

sources of summer flows in storm channels and water courses are variable and are beyond the control of a particular permittee. Evidence of the variability of these flows is before this Board.

First, the Permit itself recognizes that certain non-storm water flows will be present in storm channels and water courses. These include flows from natural springs and rising groundwater, as well as flows from incidental urban activities, including reclaimed and potable landscape irrigation runoff, potable drinking water supply and distribution system releases, non-commercial car washing and sidewalk rinsing (Permit, Part I.A, pp. 21-22). Flows also may come from other permitted sources. For example, flows in the Los Angeles River during the summer are attributable, in part, to discharges from publicly owned treatment works ("POTWs"). (Although the Los Angeles River is not subject to the SMB TMDL, it provides an example of how one cannot assume that a prohibition against non-storm water discharges will eliminate dry weather flows.) As noted in the Hildebrand Declaration, summer dry weather flows also exist in the Los Angeles and San Gabriel Rivers as a result of releases from dams.

The existence of these dry weather flows was recognized in the staff report prepared in support of the SMB TMDL. That report stated that "[m]any of the canyon creeks and stormdrains to Santa Monica Bay flow during both wet and dry weather. Dry weather flows are not directly attributable to precipitation, but rather to natural springs, over-irrigation of lawns and other activities in the watershed." (Staff Report at 17.)

The premise, therefore, that a permittee can readily control flows during summer dry weather is erroneous. Flows exist during summer dry weather over which a permittee has no control.

This Board should not base its decision on an erroneous understanding of the hydrology in the Los Angeles Basin. This Board should not assume that simply because the permittees are required to effectively prohibit non-storm water discharges, flows during summer dry weather are subject to a permittee's jurisdiction or control. The rationale underlying the iterative approach applies equally to summer dry weather and wet weather flows.

In their comments on the original Draft Order, petitioners set forth why the amendment imposes numeric effluent limits. That reasoning continues to apply to the Revised Draft Order. Petitioners respectfully refer the State Board to petitioners' comments on the original Draft Order at pages 10-12.

IV. THE REVISED DRAFT ORDER CONTINUES TO FAIL TO ADDRESS OTHER SUBSTANTIAL AND APPROPRIATE ISSUES FOR REVIEW

The original Draft Order failed to address four other significant, substantive issues. The Revised Draft Order continues that failure. The State Board should address these issues, each of which forms an independent and separate ground for remand to the Regional Board or action by this Board.

A. It is Necessary and Appropriate for the Board to Make the Amendment Consistent With Other TMDLs

The relationship between the SMB TMDL and the Malibu Creek and Ballona Creek Bacteria TMDLs was raised by petitioners before the Regional Board. Three of the SMB TMDL monitoring sites are located at the mouth of Malibu Creek and one monitoring site is located at the mouth of Ballona Creek.

Petitioners requested that these four sites, and any others impacted by discharges from these creeks, be excluded from the amendment because compliance at these sites could be dependent on the reduction of bacteria discharge from the creeks themselves and

compliance with the Malibu Creek and Ballona Creek Bacteria TMDLs was not required until 2009 and no earlier than 2013, respectively.

The State Board should not perpetuate this inconsistency among these TMDLs. Petitioners therefore request that the amendment be modified to exclude from the SMB TMDL the monitoring sites at the mouth of Malibu and Ballona Creeks.

B. The Amendment Is Inconsistent With This Board's Order Approving the Dry Weather SMB TMDL

The State Board approved the SMB TMDL on September 19, 2002. State Board Resolution No. 2002-0149. In response to comments made at that time, this Board expressly found that one permittee could not be held responsible for another permittee's discharges. This Board stated that "[Wasteload Allocations] are only enforced for a discharger's own discharges, and then only in the context of its National Pollutant Discharge Elimination System (NPDES) permit" State Board Resolution No. 2002-0149, ¶ 9 (emphasis added).

The Regional Board ignored this finding. Current footnote 3 (numbered as footnote 4 in 2006) provides that "All Permittees within a subwatershed of the Santa Monica Bay watershed management area are jointly responsible for compliance with the limitations imposed in Table 7-4.1" Permit, footnote 3, p. 22 (emphasis added).

The SMB TMDL applies not only to petitioners but also to other municipal dischargers, Caltrans, and three POTWs (Regional Board Resolution No. 2002-04, Attachment A, p. 4). Petitioners have no authority or control over these other dischargers. Footnote 3 nevertheless appears to make petitioners responsible for exceedances in the watershed management area regardless of whether they have any

responsibility for the cause of the exceedance. This provision is directly contrary to State Board Resolution No. 2002-0149. This Board either should order the Regional Board to strike the last sentence of current footnote 3 from the Permit or the Board should strike the provision itself.

C. The Amendment Is Not Adequately Supported By the Findings and There is No Evidence to Support Necessary Findings

Any amendment to the Permit must be supported by adequate findings and those findings must be supported by the weight of the evidence. Water Code § 13330 and Code of Civil Procedure § 1094.5. The amendment does not meet this requirement. As set forth in petitioners' original petition and in its comments on the original Draft Order, the Regional Board failed to make several findings necessary to support the amendment, including whether the amendment can be complied with through programs that meet the MEP standard or whether permittees will be required to go beyond that standard. The Revised Draft Order still fails to address the failure to make appropriate findings. Without these findings, the amendment cannot stand.

At the hearing before the Regional Board, staff testified that from their perspective, it was not necessary to identify the source of bacteria, to determine whether it was technically feasible to comply with the amended permit, to determine that compliance could be achieved in accordance with the MEP standard or to determine that compliance with the amendment was reasonably achievable. Staff testified that none of these findings were necessary because the amendment was simply adopting the TMDL. (R.T. 291:10-24; 23:5-15; 293:20-24; 294:21-295:6). The Regional Board apparently accepted this view, because no such findings were included in the resolution adopting the amendment.

To the extent that staff testified that these matters were considered when the TMDL was adopted, however, staff was in error. It is the position of the State Board and the Regional Board that compliance with the MEP standard and these other considerations are not required when adopting a TMDL. The Court of Appeal accepted this position in *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1429. The Regional Board staff confirmed that MEP was not a consideration when the Regional Board adopted the SMB TMDL (R.T. 280:17-20).

Contrary to staff's testimony, the adoption of a Municipal Storm Water Permit, including any amendment thereto, is governed by 33 U.S.C. § 1342(p)(3)(B)(iii), which includes the MEP standard. To the extent that the Permit includes requirements that go beyond those of the Clean Water Act, the Regional Board also must consider all of the factors set forth in Water Code § 13241. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 618.

The Regional Board was required to consider these matters and make these findings. The failure to do so means that a permittee will never get a hearing on whether the requirements meet MEP or obtain consideration of these other factors.

D. The Regional Board's Hearing Was Not Conducted in Accordance With the Applicable Sections of the California Administrative Procedure Act and the California Code of Regulations.

Title 23, Section 648 of the California Code of Regulations provides that all adjudicative proceedings before the regional boards shall be governed by the California Code of Regulations, Chapter 4.5 of the Administrative Procedure Act ("APA") (commencing with Section 11400 of the Government Code), Sections 801-805 of the Evidence Code, and Section 11513 of the Government Code. 23 Cal.Code Reg. § 648(b).

As set forth in petitioners' comments on the original Draft Order, the hearing was not conducted in accordance with these statutes and regulations.

Specifically:

(1) The Regional Board's counsel simultaneously served as counsel to the Regional Board and as counsel to Regional Board staff, actively advocating for the proposed amendment. This dual capacity violated both the APA and due process and in itself requires the permit amendment to be set aside and a new hearing held. *E.g., Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-93, 98.

(2) Petitioners were denied the right to present evidence and to cross examine witnesses; and

(3) The Regional Board did not disclose the record it intended to rely on until three business day before the hearing.

VIII. CONCLUSION

As petitioners stated at the hearing before the Regional Board, petitioners share the goals of the SMB TMDL. To that end, petitioners have been working to achieve compliance with the TMDL since before it took effect. Petitioners' efforts have included constructing many low-flow diversions and assisting other jurisdictions to install low-flow diversions or otherwise comply with the TMDL.

For the TMDL to be effective, the municipal permittees and the Regional Board should join together in its implementation. Such a partnership cannot exist, however, if Permit amendments are punitive.

For the foregoing reasons, the Revised Draft Order should be modified to provide that the amendment be set aside and the matter remanded to the Regional Board for

further proceedings. Alternatively, the State Board should revise the amendment by (1) eliminating or modifying Part 1.B, including footnote 3; (2) providing that Part 2.5, and Part 1.B if it is not deleted, are subject to the iterative process; (3) adding the words "non-storm water" to Parts 1.B and 2.5; (4) clarifying that sites impacted by discharges from Malibu and Ballona Creeks are not to be used as monitoring sites for determining compliance with the SMB TMDL; and (5) providing that any further permit amendment proceedings be full and fair and in compliance with the applicable statutes and regulations.

Dated: July 31, 2009

ROBERT E. KALUNIAN, Acting County Counsel
JUDITH A. FRIES, Principal Deputy

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COUNTY OF LOS ANGELES and
LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

BEFORE THE
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)	SWRCB/OCC FILE A-1780
)	
THE COUNTY OF LOS ANGELES)	PETITIONERS' REQUEST
AND THE LOS ANGELES COUNTY)	THAT THE STATE BOARD
FOR REVIEW OF CALIFORNIA)	CONSIDER SUPPLEMENTAL
REGIONAL WATER QUALITY)	EVIDENCE; DECLARATION
FLOOD CONTROL DISTRICT)	OF GARY HILDEBRAND, P.E.
CONTROL BOARD, LOS ANGELES,)	
REGION, ORDER NO. R4-2006-74)	[23 C.C.R. § 2050.6]
)	
)	
)	

Petitioners County of Los Angeles and Los Angeles County Flood Control District hereby request that the State Board consider the evidence set forth in the attached Declaration of Gary Hildebrand, P.E.

Pursuant to 23 C.C.R. § 2050.6, petitioners state as follows:

1. The evidence presented demonstrates that storm water from a dam or detention basin can be present in channels in the Los Angeles County water basin during summer "dry" weather days.

2. The State Board should accept the supplemental evidence for the following reasons:

(a) This evidence addresses a factual question raised at the last hearing in this matter, i.e., whether there are releases of storm water from dams or detention basins during summer dry weather. As set forth in the declaration, such releases do occur with respect to flows in the Los Angeles and San Gabriel River watersheds.

(b) This evidence was not presented to the Regional Board because the witnesses before the Regional Board stated that the permit amendment at issue in this Petition was meant to address only non-storm water. This evidence became pertinent when questions were raised about dam and detention basin releases at the first State Board hearing in this matter and when an attorney in the Office of Chief Counsel asserted, without basis, that such releases during summer dry weather were highly unlikely.

Because the State Board's decision should be based on a correct factual record,

petitioners request that the State Board admit this supplemental evidence into the record.

Dated: July 31, 2009

ROBERT E. KALUNIAN, Acting County Counsel
JUDITH A. FRIES, Principal Deputy

BURHENN & GEST LLP
HOWARD GEST
DAVID W. BURHENN

By: _____


David W. Burhenn


Attorneys for Petitioners

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flows are in addition to discharges from various permitted sources, such as publicly owned treatment works, and urban runoff.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 30, 2009 at Alhambra, California.



Gary Hildebrand, P.E.