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June 2, 2015



Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Email: commentletters@waterboards.ca.gov

Subject: Comments to A-2236(a),(kk)

Dear Ms. Townsend:

The **City of Lawndale** is pleased to submit the attached comments to the State Water Resources Control Board in connection with its revised Draft Order bearing the date of April 24, 2015.

Should you have any questions, please feel free to call me at (310) 973-3202.

Sincerely,

Stephen N. Mandoki
City Manager

Cc: Miguel Alvarez, Interim Public Works Director
Grace Huizar, Administrative Analyst

City of Lawndale
Second Round Comments In Re:
State Water Resources Control Board Draft Order WQ 2015-

I. State Board Failed to Respond to Critical Comments

In its Revised Draft Order (RDO), the State Board has not respond to critical comments that were contained in its first comment letter sent to the Board in January. Responses to these questions are necessary to assist the City with correct compliance. We ask the State Board to reconsider responding to these inquiries - especially the sanctioning of the MS4 Permit to carry over WMP/EWMP requirement into succeeding MS4 Permits. MS4 Permits are 5 year contracts between the Permitting Agency and Permittees. As such, the MS4 Permit cannot extend requirements to a successor Permit without going through the Report of Waste Discharge (ROWD) application process and public review - an "evergreen" clause cannot be written in the Los Angeles MS4 Permit.

II. WMP/EWMP Costs

Some cities participating in WMP/EWMP groups have obtained WMP/EWMP billing costs. These recently made available costs are staggering and certainly beyond the financial ability of each agency. Given that these cost have just been developed and or estimated, they could not have been and were not an issue discussed in the first round of comments to the State Board.

The following are some examples for several cities:

San Gabriel Cities WMP/EWMP Costs

- EWMP Costs:
 - Glendora EWMP - \$10 million per year over 10 years
 - Baldwin Park EWMP - \$8.2 million per year over 10 years
 - Covina EWMP - \$6 million per year over 10 years
 - Sierra Madre EWMP - \$2 million per year over 10 years

- WMP Costs:
 - Claremont, La Verne, San Dimas, and Pomona WMP - \$8 million per year over 20 years (WMP and EWMP consultants are the same)

Costs like this are well beyond the ability of the municipalities to pay for WMP/EWMP implementation. It would have been beneficial had such cost estimates for WMP/EWMP requirements been known at the time the MS4 Permit was under review for adoption. I understand USEPA expressed this concern on several occasions. The RDO asserts that the WMP/EWMP alternative *is an ambitious yet achievable compliance alternative*.¹ Due to the millions of dollars of annual cost estimated per city, the WMP/EWMP is not achievable. Implementation clearly exceeds available budgets.

¹See RDO Page 55.

III. Costs Exceed Maximum Extent Practicable (MEP)

We request that the RDO, in its support of the WMP/EWMP as an alternative compliance pathway, be reconsidered in light of the WMP/EWMP cost information presented herein.

For example, in the case of the City of Glendora, its EWMP cost is estimated to be \$8 to \$10 million per year over a twenty year period. Such an annual expenditure represents about half of this City's general fund. An expenditure such as this exceeds the Maximum Extent Possible (MEP) standard. MEO is defined on the State Board's web site as follows:

MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive." (Order No. WQ 2000-11, at p.20.)

According to the Los Angeles MS4 Permit, the WMP/EWMP programs *shall also ensure that controls are implemented to reduce the discharge of pollutants to the maximum extent practicable (MEP) pursuant to Part IV.A.1.* Given that the estimated WMP/EWMP costs are significantly beyond the reach of many, if not all, Permittees, the MEP cannot be met and the WMP/EWMPs should be voided or revised to be significantly less costly.

But there is another concern: WMP/EWMP does not apply to MEP (see below). This is an example of one of several conflicts in the MS4 Permit.

IV. MEP is Incompatible with WMP/EWMP

The Los Angeles MS4 Permit states that the WMP/EWMP is subject to MEP. It cannot be, however, because the Permit does not extend the WMP/EWMP to the iterative process. The iterative process only applies to the SWMP. According to the State Board's web site MEP is achieved through the SWMP iterative process:

*The iterative approach is a process of implementing BMPs as outlined in your **Storm Water Management Program (SWMP)**, evaluating the effectiveness of those BMPs, and modifying your SWMP accordingly (by changing the implementation of the BMP or replacing it with another BMP) in order to continuously achieve the discharge standard of MEP.*

The question is, "how do the WMP/EWMPs meet the MEP standard given that the iterative process does not apply to them?" The WMP/EWMPs propose to achieve strict compliance with water quality standards by meeting a storm water volume retention requirement, which does not allow for an iterative process.

The MS4 Permit does reference an adaptive management process (AMP) applicable to WMP/EWMPs. The AMP does not, however, appear to operate as an iterative process while the WMP/EWMP is being implemented. The MS4 Permit and revised State Board Order describe the AMP as a mechanism for proposing to the Regional Board's Executive Officer program modifications, including modifications to compliance deadlines and interim milestones (a schedule of actions to meet numeric water quality standards such as copper). The City does not believe it is a valid compliance option because there is

nothing in the MS4 Permit that references it as such - it is a program adjustment mechanism.

The L.A. MS4 Permit also creates confusion by saying the AMP fulfills the requirements in Part V.A.4 to address continuing exceedances of receiving water limitations. However, Part V.A.4 is connected to the SWMP/iterative process as the following indicates:

So long as the Permittee has complied with the procedures set forth in Part V.A.3 ... and is implementing the revised storm water management program and its components, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Water Board to modify current BMPs or develop additional BMPs.

Beyond this, Part V.A.4 says that if V.A.3 is met, a Permittee does not have to repeat the iterative process. It is apparent here that the MS4 Permit confuses the AMP, which is applicable to the WMP/EWMP with the iterative process, which is only applicable to the SWMP. The fact that these two provisions are in conflict provides another concern and example of the potential unenforceability of the MS4 Permit.

V. MS4 Permit Section Part V.A Does Not Apply to the WMP/EWMP

The RDO's redline revision supports the Regional Board's view that the WMP/EWMP enables compliance with non-storm water discharge exceedances. Citing MS4 Section C.1.b, the RDO asserts:

... Permittees will be deemed to be 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.²

We have concern about the feasibility of this provision. Section V.A exclusively deals with the SWMP and the iterative process associated with it. There is no reference to the WMP/EWMP as being subject to it. Also, had the iterative process been applied to it, there is no explanation of how it would operate.

As to the matter of non-stormwater discharge compliance with RWLs/WQSs, the City has concerns regarding this decision by the State and Regional Boards. Part V.A of the MS4 permit addresses stormwater discharges from the MS4 (V.A.1), which shall not cause or contribute to exceedances. Discharges from the MS4 applies to stormwater discharges, not non-stormwater discharges. This is in keeping with CWA 402(p)(B)(iii). It is true that V.A.2 addresses both stormwater and non-stormwater, which shall not cause or contribute to a condition of nuisance. According to California Water Code § 13050 (definitions) nuisance means:

... anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of

²RDO, page 62

*persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.; (3) occurs during, or as a result of, the treatment or disposal of wastes.*³

As such, non-stormwater discharges from the MS4 must not create any of the forgoing specific nuisances, but cannot be required to comply with water quality standards. CWA 402(p)(B)(ii) deals with non-stormwater discharges by simply prohibiting them to the MS4. They are not subject to the same pollution reduction requirements as 402(p)(B)(iii).

VI. EWMP/WMP Does Not Comply with 402(p)(B)(iii)

The RDO suggests that TMDL compliance through a WMP/EWMP can be addressed through Clean Water Act Section 402(p)(B)(iii), which gives the Executive Officer the authority to:

*... 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 State determines appropriate for the control of such pollutants.*⁴

There are two concerns/issues with this view. First, MEP cannot be applied to the WMP/EWMP. MEP only applies to the SWMP/iterative process. Second, pollution-reducing controls are limited to within Permittee's MS4 to reduce discharges. The EWMP, however, calls for regional multi-benefit controls which lie outside an MS4 - such controls have to be designed to reduce pollutants to meet water quality standards. The 85th percentile design standard has not been proven to meet such standards. We need a quantitative demonstration that retaining runoff (as opposed to diverting it from a river or other receiving water) will reduce a pollutant to a certain extent. Without this demonstration, the effectiveness of the controls cannot be determined. This is a concern expressed by USEPA in its last comment letter to the State Board, along with the NRDC and other NGOs.

VII. Permittees Were Denied the Right-to-Know

Cities needed to know what they were getting into before being surprised by the magnitude of the WMP/EWMP requirements and their potential costs. This was an issue presented to the Maryland Court of Special Appeals in response to a challenge to the Montgomery County MS4 – a permit which appears to have been modeled on the current Los Angeles MS4 Permit. Like the current Los Angeles County MS4 Permit adoption process, the Montgomery County MS4 permit also did not provide adequate public participation. In its decision the Maryland Appeal Court wrote:

To be sure, the process leading up to the Permit ostensibly allowed for several "public participation" opportunities. But the Permit deferred the process of defining important substantive provisions (TMDL implementation plans, SWMP plans, etc.) until well after approval. This creates an obvious flaw: the public can't comment on a

³California Water Code, Division 7. Water Quality, page 1

⁴RDO, page 61

program that doesn't yet exist, and by the time the program did exist, the time for comment on it had passed.⁵

In the case of the Los Angeles MS4 Permit, substantive provisions of the WMPs and EWMPs and their costs were not made known until well after the adoption of the Los Angeles MS4 Permit in November of 2012. Proposed WMP implementation plans were not submitted to the Los Angeles Regional Water Quality Control Board (Regional Board) until October of 2014. The EWMP implementation plans were only recently made public and are not due to the Regional Board until June 28 of this year. Even the RDO concedes that the WMP/EWMPs are still evolving. Permittees have a right and need to know with some degree of certainty how they are supposed to comply and what specifically will put them into compliance. Instead, they are required to comply with a "moving target."

VIII. Permittees Pressured into Joining WMP/EWMP Groups

Of much concern is that cities were pressured into participating under the threat of being subject to what are known as "minimum control measures" (the six core programs required under federal regulations), which would place cities in violation in the event receiving water exceedances are detected by water quality monitoring. However, the State Board's upholding of Water Quality Order 99-05 last November (which is implemented through Part V.A. of the current Los Angeles MS4 Permit) enables violation-preemption (but not violation-forgiveness) through the implementation of a Stormwater Management Program (SWMP) and an iterative process (to be discussed later).

IX. RDO is Still Unclear on the Definition of Iterative Process

The RDO red-lines the issue of the iterative process but still does not affirm it as a compliance determinant associated with SWMP. It asserts that the iterative process:

... involves reporting of the violation, submission of a report describing proposed improvements to BMPs expected to better meet water quality standards, and implementation of these new BMPs⁶

The RDO also re-upholds State Board Order 99-05, as the red-line excerpt clearly indicates:

In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.

This language, which provides for the SWMP/iterative process as a means of achieving reasonable compliance without having to strictly comply with water quality standards, is

⁵Court of Special Appeals of Maryland, No. 2199, September Term 2013: *Maryland Department of the Environment Et. Al. v. Anacostia Riverkeeper, Et. Al.*, page 26.

⁶RDO, page 12.

a standard feature in all MS4 Permits. The iterative process, once again, enables reasonable, cost-effective compliance through best management practices (BMPs) over a period of time.⁷ So, it must also be for the Los Angeles MS4 Permit. Unfortunately, the RDO does not clearly state this.

The RDO is not resolute enough on the iterative process. The problem is that WQO 99-05 explained a process for meeting RWLs and WQS, but it did not specifically call it an iterative process. This term was articulated and explained later in WQO 2001-15. But the State Board's draft Order and the RDO confused matters by discussing the iterative process not in terms of what is, but what it is not. The RDO explains that the courts have established that the iterative process is not safe harbor that can forgive violations. This obvious fact is nevertheless cited in red-lined footnote 44 of the RDO:

Several Permittee Petitioners have argued that the State Water Board's opinion in State Water Board Order WQ 2001-15 must be read to endorse a safe harbor in the iterative process. We disagree.⁸

The City is not one of the Permittee's that subscribes to this view and we know no others that do either. The iterative process is not intended to be a safe harbor or an in-good-faith interpretation that absolves, excuses, or forgives RWL/WQS exceedance violations. The iterative process is intended to prevent violations through the complete and timely implementation of the six core programs contained in the SWMP. If exceedances are detected through outfall water quality testing, the Regional Board must be notified and explanation of what BMPs are being implemented in the SWMP must be provided. If necessary, the SWMP's BMPs will be added or intensified to prevent future exceedances.

X. Why is the State Board Equivocating on the Iterative Process?

If the State Board were to make it absolutely clear that the SWMP/iterative process is a legal means of meeting water quality standards without having to strictly comply with them, there would be no compelling need to participate in a very costly and compliance-uncertain WMP/EWMP. It needs to be noted that the reason many cities joined the WMP/EWMP groups was that the Los Angeles Regional Board had warned, before and after the adoption of the MS4 Permit, that by not participating, Permittees would be subject to strict compliance with RWL/WQS. This does not appear to be correct because the MS4 Permit references WQO 99-05 which it implements through Part V.A. and enables softer compliance through the SWMP's BMPs. This is where the information from the Regional Board was misleading.

Nevertheless, if the State Board's intention is to replace the SWMP/iterative process with the WMP/EWMP the Board needs to say so without equivocation. It also needs to provide a legal justification, given that the SWMP/iterative process was mandated by USEPA through WQO 99-05. It will also have to explain how the Caltrans MS4 Permit and every other MS4 in the State is entitled to the SWMP/iterative process as a means a complying with water quality standards. If the SWMP/iterative process, per WQO 99-05

⁷The iterative process is not available to the WMP/EWMP.

⁸RDO, page 14.

and 2001-15, cannot enable such compliance, then we must question what purpose does it serve?

The State Board is obligated to be clear on the SWMP/iterative process to enable Permittees to decide whether they prefer this standard compliance determinant, or opt for the more costly and compliance-uncertain WMP/EWMP. This alternative pathway, in addition to being unreasonably costly, cannot guarantee compliance (see discussion below on the safe harbor).

XI. Is there or Is There Not a Safe Harbor?

The RDO has a confusing and conflicting approach towards the safe harbor. In several places it maintains that there is no such thing as a safe harbor, based on several state and federal court decisions. Yet, it contends that a safe harbor applies to the planning phase of the WMP/EWMP. In addition to being completely contradictory, the State Board does not define what "planning phase" means. Does it mean that if a RWL/WQS exceedance is detected it will be forgiven on the violation? Also, what happens if there is an exceedance during the implementation phase, which is also not defined? Will the WMP/EWMP be in violation -- or does some other violation-avoidance mechanism kick-in. If so, what is it and what legal authority is it based on?

Permittees have a right to know and need to know what will immunize them in the event of a violation resulting from an exceedance.

XII. Unclear, Conflicting, and Vague Requirements Render the RDO and MS4 Permit Unenforceable

The RDO, like the MS4 Permit which it reflects, is teeming with conflicting, unclear, and vague requirements which make both unenforceable. Attention should be drawn to *Storm Water Phase I MS4 Permitting: Writing More Effective, Measurable Permits*, a guidance document prepared by USEPA Region IX. The aforementioned Maryland Appellate Court decision reference this document. It cautions MS4 permit writers to not use language that could give rise to confusion and interpretation in case it results in challenges based on enforceability. Examples include:

- Safe harbor and the iterative process are unclear as compliance determinants and are in conflict.
- The WMP/EWMP are entitled to the iterative process under Part V.A of the MS4 permit but the RDO asserts that the iterative process is ineffective and, beyond this, Part V.A applies only the SWMP compliance.
- The applicability of MEP non-stormwater discharges is in conflict - one part of the MS4 Permit says that it is and another part say it is not.
- The WMP/EWMP as an alternative pathway to compliance does not clearly specify how the stormwater retention requirement will meet water quality standards. What is missing is a factor that determines how much of a pollutant

will be reduced from the MS4 to a receiving water by infiltrating a certain volume of runoff into the sub-surface. As USEPA guidance notes:

*NPDES MS4 permits and MS4 stormwater management programs must contain quantifiable, measurable elements so that compliance can be determined.*⁹

The WMP/EWMP do not contain measurable elements. They both rest on the assumption that Permittees will be in compliance if structural controls are implemented to meet the 85th percentile design storm and stormwater retention requirement.

----- End Comments -----

⁹See *Laura Gentile and John Tinger, U.S. E.P.A. Region IX, Stormwater Phase I MS4 Permitting: Writing More Effective, Measurable Permits, 135 (February 2003).*