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November 21, 2016

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
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**SWRCB/OCC File A-2455 (a thru m)
Comments to A-2455 (a thru m) – December 6 Board Item (Own Motion Order)**

Dear Ms. Townsend:

The City of Union City ("City") respectfully submits these comments on the State Water Resources Control Board's ("State Water Board" or "Board") proposed Own Motion Order regarding the above-referenced petitions ("Petitions"). The City is a petitioner in this matter, having filed Petition A-2455(b) on December 15, 2015. While the City appreciates the State Water Board's proposal to adopt an Own Motion Order to defer review of the Petitions before the 270-day limitation expires, we object to the open-ended extension of your consideration of our Petition for two reasons: (1) the City is prejudiced by an indefinite review period; and (2) the review is dependent on resolution of a largely unrelated matter before the Board. If the Board is unwilling to expedite review of the Petitions, then the City requests that the Board issue a stay on its own motion.

A. The State Water Board Must Complete Review Within a Reasonable and Concrete Time Frame.

The San Francisco Bay Regional Water Quality Control Board adopted Waste Discharge Requirements Order No. R2-2015-0049 on November 19, 2015 ("MS4 Permit"), just about one year ago. During this time, the City continues to incur substantial costs to implement the MS4 Permit, including those provisions challenged in our Petition. The State Water Board's proposal to complete review of the Petition within an *indefinite* time period unfairly prejudices the City.

The City is mindful of the State Water Board's need to have sufficient time to review the important issues set forth in our Petition and the other Petitions for review filed in this matter. Indeed, the State Water Board waited until the last possible moment to grant review of the Petitions (otherwise they would have been dismissed by operation of law pursuant to California Code of Regulations § 2050.5(e)). It therefore seems that the Board has already had sufficient time to consider the issues raised in our Petition over the course of the last eight months. Consequently, we have serious concerns with the open-ended time frame that the Board is allowing itself to complete review of our Petition. Now that the 270-day period will soon expire, the City and the other petitioners must have some measure of certainty that our concerns will soon be heard. The State Water Board must commit itself to a specific timeline for completing review of the Petitions. At a minimum, the State Water Board should modify the proposed Own Motion Order to complete review of the Petitions within 60 days or another reasonable and concrete period of time.

B. The State Water Board Has No Justification Postponing Review Pending Its Review of the Los Angeles MS4 Permit.

The City also takes issue with the State Water Board's decision to defer its review of the Petitions until it has completed review of the Watershed Management Programs ("WMPs") under an MS4 permit issued by the Los Angeles Regional Water Board. The proposed Own Motion Order states that the Board "believes that it is appropriate to complete review of that matter [the WMPs] prior to addressing the challenges to the San Francisco Bay MS4 Order." We fail to understand why these issues must be considered sequentially and cannot proceed at the same time as do most other matters before the Board.

The issues raised in our Petition are significantly different from those raised in the petition of the Los Angeles MS4 permit. The issues raised in our Petition include the following: 1) Several Regional Board procedural issues such as Regional Board member recusals, non-disclosure of Regional Board member emails, statement of Board member tentative conclusions prior to receiving public testimony, consideration of last-minute supplemental revisions without sufficient opportunity for public comment, and issues regarding closed session; 2) Visual assessment of trash reduction outcomes; 3) Trash load reduction receiving water monitoring; and 4) Achievement of mercury and PCB load reductions as numeric effluent limitations as opposed to numeric action levels. The review of the Los Angeles WMPs does not involve these issues. The only issue common to the two petition proceedings before the Board is the "deemed in compliance" receiving water and prohibition related issue raised in the San Francisco Baykeeper petition. Because there is little to no overlap between the issues challenging the MS4 Permit and those challenging the Los Angeles WMPs, the State Water Board has little justification for adopting a sequential review. The City requests that the Board forgo such deferral and review its Petition immediately and/or concurrently.

C. In the Alternative, the State Water Board Should Issue a Stay of the MS4 Permit.

If the State Water Board is unwilling to modify the proposed Own Motion Order to identify an expedited schedule for completion of its review, then we request that the Board issue a stay of the MS4 Permit on its own motion. (Cal. Code Regs., tit. 23, § 2053, subd. (c).) The City did not initially request a stay, because the City expected the State Water Board to review the petition within a reasonable time frame. However, the State Water Board is now proposing an indefinite review period, which compels the need for a stay.

The City satisfies the first element of its burden under California Code of Regulations § 2053(a). As noted above, the City is substantially harmed by the State Water Board's indefinite delay, because the City is spending already limited resources on Permit provisions that may ultimately be removed, such as trash load reduction requirements in Provision C.10. As the City argued in its Petition, the trash reduction targets are extremely aggressive and very expensive to implement, when there is no evidence in the record to support why such obligations are necessary to meet MEP, as is the visual assessment protocol – an expensive process with little environmental benefit.¹ The green infrastructure requirements in Provision C.3 are also burdensome, cost prohibitive, and not justified by the findings in the MS4 Permit. As for the second element, there is a lack of substantial harm to other interested persons and to the public interest if a stay is granted, because the City and the other Petitioners would simply revert to implementation of the prior MS4 permit, Order No. R2-2009-0074, as amended.² Discharges from the City's MS4 would continue to be regulated under the prior MS4 permit until the new MS4 Permit is reviewed. Finally, the third element is satisfied because the City raised numerous substantial questions of fact and law regarding the MS4 Permit. The City will not repeat those questions here, and incorporates those arguments raised in its Petition by reference.

In conclusion, it is time that the State Water Board resolve the issues presented in our Petition.³ The Board should take the responsible action to modify its proposed Own Motion Order as follows: (1) incorporate an expedited and concrete schedule for completing review (the City prefers immediately or within 60 days); (2) remove the reference to the Los Angeles WMPs and the need for a sequential review, because the issues raised are distinct and there are no

¹ As the State Water Board well knows, the California Supreme Court recently ruled that trash reduction requirements are not federally mandated and are therefore subject to the State's reimbursement obligation. (*Department of Finance et al. v. Commission on State Mandates* (2016) 1 Cal.5th 749, reh'g.den. Nov. 16, 2016, rev'd. and cause remanded.)

² The City acknowledges that it filed a petition challenging this order, and that petition is currently held in abeyance (A-2057(i)).

³ In a separate letter dated November 16, 2016, we also requested that our Petition be placed in abeyance status to prevent having to evaluate an alternative legal course of action in case an Own Motion Order is not timely adopted and/or to provide the State Water Board with a reasonable amount of time to review the matter in a more appropriately framed Own Motion Order.

reasonable grounds for deferring review; or (3) in the alternative, issue a stay of the MS4 Permit on its own motion.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Antonio E. Acosta', is written over a horizontal line.

Antonio E. Acosta
City Manager
City of Union City

cc: A-2455 (a thru m) Distribution List

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