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July 18, 2016

VIA ELECTRONIC MAIL

Jeanine Townsend
Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100
commentletters@waterboards.ca.gov

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

Dear Ms. Townsend:

This firm represents the cities of Artesia, La Mirada, and Norwalk (collectively, “Cities”), three cities participating in the Lower San Gabriel River Watershed Management Program (“WMP”). The Lower San Gabriel River WMP is one of nine WMPs currently challenged by the May 28, 2015 Petition (“Original Petition”) and one of three WMPs specifically challenged by the October 30, 2015 Addendum to the Original Petition (“Addendum”) jointly filed by the Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (collectively, “Petitioners”). The Original Petition and Addendum are the subject of this proposed own motion order before the State Water Resources Control Board (“State Board”).

On January 8, 2016, the Cities, joined by the cities of Pico Rivera, Bell Gardens, and Huntington Park, filed a motion to reject the Original Petition as moot and the Addendum as untimely. In that motion, the Cities recognized the State Board’s inherent authority to take up regional board actions on its own motion, pursuant to Water Code Section 13320(a) and California Code of Regulations, Title 23, Section 2050.5(c), but provided several reasons why the State Board should decline to do so in this case. The Cities wish to reassert each and every argument made in their January 8, 2016 memorandum and incorporate those arguments herein as though set forth in full. The Cities submit this comment letter to again request that the State Board decline to take up the Original Petition and Addendum on its own motion.

The draft own motion order indicates that it will allow the State Board to conduct a full review of the WMPs notwithstanding “certain procedural objections” to the Original Petition and Addendum. The Cities continue to believe that the Addendum, in particular, is untimely and should not be rescued by the State Board’s own motion.

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The Addendum unquestionably seeks to overturn the September 10, 2015 decision of the Los Angeles Regional Water Quality Control Board (“Regional Board”) to ratify its Executive Officer’s final approval of the WMPs. [Addendum, pg. 1.] Water Code Section 13320(a) provides that a petition challenging an action of a regional board must be filed within 30 days. In this case, the Regional Board acted upon the WMPs on September 10, 2015 when it ratified its Executive Officer’s final approval by a 6-0-1 vote following a public hearing. [RB-AR18800.] Petitioners, however, filed the Addendum on October 30, 2015, 50 days after the Regional Board acted on the WMPs. [Addendum, pg. 27.] Thus, the Addendum failed to comply with the limitations period in Water Code Section 13320. Similar arguments against the Addendum were submitted by CASQA and the Regional Board. [December 18, 2015 Letter from Gerhardt Hubner, pg. 2; January 15, 2016 Letter from Samuel Unger, pgs. 18-20.]

In response to the Cities’ timeliness argument, on January 28, 2016, the Office of Chief Counsel disclosed that Petitioners had “submitted the petition addendum following a telephone conversation with the State Water Board counsel authorizing submission of supplemental information to the State Water Board.” [January 28, 2016 Email from Ryan Mallory-Jones.] Correspondence between the Office of Chief Counsel and the Petitioners memorialized this arrangement and established a November 9, 2015 deadline to file the Addendum. [September 24, 2015 Letter from Becky Hayat; September 28, 2015 Email from Emel Wadhwani.] To our knowledge, and based on our review of documents produced through a public records request, the Office of Chief Counsel’s consent to file the Addendum on November 9, 2015 was the only authorization Petitioners’ received to file any supplemental petition challenging the Regional Board’s September 10, 2015 ratification of the Executive Officer’s approval. No formal action of the State Board itself authorized the late filing. The Cities were not made aware of this exchange until January 28, 2016, twenty days after filing their motion.

Despite the informal arrangement between Petitioners and the Office of Chief Counsel, the Addendum continues to be untimely and should be rejected. The 30-day time limit to challenge a regional board action is a statutory deadline, embedded in Water Code Section 13320(a). As such, this deadline should not be waived by informal communication between the State Board and a petitioner. Even if it can be waived, such a waiver would likely require a formal decision of the full Board. This rigid interpretation is consistent with the State Board’s prior statement that it

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“interprets that requirement strictly and petitions filed more than 30 days from regional water board action are rejected as untimely.” [Order WQ 2015-0075, pg. 7.]

Moreover, Petitioners went beyond merely supplementing the Original Petition with information regarding the Regional Board’s September 10th action. Rather, they sought to challenge the very action of the Regional Board to ratify the Executive Officer’s final approval of the WMPs. The Petitioners’ decision to challenge the Regional Board’s decision in this regard, rather than merely provide “supplemental information” went beyond the scope of the Office of Chief Counsel’s authorization.

The Original Petition and Addendum, and more particularly the relief sought in the Addendum, should not be allowed to proceed with the benefit of the State Board’s own motion.¹ Both the untimeliness of the Addendum and the manner in which the extension of time was granted calls into question the fairness of this proceeding.

The Cities recognize the State Board’s inherent discretion to consider the Original Petition and the Addendum on its own motion. Should the State Board ultimately do so, the Cities suggest limiting the scope of its review in two ways.

First, dismiss the Original Petition’s arguments relating to the Executive Officer’s legal authority to conditionally approve the WMPs. [Original Petition, Memorandum of Points and Authorities, pgs. 6-11.] Those arguments, specifically that the Executive Officer exceeded his delegated authority and that the conditional approvals improperly modified the Los Angeles MS4 Permit, are now moot in light of the Executive Officer’s final approval of the WMPs, without conditions, and the Regional Board’s ratification of that decision. Furthermore, the Executive Officer’s authority to act on behalf of the Regional Board in carrying out the various requirements of the Los Angeles MS4 Permit, and to do so by way of conditional approvals, is beyond question.² The Cities aver that these are not substantial issues appropriate for State Board review.

¹ Cities reassert that the Original Petition, which challenged the Executive Officer’s conditional approval of the WMPs, is moot in light of the Executive Officer’s final approval of the WMPs and the Regional Board’s subsequent ratification of that decision. [RB-AR18145 (approval of the Lower San Gabriel River WMP).]

² For a detailed discussion of the Cities’ legal position on these issues, see the Cities’ August 3, 2015 Memorandum to the Regional Board. [RB-AR18173-18206.]

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Second, reject the Addendum's request for relief to invalidate the Regional Board's action on September 10, 2015 to ratify the Executive Officer's final approval of the Lower San Gabriel River WMP. Such relief is extraordinary in light of the fact that the WMP is still in its initial stages and has not yet had an opportunity to prove its effectiveness. Moreover, the Executive Officer's decision to approve the WMP has already received the benefit of an appellate level review before the full Regional Board, which determined that it met the requirements of the Los Angeles MS4 Permit. The Cities are concerned that, notwithstanding this immense cost of preparing the Lower San Gabriel River WMP, amending it to address the Regional Board staff's comments, and ultimately receiving final approval from the Regional Board, those efforts could now be in jeopardy. Invalidating the WMP would result in further consultant and legal costs to the WMP group and its individual permittees, which would siphon money away from the BMPs that actually improve water quality. The Cities, on the other hand, would welcome an informational workshop regarding the WMP without the threat of an order to invalidate it.

In conclusion, the Cities respectfully request that the State Board not exercise its authority to take up the Original Petition and Addendum on its own motion. Alternatively, if the State Board does so, the Cities request that it limit the scope of its review of the WMPs in the manner described above.

Very truly yours,



Nicholas R. Ghirelli

cc: William Rawlings, City Manager, City of Artesia
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