

THE CITY OF POMONA

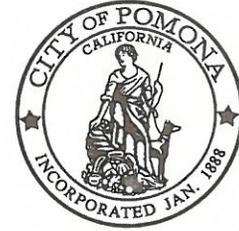
ARNOLD M. ALVAREZ-GLASMAN
City Attorney

Office of the City Attorney

July 15, 2016

Via Email [commentletters@waterboards.ca.gov]

Felicia Marcus
Chair
State Water Resources Control Board
C/O Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
PO Box 100
Sacramento, CA 95812-0100



Re: Comments to A-2386 – July 19 Board Item [Own Motion Order]

Dear Chair Marcus and Honorable Members of the Board:

The City of Pomona (“City”) submits the following comments in response to the State Water Resources Control Board’s (“State Board”) decision to consider a proposed Own Motion Order to review Petition A-2386 (“Petition”).¹ The City has concerns that the State Board’s proposed Own Motion Order undermines the City’s efforts to comply with the City’s Watershed Management Plan (WMP). The City has already expended its limited resources to proceed in good faith with WMP compliance. The State Board’s proposed Own Motion Order presents uncertainty regarding the substance of the City’s WMP. Now, over a year after WMP approval, the WMP may be revised in a manner that causes the City to face serious hardships in maintaining fiscal responsibility to our community while pursuing a moving target (revised WMP provisions).

The City therefore submits this letter to urge the State Board to reject the proposed Own Motion review of the issues raised in Petition A-2386. Review at this late date would unnecessarily interfere with implementation of the City’s Watershed Management Plan (“WMP”), and violate procedural protections in the California Water Code and State Board regulations. The City respectfully requests the State Board instead dismiss the Petition as

¹ The Petition, filed by the Natural Resources Defense Council, Heal the Bay, and Los Angeles Waterkeeper (“Environmental Petitioners”) requested that this Board review and invalidate the Los Angeles Regional Water Quality Control Board’s (“Regional Board”) approval of the Executive Officer’s conditional approvals of three Watershed Management Programs (“WMPs”) under Los Angeles Regional Board Order No. R4-2012-0175 (“Los Angeles Permit”).

untimely, moot and substantively defective, and if necessary, bring the substance of the approved WMPs back as an informational item.

1. “Own Motion” review at this late date is fundamentally unfair to the City and the other permittees.

The State Board’s “Own Motion” consideration of the Petition will prejudice the City and all permittees who have been implementing their approved WMPs. The East San Gabriel Valley (“ESGV”) WMP, in particular, has been approved and implemented for more than a year, and implementation deadlines continue to accrue. State Board staff has stated that they cannot complete their review of the plans until after August 6, 2016, which means that a decision from this Board would issue after August 6, 2016 and potentially in 2017.

It is fundamentally unfair to expect the City to implement a plan costing millions of dollars if it can be substantially revised against the City’s will at any time. “Own Motion” review of the WMPs this long after plan approval puts the City at risk of having to make substantial revisions to its WMP, while still being subject to permit deadlines requiring attainment of water quality standards by 2026. Moreover, the City is implementing its WMP at substantial cost, and does not have the luxury of incurring further costs in chasing a moving target without resulting detriment to already-strained fundamental City services and operations. The City’s compliance efforts thus far will be wasted if the State Board decides to order changes to the City’s plan.

Own Motion review likewise circumvents the procedural limitations established in the Water Code, in State Board regulations, and in precedential State Board orders involving the Los Angeles MS4 Permit. These procedural limitations provide certainty, and protect permittees, the State Board, and the environmental community. Own Motion review at this late stage prejudices the City’s interest in certainty and the City’s ability to invest in measures that protect water quality.

2. The State Board should adhere to its oversight role, and allow the Regional Board to direct the implementation of the Los Angeles MS4 Permit.

The State Board has already reviewed and approved the WMP process as a means of achieving water quality standards in the Los Angeles Region. (State Water Resources Control Board, Order WQ No. 2015-0075, p. 40) (“Los Angeles Order”) The State Board should adhere to the oversight role the State Board defined for itself in the Los Angeles Order, in which, the State Board expressed interest in hearing about the progress of the WMPs, but limited its inquiry to informational reports from the Regional Board:

We direct the Los Angeles Water Board to periodically report specific information to the State Water Board regarding implementation of the WMPs/EWMPs, including on-the-ground structural control measures completed, monitoring data evaluating the effectiveness of such measures, control measures proposed to be completed and proposed funding and schedule, trends in

receiving water quality related to storm water discharges, and compliance and enforcement data.

(*Id.* at p. 78.)

Furthermore, there are significant legal questions (discussed below) about the State Board's authority to hear a petition challenging the WMPs or order changes at this late date. Absent clear legal authority for the State Board to review the Petition on its own motion, the City requests that the State Board abide by its self-defined oversight role established by its own order, and allow the Regional Board to present updates to the State Board on the status of the plans via an agenda item report from the Regional Board on the status of the WMPs as an informational item.

3. Because the Petition was defective and should be dismissed, "Own Motion" Review would contradict and circumvent legal requirements that require dismissal

Petition A-2386 consists of two defective petitions. The first petition under A-2386 challenges Los Angeles Regional Water Quality Control Board ("Regional Board") Executive Officer Sam Unger's conditional approval of nine Watershed Management Plans. The Regional Board's independent approval of the WMPs rendered this challenge moot.

The second petition under A-2386 is an amendment challenging the Regional Board's subsequent approval of the WMPs. This second challenge is defective because the Environmental Petitioners failed to file their amended petition within thirty (30) days of the Regional Board's decision on the WMPs, as required by the Water Code.

The State Board's proposal to hear the Petition on Own Motion is inconsistent with the State Board's precedential decision issued just one year ago, which explicitly rejected as untimely an amended petition filed more than 30 days from the challenged Regional Board action. ((State Water Resources Control Board, Order WQ No. 2015-0075, p. 7) ("Los Angeles Order").) The State Board's decision to reject the permittee's untimely amended petition was based on a strict application of the 30-day limitations period in Water Code section 13320(a). (*Ibid.*)

Yet, less than four months after the State Board's decision on the Los Angeles Order, the Environmental Petitioners in this matter untimely filed an amended petition relating to *the same* Los Angeles Permit. Consistent application of the law and precedential Board orders compels the State Board to reject the Petition as untimely and decline to consider the issues raised therein. (See Civ. Code, § 3511.) Any other course of action would create one set of rules for dischargers, and another, less stringent set of requirements for the environmental community.²

² Questions have also arisen regarding the disparate treatment of Environmental Petitioners and permittee petitioners by Board staff. Board staff undertook communications with Environmental Petitioners regarding their amended petition, without copying all parties, demonstrating a lack of transparency in the administration of the Amended Petition. (See Letter from Philip Wyels to Becky Hyatt, et al., dated Feb. 26, 2016; available online at:

Moreover, the Petition is defective as to substance. As mentioned above and described more fully below, Water Code section 13320 (the purported authority under which the Petition was filed) does not allow for State Board review of the City's WMP. Section 13320 includes a specific list of Regional Board actions that are reviewable via petition to the State Board. Approval of WMPs is not on that list. Thus, even if the Petition was timely filed and the issues raised were ripe for review, there is no lawful vehicle for State Board review.

Because the first challenge raised in Petition A-2386 is moot, the second challenge requires dismissal due to an untimely amended petition (the review of which contradicts the Water Code as well as the State Board's previous application of the law to a permittee's amended petition), and the Petition is not within the State Board's authority to review on its own motion, the City urges the Board to decline consideration of the Petition.

4. Review of WMPs exceeds the State Board's "Own Motion" authority.

The Water Code Section 13320(a) expressly authorizes the State Board to review, on its own motion, the Regional Board's action taken under the following sections of the Water Code:

- Section 13225 – Regional coordination, Investigative Orders;
- Section 13260 *et seq.* – WDRs;³
- Section 13330 *et seq.* – Enforcement;
- Section 13370 *et seq.* – State implementation of the Federal Clean Water Act;
- Section 13399.25 *et seq.* – Stormwater permitting;
- Section 13500 *et seq.* – Water reclamation

None of the enumerated statutes mention WMPs, or voluntary plans submitted to comply with NPDES permit or WDR requirements. Without question, under Water Code Sections 13320 and 13263, the State Board has the authority to review NPDES permits and WDRs, and full authority to revise permit terms and requirements based on its independent inquiry into the matter. However, WMPs are not NPDES permits or WDRs. The WMPs are optional plans for attaining permit requirements. Therefore, the State Board has no authority to separately review and approve the plans without revising the underlying permit.

http://www.swrcb.ca.gov/public_notices/petitions/water_quality/docs/a2386/letter_transmitting_pra_request_022616.pdf.)

³ Section 13263 authorizes regional boards to prescribe "requirements as to the nature of any proposed discharge" (subdivision (a)); use "the full waste assimilation capacities of the receiving waters" (subdivision (b)); include "a time schedule" in waste discharge requirements ("WDRs") (subdivision (c)); prescribe, review and "requirements" in WDRs (subdivisions (d), (e)); provide notification of discharge requirements (subdivision (f)); issue a master recycling permit (subdivision (h)); or issue a general permit (subdivision (i)).

Similarly, the State Board cannot rely on regulations implementing Section 13320(a) to give itself the power to review the City’s WMP. The June 17, 2016 notice letter stating that the State Board is going to consider own motion review of the Petition cites 23 Cal Code Regs Section 2050.5(c) for that authority. Section 2050.5 is a State Board-issued regulation implementing Water Code section 13320. Regulations implementing a statute cannot go beyond the scope of the legislation. (*Cal. Drive-in Restaurant Assn. v. Clark*, (1947) 22 Cal.2d 287, 302 [“an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute”].)

Absent legal authority for the State Board to review the content of the City’s WMP, the City urges the Board to decline review of the issues raised in the Petition.

Conclusion

The City will continue with its efforts to comply with all applicable Permit requirements, and fully discharging its duties under the law. The City strongly believes that the State Board should do the same, and decline to review the issues raised in the Petition on own motion. As mentioned above, the State Board may still follow the progress of WMP implementation as an informational item, as proposed in the Los Angeles Order.

Sincerely,



Teresa Chen
Deputy City Attorney