CITY OF San Dimas CALIFORNIA

July 18, 2016

Via Email [commentletters@waterboards.ca.gov]

Felicia Marcus
Chair
State Water Resources Control Board
C/O Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
PO Box 100
Sacramento, CA 95812-0100

Re: Comments to A-2386 – July 19 Board Item [Own Motion Order]

Dear Chair Marcus and Honorable Members of the Board,

The City should not need to fear substantial, unrequested revision to its Watershed Management Plan nearly 18 months after approval.

The City is a member agency implementing the East San Gabriel Valley Watershed Management Plan. The City is working diligently to comply with its WMP and the other LA County MS4 permit requirements at substantial cost. Continued uncertainty about the substance of the City's WMP unfairly prejudices the City's efforts to attain compliance. The City therefore submits this letter to urge the State Board to reject the proposed own motion review of the issues raised in the Petition. Review at this late date would unnecessarily interfere with costly unfunded mandate for the implementation of the East San Gabriel WMP, and violate procedural protections in the California Water Code and State Board regulations.

The City respectfully requests the State Board instead dismiss the Petition as untimely, moot and substantively defective, and if necessary, bring the substance of the approved WMPs back as an informational item.

1. "Own Motion" review at this late date is fundamentally unfair to the City and the other permittees

Own motion consideration of the Petition will prejudice the City and all permittees who have been implementing their approved WMPs. The City's WMP has been approved for more than a year, and implementation deadlines continue to accrue. If State Board staff cannot complete their review of the plans until after August 6, 2016, a decision from the State Board may not issue until 2017.

It is fundamentally unfair and unrealistic to expect the City to implement a plan costing millions of dollars if it can be substantially revised against the City's will at any time. Own motion review of the WMPs this long after plan approval puts the City at risk of having to make substantial revisions to its WMP, while still being subject to permit deadlines requiring attainment of water quality standards by 2026. Moreover, the City's efforts to date drafting and implementing the plan will be wasted if the State Board decides to order changes.

Own motion review likewise circumvents the procedural limitations established in the Water Code, in State Board regulations, and in precedential State Board orders involving the Los Angeles MS4 Permit. These limitations are protections for dischargers, the State Board and the environmental community. They provide certainty. Own motion review at this late stage undermines certainty and prejudices the City's ability invest in measures that protect water quality.

2. The State Board Should Not Micro-Manage Regional Board Implementation of the LA County MS4 Permit

The State Board has already reviewed and approved the WMP process as a means of achieving water quality standards in the Los Angeles Region. (LA County MS4 Permit, p. 40.) The State Board should trust that the Regional Board is capable of appropriate implementation and stick with the oversight role the State Board defined for itself in the Los Angeles Order. In that order, the State Board expressed interest in hearing about the progress of the WMPs but limited its inquiry to informational reports from the Regional Board:

> We direct the Los Angeles Water Board to periodically report specific information to the State Water Board regarding implementation of the WMPs/EWMPs, including on-the-ground structural control measures completed, monitoring data evaluating the effectiveness of such measures, control measures proposed to be completed and proposed funding and schedule, trends in receiving water quality related to storm water discharges, and compliance and enforcement data.
>
> (*Id.* at p. 78.)

The WMPs are not NPDES permits or WDRs. They are permittee drafted plans for attaining permit requirements. There are significant legal questions about the State Board's authority to hear a petition challenging the WMPs or order changes at this late date. To avoid these questions, the State Board should follow the oversight role established by its own order and allow the Regional Board to present updates to the State Board on the status of the plans as an informational item.

3. The Petition was defective; "Own Motion" Review is a blatant effort to circumvent legal requirements that require dismissal

The Petition is in reality two actions: one petition challenging Los Angeles Regional Water Quality Control Board ("Regional Board") Executive Officer Sam Unger's conditional approval nine Water shed Management Plans ("WMPs"); and a second petition challenging the Regional Board's subsequent approval of the WMPs. The Petition is defective as to both challenges. The Regional Board's independent approval of the WMPs rendered the first

challenge moot. The Environmental Petitioner's failure to file their Petition within thirty (30) days of the Regional Board's decision on the WMPs exceeded the time allowed by the Water Code. The Petition fails on both grounds.

The State Board's proposal to hear the Petition on Own Motion is ironic, given that just over one year ago, the State Board issued a precedential decision explicitly rejecting as untimely an amended petition filed more than 30 days from the challenged Regional Board action. ((State Water Resources Control Board, Order WQ No. 2015-0075, p. 7) ("Los Angeles Order").) The State Board's decision to reject the permittee's untimely amended petition was based on a strict application of the 30 day limitations period in Water Code section 13320(a). (*Ibid.*)

Yet, less than four months after the State Board's decision on the Los Angeles Order, the Environmental Petitioners in this matter untimely filed an amended petition relating to *the same* permit. Consistent application of the law and precedential Board orders compels the State Board to reject the Petition as untimely and decline to consider the issues raised therein. (See Civ. Code, § 3511.) Any other course of action would create one set of rules for dischargers, and another, less stringent set of requirements for the environmental community.[1] The City therefore urges the Board to decline consideration of untimely raised issues in the Petition.

4. The State Board Lacks Authority to Review the WMPs

The State Board lacks authority to review the WMPs. The State Board's authority to review a Regional Board's decision, via a petition or on own motion, is limited to those actions specifically listed in Water Code section 13320(a). Section 13320(a) authorizes the State Board to review an action of a regional board taken under any of the following sections of the Water Code:

- Section 13225 – Regional coordination, Investigative Orders;
- Section 13260 et seq – WDRs;[2]
- Section 13330 et seq – Enforcement;
- Section 13370 et seq – State implementation of the Federal Clean Water Act;
- Section 13399.25 et seq – Stormwater permitting;

---

[1] Questions have also arisen regarding the disparate treatment of Environmental Petitioners and permittee petitioners by Board staff. Board staff undertook communications with Environmental Petitioners regarding their amended petition, without copying all parties, demonstrating a lack of transparency in the administration of the Amended Petition. (See Letter from Philip Wyels to Becky Hyatt, et al., dated Feb. 26, 2016; available online at:
http://www.swrcb.ca.gov/public_notices/petitions/water_quality/docs/a2386/letter_transmitting_pra_request_022616.pdf.)

[2] Section 13263 authorizes regional boards to prescribe "requirements as to the nature of any proposed discharge" (subdivision (a)); use "the full waste assimilation capacities of the receiving waters" (subdivision (b)); include "a time schedule" in waste discharge requirements ("WDRs") (subdivision (c)); prescribe, review and "requirements" in WDRs (subdivisions (d), (e)); provide notification of discharge requirements (subdivision (f)); issue a master recycling permit (subdivision (h)); or issue a general permit (subdivision (i)).

- Section 13500 et seq – Water reclamation

None of the enumerated statutes mentions WMPs, or plans submitted by dischargers to comply with NPDES permit or WDR requirements. Without question, under Water Code sections 13320 and 13263, the State Board has the authority to review NPDES permits and WDRs, and full authority to revise permit terms and requirements. However, WMPs are not NPDES permit or WDRs. The State Board has no authority to separately review and approve the plans without revising the underlying permit.

Similarly, the State Board cannot rely on regulations implementing Section 13320(a) to give itself the power to review the City's WMP. The June 17, 2016 notice letter cites 23 Cal Code Regs section 2050.5(c) for that authority. Section 2050.5 is a State Board issued regulation implementing Water Code section 13320. Regulations implementing a statute cannot go beyond the scope of the legislation. (*Cal. Drive-in Restaurant Assn. v. Clark*, (1947) 22 Cal.2d 287, 302 ["an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute"].)

The State Board lacks the legal authority to review the content of the City's WMP on its own motion. For this reason, the City urges the Board to decline review of the issues raised in the Petition.

Conclusion

The City remains committed to complying with all applicable permit requirements, and fully discharging its duties under the law. The City strongly believes and urges that the State Board should do the same, and decline to review the issues raised in the Petition on own motion. Instead, the State Board should bring the matter up as an informational item as proposed in the Los Angeles Order.

Sincerely,

Blaine Michaelis

Blaine Michaelis
City Manager, City of San Dimas

CC: Krishna Patel, Director of Public Works

07-16-06 sng