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VIA E-MAIL AND U.S. MAIL

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street 24th Floor [95814]
P.O. Box 100
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Re: Comments to A-2236(a)-(kk)

Dear Ms. Townsend:

The City of Sierra Madre ("City") submits the following comments on the State Water Resources Control Board's ("Board") Draft Order WQ 2015- ("Draft Order") in the matter of review of California Regional Water Quality Control Board, Los Angeles Region, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4, Order NO. R4-2012-0175, NPDES Permit No. CAS004001 ("the 2012 Permit"). The City is one of the permittees subject to the 2012 Permit, regulating discharges from the City's storm sewer system. Sierra Madre is one of the Petitioners as it filed Petition No. A-2236(cc) on December 10, 2012. Sierra Madre's understanding is that its residents and businesses contribute very little, if at all, to stormwater pollution that presents Clean Water Act compliance issues; its storm and sewer system is connected to Los Angeles County's comprehensive storm sewer system. It is extremely troubled by, and would have difficulty finding adequate financial resources to address, the strict liability that would appear to flow from the Draft Order if it is not amended as the City recommends.

I. BOARD SHOULD REVERSE ITS DECISION ON THE RECEIVING WATERS LIMITATION LANGUAGE AND INSTEAD AFFIRM THE ITERATIVE PROCESS

The Board's Draft Order affirms the decision of the Los Angeles Regional Water Quality Control Board ("LARWQCB") to include Receiving Waters Limitations language in the 2012 Permit virtually identical to the same language in the 2001 Permit for the Los Angeles County

MS4, also adopted by the LARWQCB. (Draft Order, pp. 9-15.) However, the 2012 Permit imposes strict liability for discharges that exceed an applicable water quality standard or cause or contribute to a nuisance because the first two sentences of the Receiving Waters Limitation language, quoted below, do not explicitly state that a city would be in compliance by adding additional control measures via the iterative process.

The City urges the Board to revise the Draft Order to add a reference to the iterative process in Parts V.A.1-2; the revised Receiving Waters Limitation language would then read as follows, in part, with proposed additional language in bold:

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited. **The Permittees will be deemed in compliance with this prohibition if they timely implement control measures and other actions designed to reduce stormwater pollutants developed through the iterative process provided for by Part V.A.3.**

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause or contribute to a condition of nuisance. **The Permittees will be deemed in compliance with this prohibition if they timely implement control measures and other actions designed to reduce stormwater pollutants developed through the iterative process provided for by Part V.A.3.**

3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications.

(2012 Permit, Part V.A.1-3, pp. 38-39.) Adding this language fulfills the intent of the Board's precedential Order WQ 99-05, which required compliance via the iterative process. If a city's stormwater discharges violate a water quality standard, then the city must assess its current best management practices ("BMPs"), identify additional measures, and develop an implementation schedule, all of which are to be presented to the appropriate regional board. Once the regional board approves or adjusts the submitted measures, the permittee must implement the additional BMPs. With these requirements, the iterative process moves the city steadily towards compliance with all applicable water quality standards.

A. Board Has Discretion under Federal and State Law to Allow Compliance via the Iterative Process

In the Draft Order, the Board correctly recognized that it has the discretion to modify the 2012 Permit to add language confirming that a city may comply via the iterative process, rather than requiring compliance with strict numeric limits, similar to the language proposed above. However, it chose not to do so because it failed to add a reference to the iterative process to Parts V.A.1-2, meaning that the text instead imposes strict liability for water quality standards exceedances.

The Board's discretion under federal law to delete the 2012 Permit's strict numeric limits and allow compliance via the iterative process is clear. The Federal Water Pollution Control Act, 33 U.S.C. section 1251, et seq., commonly known as the Clean Water Act, generally prohibits discharge of any pollutant into waters of the United States. (33 U.S.C. § 1311, subd. (a).) An exception is a discharge authorized by a National Pollutant Discharge Elimination System ("NPDES") Permit, issued either by the federal Environmental Protection Agency or a state agency. (33 U.S.C. § 1342.) The requirements of a permit must be generally structured so the permittee will achieve compliance with applicable water quality standards. (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1093.) However, the Clean Water Act does not require that NPDES permits include strict numeric effluent limitations, against which a permittee's achievement of water quality standards is measured. (*Id.* at p. 1105 [Clean Water Act does not require water quality-based effluent limitations to be numeric in NPDES Permit.].) Instead, the Clean Water Act allows a permit to require installation of specific compliance measures, and thus require cities to go through the iterative process to identify and implement compliance measures.

This is particularly true for NPDES Permits for municipal storm sewer systems, which Congress authorized by a special section of the Clean Water Act. Specifically, 33 U.S.C. section 1342 (p)(3)(B) provides, with added emphasis:

> (B) Municipal discharges
> Permits for discharges from municipal storm sewers—
> (i) may be issued on a system or jurisdiction-wide basis;
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
> (iii) **shall require controls to reduce the discharge of pollutants to the maximum extent practicable**, including management practices, control techniques and system, design, and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

Thus, the Clean Water Act provides that NPDES Permits may require cities to install BMPs to achieve compliance to the maximum extent practicable with water quality standards. It

does not require strict numeric effluent limitations. In *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165–1167, the Ninth Circuit considered this section and held that Congress did not require NPDES Permits for municipal storm sewer systems to require compliance with numeric effluent limitations; instead Congress required municipal storm sewer discharges to reduce pollutant discharges only to the maximum extent practicable. The court added that a state may impose numeric effluent limitations, but concluded that these are not required for municipal storm sewer system permits. (*Id.* at pp. 1166–1167.)

Similarly, under the state Porter-Cologne Water Quality Control Act, the Board has the discretion to require compliance via the iterative process or to require compliance with strict numeric limits. (Water Code, §§ 13241, 13263.) Particularly noteworthy is the requirement in Water Code section 13241 that the SWRCB **shall** consider, among other factors, economic considerations in establishing permit requirements.

The federal and state laws governing municipal storm sewer system NPDES permits do not require the Board to impose strict numeric compliance limits. Instead, the Board has the discretion to choose how Permittees will be required to comply with the 2012 Permit.

B. Board Should Modify 2012 Permit's Receiving Waters Limitation Language to Allow Petitioners to Feasibly Achieve Compliance via an Iterative Process.

In exercising its discretion, federal and state law require the Board to consider the economic and practical realities facing cities. The City urges the Board to revise the Draft Order to add language in Parts V.A.1 and V.A.2 providing that compliance via the iterative process constitutes compliance with the applicable water quality standards. This complies with the Board's intent in Order WQ 99-05, comports with federal and state law, and provides cities the flexibility and certainty needed to undertake significant efforts to improve stormwater quality.

1. Receiving Waters Limitation Language Defeats the Intent of Board's Order WQ 99-05 to Require Compliance via the Iterative Process, and Instead Leaves Permittees Potentially Strictly Liable for Exceedances

The intent of the Board's previous Order WQ 99-05 is plain: as long as a permittee completes this iterative process and implements the required BMPs, it will be deemed in compliance with the permit and not subject to potential liability from third-party suits.

The Board's Draft Order defeats this intent by failing to affirm the iterative process as a compliance method. Modifying the permit to allow compliance via the iterative process would not be a hollow measure. In a case brought by the Natural Resources Defense Council regarding exceedances of water quality standards detected at the County's monitoring stations, the Ninth Circuit found that the 2001 Permit's Receiving Waters Limitation language—the same language at issue with the 2012 Permit—imposed strict numeric limits on permittees. (*Natural Resources*

Defense Council, et al. v. County of Los Angeles, Los Angeles County Flood Control District, et al. (9th Cir. 2013) 725 F.3d 1194, 1206–1207 [hereinafter *Natural Resources Defense Council*].) The Ninth Circuit held the county was strictly liable for exceedances detected at monitoring stations in the Los Angeles and San Gabriel Rivers because the permit prohibited discharges that exceeded water quality standards. The 2012 Permit's Receiving Waters Limitation language suffers from the same defect. The 2012 Permit fails to specify in Parts V.A.1–2 that compliance with the iterative process constitutes compliance with the Permit.

If left unchanged, the 2012 Permit exposes every city, including Petitioner Sierra Madre, to potential liability for any exceedance of numeric water quality standards, regardless of a city's compliance efforts or its own actual contribution to such violations, unless it has a unique connection to the County's storm water system to which a water quality monitor can be installed. Exposing cities to this risk of potential liability, including third party lawsuits, is unnecessary, deviates from established Board precedent, and fails to recognize the realities of the interconnected storm sewer system. Further, by exposing cities to this third party liability, scarce resources will necessarily be shifted to defending such lawsuits, thus defeating the purpose of creating and implementing BMP compliance methods under both federal and state law.

2. Allowing Compliance via the Iterative Process Complies with Federal and State Laws, which Require Board to Consider Economic and Practical Realities.

In exercising its discretion to revise the 2012 Permit, the Board must take into account the realities recognized by federal law. The Clean Water Act requires NPDES Permits for municipal storm sewer systems to implement "controls to reduce the discharge of pollutants to the maximum extent practicable." (33 U.S.C. § 1342, subd. (p)(3)(B)(iii).) Additionally, under state law, the Board must take economic considerations into account in determining the permit's terms. (Water Code, § 13241, subd. (d).) Chief among these should be the severely constrained revenue sources available to local governments, including cities and the county, to use to fund stormwater management activities.

The iterative process, rejected by the Board in the Draft Order, meets these requirements by requiring permittees and the regional board to develop BMPs for exceedances of a given water quality standard on a case-by-case basis. As each round of the iterative process proceeds, the regional board and the permittee will identify which BMPs will resolve the exceedance at issue, to the "maximum extent practicable." Should a particular BMP prove ineffective, then the permittee is required to develop and implement a further measure, again calculated to achieve compliance to the "maximum extent practicable." This collaborative process complies with the Clean Water Act and the Porter- Cologne Act, yet recognizes the significant financial constraints faced by cities. This process avoids shifting compliance enforcement to watchdog third-party litigation groups that seek to impose strict liability to recover substantial legal fees that are better spent actually developing and implementing compliance methods.

This is especially so given the real constraints on cities' abilities to raise revenue. After the passage of Propositions 13, 62, 218, and 26, virtually every source of additional revenue that could be used by a city to fund stormwater management efforts requires voter approval and is thus very challenging to secure. Indeed, in Los Angeles County, the Board of Supervisors removed a proposed measure from the ballot in March 2013 in recognition of its wide-spread unpopularity.[1] The measure would have provided an estimated $290 million per year for stormwater management projects. In the absence of voter approval for new revenue sources, Petitioner Sierra Madre has little available funding for new stormwater management efforts. The largest available funding is federal and state grants; yet these too are scarce, given the state's budget challenges and the current state of gridlock in Congress. The iterative process recognizes this reality and allows Permittees to implement new BMPs one at a time.

The Draft Order cites the perceived ineffectiveness of the iterative process as a reason to abandon it. (See Draft Order at p. 14) But the Board's concern that the iterative process may have proved ineffective in some cases is no reason to abandon it entirely. If the Board modifies the Draft Order to add language stating that compliance with the iterative process constitutes compliance with the Permit, then all Permittees have a strong incentive to redirect their efforts to develop and implement additional BMPs. With the relative certainty provided by the iterative process, the City would be able to devote the entirety of its limited stormwater management funds to water quality improvement projects instead of litigation. Water quality will then improve, alleviating the SWRCB's concerns.

II. THE CITY SUPPORTS THE INCLUSION OF THE WMP/EWMP ALTERNATIVE COMPLIANCE PATH

The City agrees with the Board that the permittees need "a well-defined, transparent, and finite alternative path to permit compliance" with the 2012 Permit. (Draft Order, p. 15.) To accomplish this goal, the Board is right to affirm the Watershed Management Program ("WMP") and Enhanced Watershed Management Program ("EWMP") compliance approach. However, the Board should revise the Draft Order to ensure the WMP and EWMP's usefulness.

The LARWQCB's inclusion of the WMP and EWMP option is legal. The heart of the challenges by the Natural Resources Defense Council and other environmental petitioners to these programs is that their inclusion constitutes an illegal safe harbor. This contention is misplaced. The WMP/EWMP option is far from a free pass. Rather, the program requires participating cities to develop and implement a program requiring significant additional control

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[1] *L.A. County to revise proposed parcel tax to fight polluted runoff,* Los Angeles Times, March 12, 2013, available at:<http://articles.latimes.com/2013/mar/12/local/la-me-stormwater-20130313> (last visited January 14, 2015).

measures, calculated to achieve water quality standards over the life of the permit. The estimate that the program, as designed, will achieve water quality standards must be rigorously supported by a Reasonable Assurance Analysis ("RAA"). The RAA will be a detailed, mathematical modeling demonstrating that the proposed control measures in a WMP or EWMP will be enough for the storm sewer system to meet all applicable water quality standards.

Thus, as proposed, the WMP/EWMP option requires significant effort to achieve compliance. Permittees who elect to complete a WMP or EWMP are deemed in compliance only upon developing, implementing, and monitoring the effectiveness of a detailed and rigorous water quality improvement measures calculated to comply with applicable water quality standards, including any applicable Total Maximum Daily Loads ("TMDLs"). WMPs and EWMPs are expected to be quite expensive and require an extensive amount of additional efforts by Permittees. Instead of being an easy "free pass," they are effective compliance tools that will result in real benefit to water quality in the watersheds that receive discharges from the MS4.

III. PERMITTEES NEED A FEASIBLE PATH TO COMPLIANCE, THUS BOARD SHOULD REVISE THE DRAFT ORDER TO REMOVE UNNECESSARY ADDITIONAL REQUIREMENTS FOR WMPS/EWMPS

The Draft Order adds a new requirement that permittees submit a full RAA every six years to Part VI.C.8. (Draft Order, p. 38.) This should be deleted from the final order. The RAA is a detailed technical analysis estimating the reductions in pollutants from implementing a WMP or EWMP. The 2012 Permit required submitting it once, together with the draft WMP or EWMP. The RAA's estimates would then be compared to the actual results every two years in the periodic monitoring reports to assess compliance. Thus, an update to the RAA is not needed every six years. The biennial analyses of the monitoring data will accomplish the goal of ensuring that a WMP or EWMP is working as envisioned. Adding this requirement serves only to inflate the costs and complexity of WMPs and EWMPs with no added benefit to water quality.

The Draft Order also adds a new requirement for permittees who complete an EWMP, including meeting the 85th storm runoff retention requirement. For these permittees, if at the end of the implementation period of the EWMP the monitoring data show that the TMDL-listed pollutant standards are exceeded, then the permittees must identify and implement additional control measures, above and beyond the requirements of the approved EWMP. (Draft Order, pp. 43-44, modifying Part VI.E.2.e.i of the 2012 Permit.) The Board also proposes requiring verification of final compliance with receiving waters limitations for pollutant/water body combinations not addressed by a TMDL via monitoring data. (Draft Order, pp. 44-45, adding a new language to Part VI.C.2.c.) This requirement implies that cities participating in an EWMP would also be subject to additional requirements over and above the EWMP if the monitoring data indicates exceedances of these standards.

The City urges the Board to delete these unwarranted additions, or at least limit their application to egregious offenders. The original 2012 Permit indicated that full implementation

of an approved EWMP would be sufficient for permittees to be deemed in compliance except the trash TMDL. (See 2012 Permit, Part VI.E.2.e.i.) This provision was reasonable, as the 2012 Permit requires that the RAA evaluate the effectiveness of all proposed control measures in a WMP. (Part VI.C.5.b.iv.5, p. 63.) Indeed, the permit directly states that:

> The objective of the RAA shall be to demonstrate the ability of Watershed Management Programs and EWMPs to ensure that Permittees' MS4 discharges achieve applicable water quality based effluent limitations and do not cause or contribute to exceedances of receiving water limitations.

(Part VI.C.5.b.iv.5, p. 64.) After its approval by the LARWQCB, the cities should be entitled to rely on the RAA during the implementation of the EWMP and during the remainder of the Permit's term.

Moreover, adding more requirements at the conclusion of an EWMP defeats the intent of the EWMP process and upends the City's understanding of the relative benefits and burdens of the EWMP at the time it had to make the decision to pursue the EWMP path. The EWMP process was intended to encourage permittees to adopt stormwater management measures significantly greater than their previous efforts and to reward those that committed to capturing the 85th percentile storm's runoff. To justify the significant expenditures necessary to achieve that capture, the cities need certainty that completing, and implementing an EWMP protects them from exposure to third party liability. The 2012 Permit provided this incentive and benefitted the watersheds significantly. The City recognizes that it could not reasonably be deemed in compliance forever. Instead, the 2012 Permit was correct to provide that successful implementation of an EWMP would mean a city is deemed in compliance for the permit's term.

The cities participating in EWMP groups made their decisions to complete an EWMP based, in part, on their understanding that completing an EWMP would result in protection from third-party suits for the term of the EWMP. Now that the cities have already made this decision, and expended significant resources in development of EWMPS in reliance on the 2012 Permit, the Board's Draft Order turns this understanding on its head. Had cities been advised that the Board would defeat the deemed compliance provisions undergirding the EWMP option, there may have been fewer cities in EWMP groups and thus significantly fewer anticipated stormwater management projects. Fundamental fairness requires that these regulations in the 2012 Permit be maintained, or else that cities be given the chance to reevaluate their compliance efforts. Simply removing the proposed additional provisions would ensure that the significant water quality benefits expected to result from EWMPs will occur, while providing cities an incentive to develop and implement one.

A. Board Should Revise the Deadline Provisions to Ensure Cities Have Flexibility Needed to Complete WMPs and EWMPs in a Feasible Manner

The Draft Order allows for an extension of a deadline in the WMP/EWP planning phase, but only if a permittee demonstrates compliance with the receiving waters limitations while drafting the WMP or EWMP. (Draft Order, pp. 47-48, adding a new Part VI.C.4.g.) The Board is right to add additional flexibility into the permit. However, the Board's deadline extension process is illusory and must be revised. The process requires a permittee demonstrate compliance with the Receiving Waters Limitation language while taking advantage of the extension to develop its WMP or EWMP. But if a permittee could meet the Receiving Waters Limitation language initially, it would not need to do a WMP or EWMP. Instead, the cities participating in WMPs or EWMPs are generally not yet in compliance with one or more applicable standards, hence the need to develop a program to bring themselves into compliance. Requiring a city to demonstrate immediate compliance to obtain an extension of the deadlines to develop the plan for compliance is illogical. The new Part VI.C.4.g should be revised to allow for extensions of development deadlines, but without the requirement to demonstrate immediate compliance with the Receiving Waters Limitations language.

IV. THE BOARD SHOULD CONSIDER ITS RULINGS THAT DENY THE CITY FUNDAMENTAL DUE PROCESS

A. The City Should be Allowed to Respond to Environmental Groups' Motion to Strike

The Board's decision to hear the Motion to Strike the collateral estoppel arguments of the City and other city petitioners in this matter remains a glaring procedural flaw in the MS4 permitting process. The Board decided to hear the Motion to Strike, filed by the Natural Resources Defense Council and other environmental petitioners on November 11, 2013, without allowing city petitioners a chance to respond to its arguments. Instead of allowing city petitioners to respond to the Motion to Strike, on November 21, 2013 the Board issued a letter stating that it would consider the Motion to Strike but would not accept any more written submissions, including responses. This decision deprived the City of its fundamental due process rights, which demand an opportunity to be heard on the Motion to Strike's attack on a central issue involving the MS4 permitting process. This is especially so because the Motion to Strike is based on the false premise that the City and other city petitioners are barred from addressing the collateral estoppel issue because it was already raised in the Natural Resources Defense Council's receiving water limitations comment letter, but not earlier.

The exercise of quasi-judicial power in administrative hearings requires that an administrative agency comply with fundamental due process rights. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) At minimum, a fair procedure requires that a party be provided a reasonable opportunity to be heard on issues raised by their opposition. (*Kaiser Foundation Hospitals v. Sacramento County Superior Court* (2005) 128 Cal.App.4th 85, 103.) Fair procedure also prevents the decision-making body in an administrative proceeding from

excluding facts and circumstances that should be considered. (*Morgan v. United States* (1936) 298 U.S. 468, 480–481.) Any administrative proceeding that insists on only considering one side's arguments is invalid. (*Ibid.*) And any decision reached without providing both sides an opportunity to be heard on a crucial issue may be struck down as contrary to due process. (See *Wulzen v. City and County of San Francisco* (1894) 101 Cal. 15, 35.) Thus, a clear denial of due process exists where an agency decision is based on evidence and argument against parties where those parties were denied any opportunity to be heard on the issue. (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 158.)

Accordingly, the Board's decision to refuse to consider the City and other city petitioners' opposition to the Natural Resources Defense Council's Motion to Strike, while considering the Motion to Strike itself, violates long-established principles of due process and fundamental fairness. The Board should reconsider its decision to refuse to allow the City to respond to the Motion to Strike on the collateral estoppel issue which is of key importance in this matter. Indeed, the Natural Resources Defense Council's collateral estoppel argument is, substantively, that strict numeric limits must be included in the 2012 permit, and that city petitioners cannot oppose the inclusion of strict numeric limits because that issue had previously been fully litigated in their favor. As discussed above and in its previous submissions, the City contends otherwise. Rather than being limited by the previous permit's litigation posture, in which the City was not a party upon appeal, the cities may argue that the Board has the discretion to require compliance via the iterative process of successive BMPs and to not impose strict numeric effluent limits Thus, this assertion is central to this proceeding and the City must be given a chance to respond to it.

B. The Board Should Reconsider Its Decision to Close the Administrative Record

In the Draft Order, the Board also stated that it would not grant a request by Permittees to supplement the Administrative Record "with the notices of intent to develop a WMP/EWMP and associated documents filed by Permittees following adoption of the Los Angeles MS4 permit." (Draft Order, p. 6.) Further, "[w]ith regard to factual evidence regarding actions taken by Permittees to comply with the LA MS4 Order after it was adopted, we believe it appropriate to close the record with the adoption of the Los Angeles MS4 Order." (*Id.* at pp. 6–7.) The Board's decision to close the Administrative Record is improper and should be reconsidered. This is because it prevents the City from introducing relevant evidence on compliance cost issues associated with the MS4 permit, which support the City's argument that the new version of the permit is overly burdensome. As noted above, the City and other permittees made their decisions to enter into an EWMP based on the understanding that they would be deemed in compliance with the permit so long as they met the 85th percentile stormwater retention standard, and therefore be protected from third-party suits. The Board has now switched this deal to the City's detriment, yet closure of the Administrative Record means the City is prevented from introducing key evidence on this point to the Board and thus from making its full case. This is another instance of procedural unfairness to the City and it must be remedied in order to avoid a violation of the City's due process rights.

VI. CONCLUSION

For the foregoing reasons, the City requests the Board revise its Draft Order on the 2012 Permit by

- adding the language proposed above to recognize the iterative process as a viable compliance option;
- deleting the additional language requiring further compliance efforts at the end of an EWMP;
- deleting the requirement that the Reasonable Assurance Analysis be repeated every six years, and
- modifying the interim development deadline extension provision by deleting the requirement for immediate compliance.

By this request, the City does not seek to shirk its responsibilities to improve stormwater management and water quality. Instead, the City needs the tools that will permit it to expend its limited available resources on compliance measures that will actually improve water quality, rather than on defending needless litigation. The City recognizes that the iterative process for compliance may increase the administrative and regulatory burden on the state and regional boards and would support requests for appropriations in the state budget to implement this process.

Sincerely,

Holly O. Whatley
Assistant City Attorney
City of Sierra Madre

HOW:mo

cc: Sierra Madre City Council
Elaine Aguilar, City Manager
Teresa L. Highsmith, City Attorney