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Our File No. 49011.0012

June 2, 2015



**VIA E-MAIL AND U.S. MAIL**

Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street 24<sup>th</sup> Floor [95814]  
P.O. Box 100  
Sacramento CA 95812-0100  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

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") Revised Draft Order WQ 2015- ("Revised 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 also one of the Petitioners; it filed Petition No. A-2236(cc) on December 10, 2012. Recognizing that the Board requested comments just on the revisions made to the Draft Order, the City limits its comments to those revisions.

The City reiterates its comments, made in its January 21, 2015 comment letter, on the remaining provisions of the Permit and the Draft Order. Moreover, in commenting on the Revised Order's EWMP provisions, the City does not waive its challenge to such provisions in the first instance as set forth in its Petition.

Sierra Madre's residents and businesses contribute very little, if at all, to stormwater pollution that presents Clean Water Act compliance issues, given its

location high in its watershed and its types of land uses. The City supports the SWRCB's apparent recognition in the Revised Order that it, and the other cities in Los Angeles County, need to be given a feasible compliance path which takes their unique situations into account via the WMP and EWMP compliance option. To that end, the City supports the recognition that the integrated watershed monitoring program and adaptive management program will provide sufficient assurance of successful EWMPs by deleting the requirement for an additional plan after completion of an EWMP. However, the City requests further revisions to the provisions governing deadline extensions to ensure appropriate flexibility.

Lastly, the Board's Revised Order collapses the distinction drawn by the Ninth Circuit between liability and responsibility. To repair this error, the Board must modify the Revised Order to delete its references to "joint responsibility." These references do not comport with the Ninth Circuit's ruling that permittees may be held jointly liable but are not jointly responsible for remedying exceedances of pollutant standards in a water body and instead only need to remedy their own discharges. By replacing the Draft Order's references to "joint liability" with "joint responsibility," the Revised Order apparently seeks to force Permittees to be jointly responsible for remediating exceedances. This goes beyond the Ninth Circuit's ruling and must be revised.

#### **I. BOARD WAS RIGHT TO RECOGNIZE THAT THE INTEGRATED WATERSHED MONITORING AND ASSESSMENT AND ADAPTIVE MANAGEMENT PROCESSES BUILT INTO EWMPs WILL ALLOW ADEQUATE ASSURANCE OF EWMPs' SUCCESS**

In its January 21, 2015 letter, the City expressed concern that the Draft Order's proposed revisions to the portion of the Permit governing Enhanced Watershed Management Programs ("EWMPs") were unwarranted and defeated the intent in creating EWMPs. The intent is to provide the City with a reasonable and feasible path to compliance that also assures the public, the SWRCB, the Regional Board, the cities, and all other stakeholders that the City is tackling the problem and working towards storm water quality improvements in the storm sewer system. Specifically, the Board had proposed adding a new requirement for permittees who complete an EWMP, including meeting the 85th storm runoff retention requirement, requiring these cities to 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 City supports the Board's deletion of this onerous requirement at pages 50-51 of the Revised Order. The Board correctly recognized that requiring the City to develop a further plan for compliance at the end of implementation of an EWMP is unnecessary given the existing requirements for the City and its partner cities to refine the EWMP as implementation proceeds. The monitoring provisions of Part VI.C.7 of the Permit will ensure that each EWMP group has the information needed to assess progress under the EWMP and the effectiveness of the control measures included in the EWMP. Using this information, each EWMP group can then modify the EWMP as needed under the adaptive management provisions of Part VI.C.8. As recognized by the Board's revisions to Part VI.E.2.e.i on Pages 50-51 of the Revised Order, these existing elements of the Permit will be sufficient to ensure the effectiveness of EWMPs, both during and after implementation.

Similarly, the Board correctly recognized that requiring the EWMP groups to revise the Reasonable Assurance Analysis every six years was unnecessary. (Revised Order, p. 44, modifying Part VI.C.8 of the Permit.)

## **II. DEADLINE PROVISIONS NEED FURTHER REVISION TO ENSURE CITIES HAVE FLEXIBILITY NEEDED TO COMPLETE WMPs AND EWMPs IN A FEASIBLE MANNER**

The Revised Order allows for an extension of a final deadline set within a WMP or EWMP, if a City requests approval of an extension from the Executive Officer of the Regional Board, or barring that, from the Regional Board itself. (Revised Order, p. 35-36, modifying Parts VI.C.6 and VI.E.4.) The Draft Order thus recognized that cities may need flexibility to meet the deadlines set within WMPs and EWMPs. (Draft Order, adding Part VI.C.6.b and modifying Part VI.E.4.b of the Permit.) The Draft Order stated that a City can make such a deadline extension request up to 45 days before the deadline. But the Revised Order unnecessarily narrows the window and requires instead that Permittees apply to the Regional Board at least 180 days ahead of a final deadline to seek an extension.

This increase in the time period to ask for an extension by a factor of is unreasonable. WMPs and EWMPs are intended to allow a city the opportunity to develop a comprehensive program of measures to achieve compliance with applicable water quality standards over the implementation period, while recognizing that cities need time and flexibility to implement these programs. Part of the anticipated success of

this approach is that it recognizes that the cities need the ability to modify their WMPs and EWMPs, and the associated deadlines, to respond to changing situations. For example, sporadic or infrequent rainfall events may pose a challenge to obtaining the qualifying data needed to determine if requesting an extension is necessary (180 days does not fit with monitoring schedule.) Without the ability to respond nimbly to changes in their circumstances and in their watersheds, cities and the wider community lose much of the benefit that comes with participating in a WMP or EWMP. In its Draft Order, the Board rightly recognized that the benefits that WMPs and EWMPs will bring to the watershed, comprising extensive programs above and beyond most cities' current efforts. To maintain these benefits, the cities need the flexibility to modify their programs over time, as implementation proceeds, including having an adequate opportunity to seek deadline extensions. To ensure this, the City urges the Board to modify the revised order at Pages 35-36 and return to the previous 45 day period to request a deadline extension.

### **III. THE BOARD CORRECTLY RECOGNIZES LACK OF FUNDING AS A REALITY FACING CITIES**

The Revised Order's discussion of compliance deadlines for interim milestones and final compliance deadlines in WMPs and EWMPs, other than those set in TMDLs, recognizes the most pressing constraint faced by the City and its partners in its EWMP group—limited funding. (Revised Order, p. 40.) The City supports the Revised Order's preservation of the modifications to Part VI.C.6.a of the Permit. Those provide that a city may seek extensions of compliance deadlines for interim milestones and final compliance deadlines in WMPs and EWMPs, other than those set in TMDLs, from the Executive Officer of the Regional Board, by applying at least 45 days ahead of the deadline.

The City additionally supports the addition to the Revised Order's narrative on Page 40, recognizing that one of the grounds the Executive Officer may consider is that a city faces substantial hardship, "including the inability, despite all reasonable efforts, to obtain funding for a project." (Revised Order, p. 40.) EWMPs as presently proposed are very expensive and have uncertain funding sources. Sierra Madre's individual cost of its EWMP is estimated at \$25 million. The City is committed to working on finding funding to pay for these costs. But, plainly, that amount of funds is substantial, and should the City prove unable to identify and secure these funds, then the Board is right to allow the City to modify its EWMP to reflect available funding. To ensure clarity on

this point, the City requests that the Board modify the Revised Order to include recognition of limited funding as an appropriate ground to modify or extend compliance deadlines in the Permit itself.

#### **IV. BOARD MUST REVISE REFERENCES TO JOINT RESPONSIBILITY**

The Revised Order improperly conflates joint liability with joint responsibility, conflating two concepts that the Ninth Circuit was careful to separate. In its ruling considering the terms of the 2001 Permit, the Ninth Circuit rules that mass-emissions monitoring data demonstrating exceedances of applicable water pollutant-water body standards could be used to hold the County liable for those exceedances, but that the responsibility for remedying the exceedances would fall on each permittee with respect to its own discharges. (*Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194, 1206.)

On Pages 72-76 of its Revised Order, the Board replaces references to "joint liability," with references to "joint responsibility." The City urges the Board to reverse these changes. The Ninth Circuit's ruling drew a distinction between liability and remedy, holding the County liable based solely on exceedances detected as mass-emissions monitoring stations; but requiring that the trial court sort out the remedy under the rule that each permittee is responsible solely for its own discharges. This approach rightly ensures that each city bears the responsibility only for its own discharges. The Board's Revised Order improperly attempts to work around this decision, by replacing references to "joint liability" with references to "joint responsibility." It is not at all clear that the Board has the power to impose joint liability on Permittees for others' discharges. But it is definitive, given the Ninth Circuit's ruling, that the Board lacks the power to impose joint remedial responsibility on Permittees for others' discharges. The Board must modify the Revised Order to either delete references to "joint responsibility," or better, modify it to state directly that each Permittee is only responsible and liable for its own discharges.

#### **VI. CONCLUSION**

For the foregoing reasons, the City requests the Board modify its Revised Order on the 2012 Permit by

- Making the period to request an extension of a final deadline set

June 2, 2015

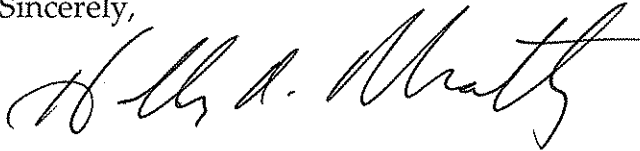
Page 6

within an WMP or EWMP from the Regional Board or the Regional Board's Executive Officer 45 days, not 180 days, in Parts VI.C.6 and VI.E4;

- Modifying the Revised Order to explicitly list limited funding as an appropriate ground to modify or extend compliance deadlines; and
- Modifying the Revised Order either to delete references to "joint responsibility," on Pages 72-76, or to state directly that each Permittee is only responsible and liable for its own discharges.

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