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SENT VIA EMAIL & INTER-DEPARTMENT MAIL

TO: Dorothy Rice
Executive Director

FROM: 
Michael A.M. Lauffer
Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: August 1, 2008

SUBJECT: *CITIES OF ARCADIA, ET AL. V. STATE WATER RESOURCES CONTROL BOARD, ET AL.*, (SUPER. CT. ORANGE COUNTY, 2008, NO. 06CCO2974):
COURT ORDER PERMITTING ENROLLMENTS UNDER GENERAL STORM WATER PERMITS

On July 16, 2008, I issued a memorandum indicating that a writ and judgment entered in the above-referenced case prohibited the State Water Resources Control Board (State Water Board) from processing new enrollments under general National Pollutant Discharge Elimination System (NPDES) permits for discharges of storm water within the Los Angeles region. The State Water Board has worked with petitioners' counsel to obtain a court order that has the effect of limiting the scope of the writ and judgment. On August 1, 2008, the court signed an order that allows the water boards to implement and to apply terms and provisions of NPDES storm water permits, so long as they do not implement or enforce (i) any element of a TMDL, or (ii) any numeric limit that may be included in any such NPDES permit.

The court's order allows the State Water Board to resume processing enrollments under the various NPDES general storm water permits. Division of Water Quality staff should immediately resume processing Notices of Intent (NOIs) for the Los Angeles region. Highest priority should be given to NOIs that may have been delayed because of the court's writ and judgment.

Effect of the August 1, 2008 Court Order

The July 2 writ of mandate directs and commands the water boards:

to cease, desist and suspend all activities relating to the implementation, application and/or enforcement of the Standards in the Basin Plan, as applied or to be applied to Storm Water, whether through TMDLs or other Basin Plan amendments or regulations, or through NPDES permits, water quality policies or otherwise. . . .

(Writ of Mandate, ¶ 4.) My prior memorandum indicated that the writ prohibits enrollments under the general storm water permits, because those permits require compliance with water quality standards and require dischargers to design plans to “implement” water quality standards. In other words, the permits—through their terms and provisions—involve the “implementation” and “application” of “Standards” in the Los Angeles “Basin Plan” to “Stormwater” “through an NPDES permit.” The writ prohibited these activities, so the State Water Board had to halt enrollments to comply with the court’s order.

In addition to the command preventing the water boards from taking certain actions involving the “implementation, application and/or enforcement” of “Standards” in the “Basin Plan” to “Stormwater” “through NPDES permits,” the court included a limiting clause. Paragraph 4 of the writ includes a sentence stating:

Nothing contained in this Paragraph 4 shall prevent the *enforcement* of any term or provision in an NPDES Stormwater permit, except to the extent that any such term or provision is used or designed to implement or enforce (i) any element of a TMDL, or (ii) any numeric limit that may be included in any such NPDES permit as a means of enforcing a Standard outside of the TMDL process.

(Writ, ¶ 4, emphasis added.) This limiting sentence only addressed “enforcement” of terms and provisions in the water boards’ NPDES permits. The limiting language did not, however, address the “implementation” or “application” of terms or provisions in storm water permits.

Today’s court order effectively extends the limiting sentence so that the writ and judgment allow the water boards to “apply” and “implement” terms and provisions of their storm water permits. While my July 16 memorandum only referenced the Construction General Permit¹ and Industrial General Permit,² its conclusions applied with equal force to the Linear Construction General Permit.³ With the court’s new order, the State Water Board can resume processing NOIs for the Los Angeles region under all of these existing permits, as none contain TMDL elements or numeric limits in the permit.

Effect of Writ with Respect to Other State Water Board Activities

This memorandum only addresses the narrow issue of the application of the writ to enrollments under the existing general storm water permits. Other issues concerning compliance with the writ will continue to be addressed through separate memoranda or letters.

If you have any questions about this matter, please contact me.

cc: See next page

¹ State Water Board Order No. 99-08-DWQ.

² State Water Board Order No. 97-03-DWQ

³ State Water Board Order No. 2003-0007-DWQ.

Dorothy Rice
Executive Director

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cc: **[All via email only]**
State Board Members
Jonathan Bishop, Exec
Tom Howard, Exec
Darrin Polhemus, DWQ
Bruce Fujimoto, DWQ
Tracy Egoscue, Los Angeles Water Board
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