

June 22, 2018

VIA ELECTRONIC MAIL

Regional Water Quality Control Board
320 West Fourth Street
Suite 200
Los Angeles, CA 90013
losangeles@waterboards.ca.gov

Re: LA County MS4 Permit -- City of Duarte Comments on RH/SGR Revised EWMP

Dear Honorable Chairperson and Members of the Board:

The City of Duarte (“City”) appreciates the opportunity to comment on the Rio Hondo/San Gabriel River Water Quality Group’s (“RH/SG Group” or “Group”) proposed revised Enhanced Watershed Management Program (the “revised EWMP”). As an initial matter, the City, along with its RH/SG partners, thanks the Regional Board and its staff for its continued efforts to seek to improve water quality in the Los Angeles region, as well as the Regional Board’s cooperation. For itself, the City remains committed to continuing to attempt to improve water quality within the City, and to working with its partners in the RH/SG Group to improve water quality within the watershed.

As the Board is aware, however, the City has filed a lawsuit (which is pending) challenging certain aspects of the 2012 Permit, and the City thus remains opposed to the use of numeric effluent limitations (“NELs”) in a municipal NPDES permit, including the NELs that have been included in the current 2012 Permit. The City is also challenging other related aspects of the 2012 Permit in its lawsuit, and is challenging the zero non-storm discharge prohibition (“NSW NEL”) provisions in the 2012 Permit.

The primary basis for the City’s challenge to the NELs, including the NSW NEL, is that compliance with these permit terms is not reasonably nor economically achievable, and that the Regional and State Boards have failed to make sufficient determinations/findings to show they are.

The Group’s original EWMP was submitted because without it, the City and all Group Members likely could have been found out of compliance with the 2012 Permit NELs, and thus subject to enforcement actions, citizen suits and penalties. Such EWMP included an estimated total cost for its implementation of \$1.4 billion, with Duarte’s share being estimated in excess of \$180 million over a twelve-year period.

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The revised EWMP was spear-headed by the City of Monrovia, and while it appears to contain some cost data, does not identify its total cost of implementation, including leaving out operation and maintenance costs and land acquisition costs. Nor does the revised EWMP contain a breakdown or description of the projects to be implemented in each participating city to achieve the NELs in issue, or the individual city's estimated costs to implement the programs thereunder to comply with the NELs.

Further, there is no analysis regarding where the funding will come from to implement the revised EWMP, which is in addition to the fact that the revised EWMP does not identify its total cost, nor the respective estimated cities' share of such costs.

In addition, the technical/substantive analysis set forth in the revised EWMP appears to be limited, and it is by no means evident from the revised EWMP that it will result in compliance with the numerous applicable NELs it is purportedly designed to achieve.

In light of these and other significant concerns, it was important for the City to preserve its rights by attending the Regional Board's May 10, 2018 hearing regarding the new permit cycle and the revised EWMP. At that time, in addition to presenting a PowerPoint presentation expressing the City's concerns with the Regional Board's apparent desire to continue with the use of NELs into the new Permit, the City also read into the record a letter signed by each and every member of the Duarte City Council, expressing their collective concerns and objections to the use of NELs and to the revised EWMP, given that such NELs are not reasonably nor economically achievable by the City at this time, and given the many unanswered questions with the revised EWMP. At the conclusion of the City's presentation, the City also submitted multiple copies of that letter (in addition to the presentation) to the Board to be included in the record.

A copy of the PowerPoint Presentation and the City Council's letter are included herewith as Exhibits A and B respectively, and we ask that these Exhibits and this Letter be included in the administrative record for the Regional Board's review and consideration of the revised EWMP.

Since May 10, the City's position has not changed, and it continues to have significant reservations with the revised EWMP. As such, Duarte City Council has not approved the submission of the revised EWMP on the City's behalf, and thus the City urges the Regional Board to only approve the revised EWMP as a conceptual document at this time, and to withhold final approval until such time as the many questions and issues raised herein and at the time of the May 10 Workshop have been fully addressed, and the revised EWMP is further modified.

As set forth in the City Council's attached letter of May 10, 2018 and in the attached PowerPoint presentation, the City has a number of concerns with the proposed revised EWMP, which can be summarized as follows.

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First, the City understands that no party in the Group or otherwise is aware of what the actual overall cost of complying with the programs discussed in the draft revised EWMP would be, let alone Duarte's or the other participating cities' individual cost to comply. The revised EWMP contains a discussion of some capital costs, but does not indicate whether these capital costs cover the entirety of the programs to be implemented, and nor is there any analysis of the operation and maintenance costs, nor land acquisition costs.

Second, the number and extent of the new programs or projects proposed with the revised EWMP remains unknown. While the revised EWMP contains attractive illustrations, and hopeful assertions, the truth is that the actual elements of the revised EWMP are still being defined, and it is the City's understanding that a feasibility study must still be conducted. Further, the technical feasibility of achieving the NELs with the revised EWMP appears unknown, and is not discussed in a sufficient level of detail that would allow any party to determine whether the objectives of the revised EWMP (of achieving the final NELs) are realistic and/or feasible.

Third, the City's obligations under the proposed revised EWMP remain unknown, as does the location and extent of the necessary projects that are being proposed within the City's jurisdiction. Also unknown, is whether the proposed revised EWMP is reasonably and economically feasible, and whether it will actually achieve compliance with the NELs and, if so, when.

Fourth, there are continued concerns regarding which entities will remain parties to this revised EWMP. With the City of Azusa no longer participating in the Group, and at least one other city evaluating its ability to continue, the implementation and viability of the proposed revised EWMP programs, once the revised EWMP can be fully defined and the associated responsibilities and costs determined, remains a question mark.

Fifth, the revised EWMP was apparently submitted as a redline of the original EWMP, with strike out changes reflecting deletions, and additions being underlined. The document is thus difficult to follow and generally unwieldy to approve.

Sixth, the revised EWMP was submitted as an attempt to meet the NELs required in the 2012 Permit for the RH/SG Group. Yet, the NELs are not federal mandates, and as such, are State Mandates which must be funded by the State of California. The revised EWMP, however, does not address the need for the State to provide the funding for its implementation, and, as mentioned, does not identify the respective shares of the participating permittees, nor where the monies will be obtained to fund implementation.

For all of the reasons expressed above, Duarte City Council has not approved the submittal of the revised EWMP on its behalf as a final document, and the City respectfully requests that the

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Regional Board not approve the revised EWMP as a final document, unless and until all of the above referenced questions have been addressed.

The City must also continue to reserve all of its rights and claims, as set forth in the City's pending lawsuit challenging the NELs and other 2012 Permit terms and further reserves all of its rights and claims regarding the revised EWMP, as outlined in the attached PowerPoint presentation and City Council Letter.

The City desires to continue to work with the Board and your staff and the other permittees toward the collective goal of achieving a better, cleaner environment, but through reasonable, technical and economically achievable means. Although, as discussed, the City does not believe the WMP/EWMP programs should be required to be designed to achieve NELs that are not reasonably nor economically achievable, the City does believe that the revised EWMP, conceptual as it is, is preferable over the Group's original approved EWMP, except that the revised EWMP has not yet been adequately developed to the point where it can be approved as anything other than a conceptual document by the Regional Board at this time.

The City looks forward to working with all of the involved parties in addressing the above-referenced concerns with the revised EWMP, and in general, developing appropriate stormwater management programs that are more concrete and with reasonably and economically achievable objectives. In the meantime, the City requests that the Regional Board approve the revised EWMP as a conceptual document only.

Thank you for your consideration of these important issues.

Sincerely,

RUTAN & TUCKER, LLP



Travis Van Ligten

TV:nd
Attachments

cc: Darrell George, City of Duarte City Manager
Ivar Ridgeway, Regional Water Quality Control Board, Los Angeles Region
Chris Lopez, Regional Water Quality Control Board, Los Angeles Region
David Cosgrove, City of Duarte City Attorney
Richard Montevideo

EXHIBIT A

City of Duarte's Reservation of Rights and Concerns with the Revised EWMP

Duarte City Attorney's Office
Rutan & Tucker, LLP

Regional Board Workshop – May 10, 2018 1:00 p.m.

Travis Van Ligten, Esq.

Duarte's Reservation of Rights

- Duarte and other cities filed lawsuits in July of 2015 against the Regional and State Boards, challenging, among other issues, the numeric effluent limitations (NELs) in the Permit, including the Watershed and Enhanced Watershed Management Programs (WMPs/EWMPs) to the extent they are to be designed to meet the NELs.
- The Duarte lawsuit alleges the NELs were invalidly adopted and are not reasonably and economically achievable, and that the WMPs/EWMPs should not, therefore, be required to achieve compliance with NELs. Instead, Duarte has urged that these WMPs/EWMPs programs be designed to implement a series of minimum stormwater control measures/BMPs to improve water quality to the maximum extent practicable, given the geographical and physical constraints in issue and the costs of compliance, and the financial, technical and practicable capabilities of the participating entities.

Duarte Reservation of Rights (Cont'd)

- There is no evidence that Duarte is aware of, that it can, either with the Rio Hondo/San Gabriel River Group or otherwise, reasonably and economically comply with the 2012 Permit's NELs, and thus comply with any corresponding EWMP aimed at achieving compliance with those NELs.
- The trial on the Duarte Case and the related *City of Gardena v. State Board* case was finished last month, with a decision expected this Summer (2018).
- Duarte wishes to cooperate with adjoining cities to attempt to remain in compliance with the 2012 Permit but without jeopardizing its legal claims, nor its sincere concerns that the NELs are simply not reasonably or economically achievable. *As such, Duarte must continue to reserve all of its rights and claims, as stated in its lawsuit.* It is participating in the EWMP process in an attempt to comply with the 2012 Permit, but maintains that the NELs and the other challenged requirements of the Permit are legally invalid and are not reasonably or economically achievable. Should Duarte prevail in its litigation, Duarte reserves the right to withdraw from the EWMP.
- Duarte also reserves all of its rights and claims regarding whether the 2012 Permit's terms, including the NEL terms, are unfunded state mandates subject to reimbursement by the State under the California Constitution.

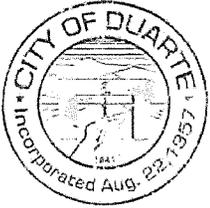
Duarte's Reservations with the Revised EWMP

- Duarte's City Council has not approved the revised EWMP, which is still a work in progress. Questions remain on whether the revised EWMP is technically, practically and economically viable, as well as the amount of the overall costs (including Duarte's share) to implement and maintain the proposed projects under the revised EWMP. Questions also remain over whether the EWMP's programs would result in Duarte achieving compliance with the applicable NELs.
- Duarte is considering participating in the revised EWMP to contribute to regionally responsible stormwater treatment programs, and to continue to be in compliance with the Permit terms, but without conceding the NELs in the 2012 Permit are legally valid and binding, and with the understanding that the NELs may be invalidated by the Courts.
- Questions regarding formation of a joint powers authority (JPA) for the purpose of funding some or all of the projects proposed by the revised EWMP are premature, and Duarte understands no EWMP participant is committing to do so at this time.

Duarte's Reservations with the Revised EWMP (Cont'd)

- Before Duarte can commit to fully participating in the revised EWMP, Duarte is seeking resolution of the following matters:
 - A final resolution of its pending lawsuit.
 - The identification of all of the various projects necessary under the revised EWMP to meet the NELs; a description of their scope; and an analysis of whether the projects are technically, practically and reasonably achievable, and will timely meet the applicable NELs,
 - An analysis of the full estimated cost of implementing and maintaining all of the various projects proposed under the revised EWMP, and Duarte's individual estimated implementation and maintenance costs to comply, so that all of the parties, including the Board, can determine whether the revised EWMP terms are appropriate in light of the cost of compliance.
 - The viability of the EWMP for those members who remain in the Group, given the loss of the City of Azusa from the group, and other possible shifts in membership.
- In addition to this presentation, the Duarte Mayor, Mayor Pro Tem and entire City Council has signed a letter setting forth the Council's additional comments to the Board on these matters. On behalf of the Council, I am hereby submitting this letter to the Board and placing it into the record.

EXHIBIT B



City of Duarte

1600 Huntington Drive | Duarte, CA 91010 | Bus. 626.357.7931 | Fax 626.358.0018 | www.accessduarte.com

May 10, 2018

Mayor
John Fasana

Mayor Pro Tem
Liz Reilly

Councilmembers
Margaret E. Finlay
Samuel Kang
Tzeitel Paras-Caracci

City Manager
Darrell J. George

California Regional Water Quality Control
Board, Los Angeles Region
320 West Fourth Street, Suite 200
Los Angeles, CA 90013

Re: Public Workshop of May 10, 2018 re: Reissuance of Regional Municipal Separate
Storm Sewer System (MS4) Permit
City of Duarte Comments & Reservations

Dear Honorable Chairperson and Members of the Board:

The City of Duarte appreciates the Regional Board's and its staff's continued efforts to improve water quality in the Los Angeles region, as well as your cooperation with the various municipalities, including Duarte, in working with them to implement the current 2012 Permit requirements. The City remains committed to continuing to attempt to improve water quality within the City and to working with its partners in the Rio Hondo San Gabriel River Group to improve water quality within the region.

As the Board is aware, however, the City remains opposed to the use of the numeric effluent limitations (NELs) that have been included in the current 2012 Permit, as well as certain other provisions in the Permit, and for this reason continues to pursue its litigation challenging these NELs and other Permit terms. The primary reason for the City's opposition to these provisions is because of its strong belief that they are not reasonably, technically or economically achievable at this time, given the variable nature of stormwater runoff and the enormity of the storm drain system in Los Angeles County.

Also, as the Board is likely aware, Duarte is a small residential community, encompassing roughly 6.7 square miles, with approximately 22,000 residents, and total annual general fund revenues of about \$15-16 million dollars. Of course the City has many obligations to meet with its revenues, including police, fire, public libraries, public works, building and safety/community development, public parks, trails and other public amenities and projects, in addition to necessary administrative services. Yet, our staff has advised us that the current approved EWMP programs would cost Duarte in excess of \$180 million over the next 10 years, which, of course, is money the City does not have, and with there being no assurance that the City would even then be in compliance with the numerous NELs in the Permit.

Given Duarte's concerns with the approved EWMP, Duarte agreed to participate with the Group in developing the document, but by necessity, did so reserving all of its legal rights to pursue its lawsuit and to pursue its rights to seek reimbursement from the State for the cost to implement the EWMP to attempt to reach the NELs, and to comply with the other required Permit programs

With the proposed revised EWMP, the City must continue to reserve all of its rights and to object to the premise behind the revised EWMP, i.e., the requirement that cities meet the NELs. NELs should not be imposed in a municipal stormwater permit, especially on a City the size of Duarte who can ill-afford the enormous cost and difficulties involved in attempting to achieve compliance with these numeric limits.

The City has additional concerns with the revised EWMP as well. For example, no party, including Duarte, is aware of what the actual overall cost of complying with the programs discussed in the draft revised EWMP would be, let alone Duarte's individual cost to comply. Further, the number and extent of these new programs remains unknown, as they are still being defined, and it is our understanding that a feasibility study must still be conducted. The City's obligations in the revised EWMP also remain unknown, as does the location and extent of the necessary projects that are being proposed within the City's jurisdiction. Also unknown, is whether the revised EWMP is practically, technically and economically feasible, and whether it will actually achieve compliance with the NELs and, if so, when.

Similarly, there are continued concerns regarding which entities will remain a party to this revised EWMP. With the City of Azusa no longer participating with the Group, and at least one other city evaluating its ability to continue, implementation of the revised EWMP programs, once they are fully defined, remains a question mark.

For all of these reasons, and understanding the City is continuing to participate with the Group with the revised EWMP because it has no other option if it wishes to remain in compliance with the current Permit, the City is reserving its judgement and approval of the revised EWMP until all of these unanswered questions are addressed, and the EWMP is fully developed and vetted.

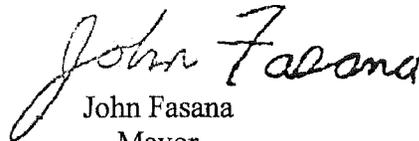
The City must also continue to reserve all of its rights, as outlined in the City's pending lawsuit, to challenge the NELs and other permit terms, and participates in this EWMP process with the express caveat that the City may need to withdraw from further participating in the revised EWMP, particularly if it prevails in its pending litigation.

The City must also reiterate its position that it is not participating in the EWMP process willingly, but is instead being compelled to participate because it has no other choice to remain in

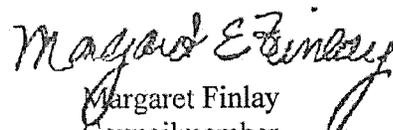
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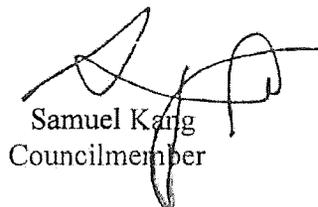
compliance with the terms of the 2012 Permit. For this reason, the City believes that the original EWMP, and any subsequent approved revised EWMP, are State imposed mandates.

The City desires to continue to work with the Board and your staff and the other permittees toward the collective goal of achieving a better, cleaner environment, but through reasonably and economically achievable means, and looks forward to working with all of the parties to reach this common goal. Thank you.


John Fasana
Mayor


Liz Reilly
Mayor Pro Tem


Margaret Finlay
Councilmember


Samuel Karg
Councilmember


Tzeitel Paras-Caracci
Councilmember