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Hearing on Petition for Stay filed by the City of Los Angeles and the City of Arcadia, et al.

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On December 13th, 2001, the Los Angeles Regional Water Quality Control Board (Regional Board) held a hearing on the renewal of the Municipal Storm Water NPDES permit for Los Angeles County and 84 cities within Los Angeles County. The permit was the third such version of the permit with the previous permits being issued in 1990 and 1996. The Petitioners seek review of the permit by the State Board and, in advance of that hearing and decision, the adoption of a stay to prevent the terms of the permits from taking effect. The Regional Board objects to the issuance of a stay.

In this presentation, I will comment on the many technical facets of the permit and how the objections raised by the Petitioners do not rise to the level required to justify a stay. I will be followed by Michael Lauffer, Regional Board counsel, who will conclude with a review of the legal points most salient to our opposition.

Harm to the Public Interest if the Petition is Granted

I wish to begin by making the case that there is a great harm to the public interest should the State Board issue this stay.

There is simply no question that storm water adversely affects the waters of the state of California and that a strong and effective permit is required to make progress against this longstanding threat to water quality. A report issued by the Southern California Coastal Water Research Project (SCCWRP) and Sea Grant of the University of Southern California issued in November 1, 1999, provides clear evidence of the threat posed by storm water pollution to Santa Monica Bay. The report, prepared from data collected over a three year period (1995/96, 1996/97 and 1997/98) makes the following important points:

"Toxicity was detected in virtually every sample obtained from Ballona Creek and this toxicity was often present even after the sample was diluted 10-fold in the laboratory."

"Samples of Ballona Creek storm water, obtained from the first storm of the season, were between two and ten times more toxic than samples from later storms."

"Toxicity was frequently detected in surface water within the storm water plume offshore of Ballona Creek, indicating that the initial dilution of storm water discharge from this watershed was not sufficient to reduce the concentrations of storm water toxicants below levels that are harmful to marine organisms."

In this report, toxicity was measured up to 2 miles offshore of Ballona Creek and seafloor sediments were found to be a potential source of contaminants that bioaccumulate in seafloor organisms. Concentrations of lead, DDTs, and PCBs were three to ten times higher in sea urchins exposed to sediments collected offshore of Ballona Creek as compared to a reference location.

Each storm produces runoff that contains high concentrations of bacteria to the ocean, higher than that provided for in receiving water limitations and high enough to trigger beach closures for extended days. Storms also produce a loading of trash and litter to the ocean, which can produce a washout effect that inundates local beaches as seen here on this photograph (Exhibit _____) that appeared in the Los Angeles Times on January 11, 2001.

Another study by the Southern California Coastal Water Research Project (SCCWRP) released last year, "Characteristics of Parking Lot Runoff Produced by Simulated Rainfall," (Exhibit ___), reveals that the problem of storm water toxicity, and particularly the presence of zinc as a major element of that toxicity, will pose a serious threat to water quality for many years to come. It also shows that the new MS4 permit will likely need to be augmented with additional BMPs to achieve improvements in water quality.

The administrative record is replete with detailed information that documents the extent and serious nature of the storm water runoff problem. This includes Los Angeles County reports on receiving water impacts, Los Angeles County storm water monitoring reports, and a 1993 study of chemical contaminant releases into Santa Monica Bay by the American Oceans Campaign, among others. Yet the data prepared as part of the Regional Board's own draft pathogen TMDL is among the most telling. Over the last five years, during wet and dry weather 35 of 54 beaches in Santa Monica Bay exceed the bacteria standard more than 10% of the time (page 14). During wet weather, 43 of the 56 monitoring locations exceed standards more than 10% of the time. Pathogen exceedances rise to 100% at storm drain outlets, and during significant storms the impact covers a much larger area of beach. And there is, of course, the 1996 landmark study looking at the health of swimmers in Santa Monica Bay by the Santa Monica Bay Restoration Project which documented adverse health effects where storm drains enter the ocean.

So, one element of the three prong test that must be met to grant this petition is for the State Board to find that the water quality conditions resulting from storm water runoff do not pose a threat to the environment – that the conditions do not rise to a level that merit immediate action to address the problem. On that point, the scientific evidence speaks without any ambiguity. Storm water poses a clear threat to water quality, storm water

presents the greatest contribution of pollutants to our beaches, and storm water poses a clear and unequivocal threat to public heath. It is equally apparent that more efforts, not fewer, as the Petitioners appear to suggest, will be necessary to turn this problem around. A stay will only delay improvements to water quality.

The Petitioners will not incur Substantial Harm if the Stay is not Granted

Response to the City of Los Angeles - Receiving Water Limitations

Now I turn to the subject of the receiving water limitation language in the new MS4 permit since it is the focus of some of the strongest objections that have been raised against the permit.

The LA County storm water permit contains receiving water language that mirrors the language that was directed by the State Board in a memo dated _____. The 1996 permit obviously did not contain this language since it was adopted after its issuance. The receiving water language in the new MS4 permit conforms to that directed by the state board with minor modifications.

The 1996 permit contained an omnibus safe harbor provision in the receiving water section that was necessary due to the lack, at that time, of a clear process for achieving receiving water quality in that permit and in response to the demands made by many of the petitioners at that time. The new language directed by the State Board replaces this safe harbor provision with a new process, known as the "iterative" process which defines compliance in a new way, that of participation in a good faith effort to achieve receiving water limitations over time, using the BMP approach.

One of the prongs of the test to grant a stay is to show that the Permittees will incur a substantial harm if the stay is not granted. The harm incurred to the City of Los Angeles, in their submission, appears to solely reside in a fear of litigation and fines resulting from non-compliance with the specific provisions of the Receiving Water Limitation.

First, the State Board's directed language for receiving water was used in this permit with minor changes. This language was developed over some time and has now been incorporated into a number of storm water NPDES permits. This is the only instance where a stay has been requested ????? and given the decision of the State Board in the recent petition of the County of San Diego MS4 permit, the State Board has already ruled on the validity of the Receiving Water Language. The State Board, to grant a stay on the City of Los Angeles motion would have to obviate its recently issued decision that so clearly supported the entire concept of the iterative process. The language in the pending permit differs only slightly with that of the State Board directed language and the differences are non-substantive in their effect. Accordingly, on that basis alone, this element of the stay should be readily disposed by the State Board.

Moreover, the fear of litigation would appear unfounded in that the entire concept of the receiving water limitation is to provide a mechanism for interim compliance. Part 2 (4), which states in part,

> "So long as the Permittee has complied with the [iterative] procedures set forth above and is implementing the revised SQMP 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 Board to develop additional BMPs."

Note that in this provision drafted by the State Board, actual non-compliance with receiving water limitations is recognized as an expected condition. The whole point of the *iterative* process is to make progress toward achievement of water quality limitations while acknowledging that they will not be easily achieved and that a prolonged period of time will be needed to identify new BMPs, apply them in the field, and then to measure their success. The State Board could have gone farther in providing additional protection in iron clad safe harbor language but it did not. Clearly, the State Board felt that the language it endorsed, and required to be placed into each MS4 permit, was adequate to provide sufficient protection against the threat of third party litigation.

Total Maximum Daily Loads

The State Board's legal counsel has already weighed in on the importance of the MS4 permit to compliance with TMDLs. In an October 14, 1999 memo from Elizabeth Jennings to then Executive Director Walt Pettit discussing the implications of the ninth circuit case, Defenders of Wildlife v. Browner, Ms. Jennings stated, "…because most MS4 discharges enter impaired water bodies, there is a real need for permits to include stringent requirements to protect those water bodies. As TMDLs are developed, it is likely that MS4s will have to participate in load reductions, and the MS4 permits are the most effective vehicles for those reductions."

Both the City of Los Angeles and the Arcadia petitioners raise the spectre that the trash TMDL adopted by USEPA on March 19th , prior to final approval by OAL of the TMDL recently approved by the State Board, will pose an immediate third party litigation threat since the USEPA's TMDL does not contain the implementation schedule adopted by the Regional and State Board. This concern is misplaced. Part 4 (F) (5) (b) of the permit specifically addresses this concern. This provision states that Permittees subject to the trash TMDL are required to implement specific enumerated requirements until such time as the trash TMDL implementation measures are adopted. In this instance, the permit itself contains implementation measures that are specific to the MS4 permit and which should provide adequate defense against third party litigation. A point on which USEPA concurs.

The Petitioners will not incur Substantial Harm if the Stay is not Granted

Response to the City of Arcadia, et al.

While the City of Los Angeles request for a stay is limited to just the Receiving Water Limitations, the petition of the City of Arcadia, et al., raises several specific issues in support of its contention that the cities and the public will be substantially harmed if a stay is not granted. These include:

Wastage of Government Funds (41 mandated programs)

Arcadia contends that there are 41 specific programs or activities that they would need to pursue if a stay is not granted, and that if they are subsequently overturned without a stay, they would have incurred a cost they would other wise not have had to pay. Some of these provisions have already been included in two other storm water permits in this Region (City of Long Beach and the County of Ventura) without complaint. Regional Board staff have prepared a summary comparison document that goes through the 41 programs raised by the Arcadia petitioners to show where they fall with regard to being carry-over provisions from the old permit, already in other permits, or new provisions and this is Exhibit _____. In some cases, Petitioner Arcadia includes provisions that are solely an obligation of the Principal Permittee, most of which, the Principal Permittee is not objecting to in their own petition and in any event, are not the subject of a stay from the County of Los Angeles. Other program activities have already been a staple of the former permit and which the cities have already been fully implementing, e.g., submission of annual reports. Yet other provisions are cited which form the basis of fundamental good government, i.e., intra-agency coordination.

Clearly, the truly new provisions are far fewer than Petitioner Arcadia would have you believe. Moreover, it only makes sense that they should be required to update their ordinances to reflect new provisions, amend their general plan, and train their staff on the new permit. Some provisions are eminently reasonable, i.e., mapping permitted connections to the storm drain system, and some are so simple, i.e., providing a contact name to the Principal Permittee for staff at the city who are responsible for storm water public education, that is almost absurd that it is listed as one of the "countless programs required in the next twelve months of the permit…" But that is the point, the Arcadia petitioners are being disingenuous. They are attempting to create the impression of an out of control permit that they can't possibly fathom much less comply with, when that is clearly not the case.

Communication of Misinformation, i.e., program requirements that would otherwise be overturned by the State Board

Petitioner Arcadia goes to great length to justify a stay on the premise that the programs in the permit are so flawed that it will be a waste of time to train city staff, revise ordinances, and perform the other specific tasks required by the permit, since all that effort would just have to be done over once the State Board invalidated all the provisions.

As noted above, of the 41 programs complained of, there are, in reality, only a few that may ultimately be the focus of the State Board's review. For this, Petitioner Arcadia asks that the entire permit be stayed.

In the event that some specific elements of the permit are modified by the State Board, it seems incongruous to argue that the changes could be of such magnitude as to cause rampant confusion. Clearly, it is not that difficult to send out an advisory to staff updating them on specific changes to the permit once those changes become effective.

Petitioner Arcadia continues their argument by citing problems with revisions of ordinances, general plans, CEQA guidelines, and Public Agency Programs. Similarly, the scope of revision is likely to be small, and in any case, the State Board has indicated its intention to quickly consider these issues and the matter may be entirely resolved - most likely before any revisions become necessary to a general plan.

Best Management Practices Have Built-in Flexibility

The essence of the storm water permit is for Permittees to use Best Management Practices to the Maximum Extent Practicable. The permit, therefore, from its inception in 1990, contained specific measures that were required to be performed as part of the Storm Water Management Plan, which is incorporated as part of the permit. For example, the 1990 permit specifically required stenciling of storm drains. This and other similar specific provisions from earlier permits have been carried over into the current permit. As a result of the 1996 permit, a number of additional specific BMPs were formally adopted by the Regional Board following the adoption of the permit.

It should, therefore, not be surprising that as time passes and as water quality improvements have not been realized, the permit should incorporate new provisions that reflect the determination of the Regional Board that specific new BMPs should be implemented which are determined to meet the MEP standard. This, after all, is the essence of the "iterative" process that the State Board has required.

The new MS4 permit has also included a provision for BMP flexibility that has been entirely overlooked by the petitioners. Part 4 (A) (page 23) leads off the section of the permit that identifies specific BMP requirements. It is a provision that allows BMPs to be substituted upon petition by any Permittee and with approval of the Executive Officer. The provision establishes a three part test for BMP substitution: that the alternative will be achieved in a similar amount of time, and that the alternative will be at least equivalent in meeting the intent of the BMP being replaced, or the cost of the listed BMP is greater than the alternative without a substantially greater benefit in storm water quality improvement.

The BMP substitution provision provides the petitioner cities with the opportunity to propose alternative BMP approaches to those specified in the permit Rather than rejecting specified BMPs out of hand in this petition and citing their unreasonability and

cost, the petitioners should take the opportunity to justify, with specificity and adequate justification, alternatives that can achieve the same result.

Additionally, in the matter of The Petition of the Department of Parks and Recreation, Order No. WQ 82-15 the state board has already ruled on the specificity of BMPs. In part, the State Board, in that order held,

> "We have previously addressed the issue of whether Water Code Section **13360** precludes a Regional Board from specifying the manner of compliance with waste discharge requirements in NPDES permits. In the Matter of the Petitions of the Las Virgenes Municipal Water District et al., Order No. WQ 80-19, at pp. 20-21, we held that a Regional Board may specify manner of compliance in an NPDES permit: The Porter-Cologne Water Quality Control Act, Division 7 of the Water Code, provides that, notwithstanding any other provision of the division, the State and Regional Boards shall issue NPDES permits as required or authorized by the Clean Water Act, 33 U.S.C. § § 1251 et seq., to ensure compliance with the Federal Act. Water Code § 13377.
>
> Under the Clean Water Act, effluent limitations, effluent standards and prohibitions, and standards of performance promulgated by EPA are enforced through the issuance of NPDES permits. Prior to the adoption of such limitations, standards, and prohibitions, the Administrator of EPA is authorized by the Act to impose 'such conditions as the Administrator determines are necessary' to carry out the provisions of the Act. 33 U.S.C. § 1342(a)(L); see NRDC, Inc. v. Costle, 568 F.2d 1369 (DC Cir. 1977). In addition, EPA regulations adopted under the Clean Water Act authorize conditions in NPDES permits setting 'best management practices' where numeric effluent limitations are infeasible or where reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Act…
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> Consequently, since the Clean Water Act authorizes the imposition of conditions including best management practices, in NPDES permits where limitations and standards have not been promulgated, the Porter-Cologne Act gives the State and Regional Boards the same authority." [emphasis added]

The Inspection Program does not Pose and Immediate Compliance Challenge

The provision to conduct inspections is not an insurmountable burden for the Permittees. The 1996 permit already required that Permittees conduct site educational visits at specific businesses that were identified by the Permittees. With the new permit, the expectation of the inspection is for Permittees to take what can only be described as minimal additional efforts beyond those associated with an educational site visit to identify the most obvious instances where a business is clearly contributing to storm water pollution.

Even so, the new MS4 permit does not require that any inspections of any facilities occur in the immediate future. Rather, the permit provides a very flexible schedule for inspections. For each category of inspections, the new permit requires that the first of two inspections required over the life of the permit be completed by August 1, 2004. This is well over two years away. Consider also that most of the cities in the Arcadia petition are relatively smaller communities in terms of population. This also implies that the number of sites to be inspected would be relatively few and easily completed with more than adequate time to spare following the conclusion of the State Board's review. Clearly, the urgency is not present to justify a stay. I also note that the County of Los Angeles and the City of Los Angeles have chosen not to seek a stay for the inspection program. They, by far, have the greater burden under the inspection program.

The MS4 Program's Cost is Not Unreasonable

Unfortunately, the arguments being raised in opposition to the new MS4 permit have been based, too frequently, on a misrepresentation of the facts, and, when it comes to a characterization of the costs associated with the program, a complete distortion intended to invoke fear and encourage political opposition. The Arcadia petitioners have not provided any detailed cost estimates to support their contention that substantial harm will be caused to the petitioner cities by not granting a stay. The supporting statements for the petition have included vague generalizations, for example, a statement that millions of dollars will be expended on placing trash receptacles at bus stops.

Mr. Desi Alvarez of the City of Downey is cited in an accompanying declaration as estimating that the cost to Permittees over the next twelve months will cost Permittees tens of millions of dollars. However, there is no additional justification beyond that statement. There are no calculations provided based on costs for compliance with each of the 41 program elements cited in the petition (and especially the cost associated with the bus stops). Indeed, there are no calculations whatsoever. We do not know if the estimate provided is solely for the Arcadia petitioning cities or all cities, including those who are not seeking a stay and, indeed, those who are not even petitioning the permit. Without any such calculation and the bases for the calculation, it is impossible for the Regional Board to effectively comment on the contention.

We can, however, direct the State Board's attention to Exhibit ____ which is a letter dated January 3, 2002, from Mr. James A. Noyes, Director of the Los Angeles County Public Works Department to the five Los Angeles County Supervisors. In this letter, we have a very credible and specific estimate for the complete inspection program. It is estimated to be $8 million over the 5 year term of the new MS4 permit. This would translate to a cost of $1.6 million per year. Now consider that the vast majority of sites to be inspected will not be in the Arcadia petitioner cities and you end up with a very modest cost for the inspection program in these communities. Clearly, the burden to comply with this, perhaps the most controversial element of the new MS4 permit, is not a substantial harm, and remember, as noted earlier, inspections can be delayed until well after the State Board has ruled on the matter.

SUSMP Provisions

With regard to Standard Urban Storm Water Mitigation Plans or SUSMPs, Petitioner Arcadia asserts, the extension of the SUSMP requirements to non-discretionary projects is not consistent with the State Board's direction in their SUSMP Order. We disagree and believe that the modifications made in the SUSMP requirements took the State Board's direction into account. In your order, the State Board noted its concern "that limiting SUSMPs to discretionary projects may not be sufficiently broad for effective storm water control". If the State Board grants a stay, that action will cause substantial harm to the public by perpetuating the discretionary project loop-hole that would otherwise exist with regard to SUSMPs.

But that is in the future. The extension of the SUSMP provisions to non-discretionary projects will not apply until September 2, 2002. Numerous commercial redevelopment projects currently undergoing review, such as the Sears automotive center in the City of Downey cited by Mr. Alvarez, will very likely be able to escape SUSMPs if the cities involved expedite their approvals prior to that date. Afterward, all communities are equally affected and it is most unlikely that the extension of SUSMPs to non-discretionary projects will seriously impede major economic development decisions. Conversely, if a stay is granted, the opportunity to mitigate storm water pollution from a potentially significant source would be lost perhaps for decades to come. Indeed, Mr. Alvarez's own example is most instructive in that regard. The Sears Automotive repair facility he cites is exactly the sort of facility, one that has already been identified as a source of pollutants of concern, that should come under the SUSMP provisions.

While water quality improvements from the implementation of SUSMPs will be incremental and take decades to fully materialize, it is inappropriate to suggest that description applies to all aspects of the new permit. Other provisions will produce immediate results, especially the inspection program which is designed to minimze the effort on the petitioners while maximizing immediate water quality benefits.

Concluding Remarks

For all the reasons noted above, the State Board should not grant a stay. The State Board has already ruled on similar permits and other communities throughout the state are complying with many, if not all, of the provisions that are found in this new permit. Where there is so much compliance already or where the State Board has already ruled, it would seem the hurdle should be even higher for these Petitioners to prevail on this motion.

(include if adopted by the State Board on 3/21) Finally, I would like to draw your attention to the adoption last week of a resolution by the State Board to Commemorate the Year 2002 as the Year of Clean Water - recognizing the 30th anniversary of the Clean Water Act. The resolution observed that "water pollution problems, however, do persist throughout the state and significant challenges lie

ahead in the effort to protect water resources from point and non-point sources of pollution." The resolution calls upon al levels of government to "…recommit to achieving the goals…" of the Clean Water Act. A stay in this matter does not benefit the environment and will set us back, not move us forward. To be true to this resolution, so freshly adopted, the stay should be denied.