(6/16/15) Board Meeting
Comments to A-2236(a)-(kk)
Deadline: 6/2/15 by 12:00 noon

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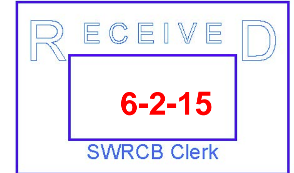

June 2, 2015

BY EMAIL [COMMENTLETTERS@WATERBOARDS.CA.GOV]

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Comments on Revised Draft Order for Petitions A-2236(a)-(kk)

Dear Ms. Townsend:

Best Best & Krieger LLP represents the City of Lake Forest ("City"). The City submits these comments on State Water Resources Control Board's ("State Board") April 24, 2015 revisions to Draft Order WQ 2015- XXXX, In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS0004001 ("Draft Order"), which petitioned the State Board (Petition Nos. A-2236(a) through (kk)) for review of California Regional Water Quality Control Board, Los Angeles Region's ("Regional Board") Order No. R4-2012-0175 (NPDES No. CAS 004001) ("2012 Permit"). The City is a permittee under Santa Ana Regional Water Quality Control Board Order No. R8-2009-0030, and until that permit is revised, is also a permittee under San Diego Regional Water Quality Control Board Order No. R9-2013-0001. The Draft Order will likely affect the structure of the San Diego order and the next iteration of the Santa Ana order. For these reasons, the City is interested in the Draft Order.

I. INTRODUCTION

The City would like to express support for a BMP-based approach to Permit compliance and the modifications in the Draft Order that allow for this approach, including the deletion of language from II.B.5.a and addition of language in footnote 127. The City supports the modifications to Section II.B.1, which confirm that the 2012 Permit's Wastershed Management Programs ("WMP/EWMP") do not violate the anti-backsliding provisions of the Clean Water Act or the federal regulations implementing the National Pollutant Discharge Elimination System ("NPDES"). The City also supports the addition to Section II.B.4.b (page 40), which confirms that the Permittees' inability to obtain funding for a project may constitute grounds for an extension of deadlines set forth in a WMP/EWMP.

The City believes that two revisions to the Draft Order, which were intended to provide clarification, are unnecessary and otherwise confuse the regulatory landscape established by the 2012 Permit. For these reasons, the City requests deletion of, or in the alternative, further modifications to Section II.B.5.c, and footnotes 133, 187, and 192.

II. COMMENTS

The City submits the following comments, supporting, in part, the April 24, 2015, revisions to the Draft Order, and seeking, in part, further modifications to the Draft Order.

A. THE CITY SUPPORTS THE 2012 PERMIT'S BMP-BASED APPROACH TO COMPLIANCE, ANTI-BACKSLIDING PROVISIONS, AND FUNDING CONSIDERATIONS

Three revisions in the Draft Order enable the Permittees to better focus their efforts and limited resources. Specifically, the BMP-based approach and WMP/EWMP compliance pathway, anti-backsliding structure, and funding considerations in the Draft Order recognize the restrictions the Permittees face as they act to protect the environment and also establish a rigorous and proactive structure to ensure continued environmental protection. The City expresses its support for these revisions.

1. *BMP-based Compliance is Consistent with the Clean Water Act, Required by State Board Precedential Orders, and Protective of the Environment*

The addition of footnote 127 and the amendment of Part VI.E.2.e.i(4) of the 2012 Permit provide a clear statement of the manner in which the Permittees "will be deemed in compliance with the receiving water limitations during the EWMP development phase[.]" (Draft Order, fn. 127.) The WMP/EWMP provisions in the 2012 Permit establish a rigorous plan for attaining water quality benefits consistent with the goals of the Clean Water Act and the State Board's precedential orders. (Gov. Code, § 11425.60; State Board Order WQ 2001-15; State Board Order WR 96-1, footnote 11 ["the [State Board] designates all decisions or orders adopted by the [State Board] at a public meeting to be precedent decisions"].)

The Clean Water Act does not require strict compliance with water quality standards for municipal separate storm sewer dischargers ("MS4"). Instead, it requires MS4 "to reduce the discharge of pollutants to the maximum extent practicable." (33 U.S.C. § 1342, subd. (p)(3)(b)(iii); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165 ["Congress chose not to include a [strict compliance] provision for municipal storm-sewer discharges."].) Consistent with *Defenders of Wildlife v. Browner,* the State Board has determined that water quality standards in municipal stormwater permits are to be obtained using an iterative approach:

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> which focuses on timely improvements of BMPs . . . . ***We will generally not require "strict compliance" with Water Quality Standards through numeric effluent limits 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 difficulties of achieving full compliance through BMPs that must be enforced through large and medium municipal storm sewer systems.
>
> (State Water Board Order No. 2001-15, pp. 7-8 [emphasis added].)

The inclusion of footnote 127 and the deletion of the additional control measures in Section II.B.5.a provide a clear pathway for the Permittees to engage in the iterative process, and in so doing, to fulfill the requirements of the 2012 Permit. In addition, in light of the potential for confusion created by the addition of the non-stormwater discharge language (Section II.B.5.c and footnotes 133 and 187 discussed below), the City supports the Draft Order's strong statement of what constitutes compliance with the 2012 Permit.

2. *The Draft Order's Anti-backsliding Analysis is Consistent with the Clean Water Act*

The additional language in Section II.B.1 and footnote 64 is consistent with case law interpreting the anti-backsliding provision of the Clean Water Act. (33 U.S.C. § 1342, subd. (o); 40 C.F.R. § 122.44, subd. (l)(1); *Communities for a Better Environment v. State Water Resources Control Board* (2005) 132 Cal.App.4th 1313, 1330-1331.) The City supports the additional language in Section II.B.1 and footnote 64 as additional confirmation that a BMP-based compliance approach is not backsliding.

3. *Allowing deadline extensions because of funding challenges is consistent with State and Federal law*

The revisions to the Draft Order allow the Permittees to request an extension of time to comply with final deadlines in a WMP/EWMP for receiving water limitations not otherwise addressed in a TMDL based on inability to obtain funding for a project. (Draft Order, § II.B.5.a.) The City supports this revision to the Draft Order.

Water Code section 13241 (via Water Code section 13263) requires the State Board and the Regional Boards to consider the economic implications of the Waste Discharge Requirements they issue. While some courts have narrowed this requirement (*see City of Arcadia v. State Water Resources Control Bd.*, 191 Cal.App.4th 156 (2010)), failing to allow a city to make

changes to its WMP or EWMP based on the availability of funding would ignore this obligation. Moreover, apart from the State and Regional Boards' obligations under Water Code sections 13263 and 13241, neither agency has the authority to impose unreasonable or unattainable requirements on the cities. (*California Assn. of Sanitation Agencies v. State Water Resources Control Board*, 208 Cal.App.4th 1438 (2012) ["where the regional board has evidence that a designated use does not exist and likely cannot be feasibly attained, it is unreasonable to require a discharger to incur control costs to protect that use"].)

State law places limitations on how and when a city can impose fees and taxes or issue bonds to provide funding for the infrastructure necessary to implement stormwater control projects. (*See Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351.) Articles XIII A, XIII C, and XIII D of the California Constitution severely limit the Permittees' power to impose fees. In most cases, fees could only be imposed by some form of special tax or property related fee that would require approval by either a 2/3 vote of the electorate subject to the tax; or a majority vote of the property owners subject to the property related fee.

Where the State Board or the Regional Board receives evidence that a city cannot implement a particular aspect of its WMP or EWMP because of a lack of funding or some other legal impediment, the Board cannot refuse to extend the deadline. Imposing impossible or infeasible requirements is an abuse of discretion and contrary to law. (*California Association of Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438; *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir. 1996); *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1994).)

B. THE CITY SEEKS FURTHER MODIFICATION TO THE DRAFT ORDER TO REMOVE CONFUSING AND UNNECESSARY "CLARIFICATIONS"

Two revisions in the Draft Order are unnecessary and otherwise confuse the regulatory landscape established by the 2012 Permit. Specifically, the addition of Section II.B.5.c, when read in light of footnotes 133 and 187 create uncertainty regarding the significance of the Permittees' participation in and compliance with the WMP/EWMP provisions. Similarly, the addition of footnote 192 confuses the regulatory landscape by concluding that the Clean Water Act preempts state law that requires consideration of cost and feasibility on the grounds that such considerations stand as an obstacle to accomplishing the purpose and objective of the Clean Water Act. The City requests deletion of these provisions, or, in the alternative, further modifications.

1. *Remove the "Clarification" on Non-Stormwater Discharges*

The revisions to the Draft Order add Section II.B.5.c (Draft Order page 52) and footnotes 133 and 187. The City is concerned that, when read together, Section II.B.5.c, footnotes 133 and 187

and the non-stormwater discharge prohibition in the 2012 Permit could be construed to mean that any discharge from the MS4 during dry weather is a violation of the 2012 Permit and/or Clean Water Act until proven otherwise by the Permittees. Footnote 187 attempts to further clarify that the this is not the case stating "[w]e disagree that the phrasing of the non-stormwater discharge prohibition in the Los Angeles MS4 Order means that any dry weather discharges from the MS4 could be construed as a violation of the Clean Water Act." Nonetheless, this statement is qualified by reference to the list of exempt discharges into the MS4 system.

The City fundamentally disagrees with and objects to the Draft Order's treatment of "non-stormwater" discharges *from* the MS4. The City believes that reasonable minds may disagree on the significance of the additional language. To avoid implications that the existence of non-stormwater discharges may be deemed noncompliance with the 2012 Permit, the City requests the deletion of Section II.B.4.c and footnote 133, and deletion of the second sentence in footnote 187. In the alternative, the City seeks additional clarity regarding the significance of non-stormwater discharges, and without waiving any arguments or comments previously submitted, request that the following modifications be made to Section II.B.5.c of the Draft Order:

Draft Order, Section II.B.5.c

> The Environmental Petitioners suggest that the Los Angeles MS4 Order is unclear as to whether compliance with the WMP/EWMP may also constitute compliance with the non-stormwater discharge prohibition of the Order. We disagree that the Los Angeles Ms4 Order is unclear on this issue. Implementation of control measures through the WMP/EWMP may provide a mechanism for compliance with Section III.A, which establishes the prohibition on non-stormwater discharges, but such implementation does not *constitute* compliance with Section III.A. Section III.A establishes an extensive list of exceptions and conditional exemptions to the non-stormwater discharge prohibition. As a result, the existence of non-stormwater discharges to and from the MS4 is not deemed noncompliance with Section III.A. The several provisions stating that Permittees will be deemed in compliance with the receiving water limitations of the Los Angeles MS4 Order for implementing the WMP/EWMP specifically reference Section V.A of the Order, the receiving water limitations provisions, and not III.A.[133] Although we accordingly see no need to direct revisions to the Order we provide this clarification here to respond to the Environmental Petitioners' concern and address any confusion that may exist.

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2. *Remove Footnote 192 and Allow Cost-Based Extensions in All Instances*

The addition of footnote 192 misstates the cooperative federalist structure inherent in the Clean Water Act and should be deleted. Footnote 192 asserts that allowing deadline extensions for EPA issued TMDLs due to cost considerations would stand as an obstacle to accomplishing the full purposes and objectives of the Clean Water Act and is, for this reason, preempted by the Clean Water Act. (Draft Order, § I.E., fn. 192, citing *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238.) The Clean Water Act, however, establishes a cooperative federalist structure that permits consideration of costs under the Porter-Cologne Water Quality Control Act ("Porter Cologne").

The Federal and State governments are subject to the basic rule that each is required to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. (U.S. Const., art. VI, cl. 2; U.S. Const., 10th Amend.; *Pacific Co. v. Johnson* (1932) 285 U.S. 480, 493.) Despite the basic rule of noninterference, there are a variety of arrangements by which states can voluntarily cooperate with the federal government in the exercise of their regulatory authority. (See *New York v. O'Neill* (1959) 359 U.S. 1, 6.) The Clean Water Act's scheme of cooperative federalism is one such arrangement. (*Aminoil U.S.A., Inc. v. Cal. State Water Resources Control Board* (9th Cir. 1982) 674 F.2d 1227, 1228 (superseded by statute on other grounds as noted in *Beeman v. Olson* (9th Cir. 1987) 828 F.2d 620, 621.) Under cooperative federalism, Congress gives states the "choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." (*New York, supra*, 505 U.S. at p. 167; see also *Hodel, supra*, 456 U.S. at pp. 287-289.) Cooperative federalism thus, "allows the States, within limits established by the federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." (*Virginia v. Browner* (4th Cir. 1996) 80 F.3d 869, 882-883.) As long as a state law is consistent with a federal law that has a cooperative federalism scheme, the state law is not preempted.

Cost considerations cannot relax permit conditions to a point where they are *less* stringent than the Clean Water Act; however, consideration of costs when imposing permit conditions that *meet* or *exceed* federal standards is entirely consistent with the Clean Water Act's purposes and objectives. (See, e.g., 33 U.S.C. § 1311, subd. (m) [allowing a permit issued under Clean Water Act section 402 to modify certain effluent limitations in a permit where the cost of meeting requirements exceeds the benefits to be obtained by an unreasonable amount]; see also *Entergy Corp. v. Riverkeeper, Inc.* (2009) 556 U.S. 208, 222 [the Clean Water Act's silence regarding factors to consider when implementing the Act "is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."]; *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 627 [prohibiting consideration of "economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." (Emphasis in original).) In certain circumstances, the Act expressly permits cost consideration in furtherance of its purposes and

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objectives. (See e.g., 33 U.S.C. § 1311.) The Clean Water Act does not expressly prohibit consideration of cost when establishing monitoring and reporting requirements; it is merely silent on the role cost should play. (See *Entergy Corp., supra,* 566 U.S. at p. 222.) Such silence cannot be interpreted as prohibiting cost considerations. (*Ibid.*) Porter-Cologne's requirement to consider costs when imposing certain permit conditions is entirely consistent with federal law's silence on the issue, as long as cost considerations (or any factors, for that matter) are not used to justify imposition of conditions less stringent than federal law. (*City of Burbank, supra*, 35 Cal.4th at p. 618.)

Because cost considerations do not directly contradict the Clean Water Act, do not contradict the Clean Water Act's purposes or objectives, and are consistent with the Act's silence on the issue, the City requests deletion of footnote 192 from the revised Draft Order.

III. CONCLUSION

For the reasons set forth above, the City respectfully requests that the State Board modify both the Draft Order and the 2012 Permit as requested herein.

Sincerely,

J. G. Andre Monette
of BEST BEST & KRIEGER LLP

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