STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2002 - 0014

In the Matter of the Petitions of

CITY OF ALISO VIEJO; CITY OF MISSION VIEJO; AND GOLDEN RAIN FOUNDATION OF LAGUNA WOODS (AKA LEISURE WORLD)

For Review of Waste Discharge Requirements Order No. R9-2002-0001
[NPDES No. CAS0108740]
for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s)
Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County,
and the Orange County Flood Control District
Within the San Diego Region
Issued by the
California Regional Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1465(c),(d), AND (f)

BY THE BOARD:

The San Diego Regional Water Quality Control Board (Regional Board) issued waste discharge requirements Order No. R9-2002-0001 [NPDES No. CAS0108740] (Permit). The Permit regulates discharges of storm water and urban runoff from municipal separate storm sewer systems (generally called MS4s) in the portion of south Orange County that lies within the jurisdiction of the Regional Board. Seven petitions were filed with the State Water Resources Control Board (State Board) challenging the Permit.[1] Three of the petitioners, City of Mission Viejo, City of Aliso Viejo, and the Golden Rain Foundation of Laguna Woods (hereinafter referred to as Leisure World), jointly referred to herein as Petitioners, submitted complete requests to stay the effect of the Permit.[2] Leisure World sought a stay of the entire permit, while

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[1] The seven petitioners are County of Orange and Orange County Flood Control District, et al.; City of Lake Forest; City of Dana Point; City of Mission Viejo; City of Aliso Viejo; Building Industry Association of Southern California, Inc. (BIASC), et al.; and the Golden Rain Foundation of Laguna Woods (aka Leisure World). Of these seven petitions, only the City of Mission Viejo's petition is active, as the remaining petitions have been placed in abeyance at the petitioners' requests.

[2] Three other petitioners requested stays. The State Board dismissed BIASC's stay request for failure to respond by the deadline for remedying defects in the request. Dana Point and Lake Forest withdrew their requests for an immediate stay.

Aliso Viejo and Mission Viejo sought limited stays.[3] For the reasons discussed below, we will grant partial relief to Aliso Viejo and Mission Viejo and deny the request of Leisure World.[4]

I. BACKGROUND

The Permit is the third area-wide storm water permit issued for Orange County.[5] For the cities of Lake Forest and Laguna Woods, the Permit regulates only those portions of the cities within the Regional Board's boundary.[6]

In March 2002, seven petitioners filed petitions seeking review of the Permit, with six seeking stays of all or a portion of the Permit. On April 15, 2002, the State Board sent a letter concerning the status of the stay requests stating that all six requests were, to some extent, incomplete. By June 7, 2002, the three Petitioners had amended their stay requests, while the others had not.[7] On June 18, the State Board issued a notice of public hearing to be held on the afternoon of July 2, 2002. The State Board continued the hearing in order to notify all interested persons. On July 9, the State Board issued a second notice and held a hearing on July 29, 2002. Leisure World did not participate in the hearing.

In order to issue a stay of the Permit, the State Board must find that the Petitioners have alleged facts and produced proof of: (1) substantial harm to the Petitioners or to the public interest if a stay is not granted; (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted; and (3) substantial questions of law and fact regarding the disputed action. (Cal. Code Regs., tit. 23, § 2053. See, State Board Order WQO 2002-0007.)

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[3] Aliso Viejo sought the stay of a toxicity finding and the industrial, commercial, and construction components of the Permit, while Mission Viejo sought a more generalized stay that included the industrial, commercial, and construction components plus a requirement to prevent sanitary sewer overflows from entering the storm sewer system.

[4] This is a non-precedential order pursuant to State Board Resolution No. 2002-0103.

[5] The first permit, Order No. 90-38, was adopted on July 16, 1990, followed by Order No. 96-03, adopted on August 8, 1996.

[6] Other portions of Orange County and the cities are regulated by Santa Ana Regional Water Quality Control Board Order No. R8-2002-0020, adopted on January 18, 2002.

[7] See *supra*, note 2.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioners contend that they will suffer substantial harm if a stay of the Permit is not granted.

A. Aliso Viejo's Contention of Substantial Harm

Finding: Aliso Viejo requested a limited stay. First, it sought to stay provisions F.3.b, F.3.c, and F.2. of the Permit, which require co-permittees to enforce their municipal storm water ordinances as applied to industrial, commercial, and construction sites. Next, it sought to stay the last sentence of Finding 26. This sentence provides a numeric interpretation of the Water Quality Control Plan for the San Diego Region (Basin Plan) prohibition of toxic discharges.

Aliso Viejo, a recently incorporated city, produced proof that it faces $95,000 in total costs to comply with the industrial, commercial, and construction components of the Permit over the next year.[8] Most of the $55,000 cost for the industrial and commercial programs was attributed to program development costs (e.g., establishing a database and staff), while most of the $40,000 construction costs stemmed from inspection requirements.[9]

We find that these requirements do not constitute substantial harm. First, most of the costs are associated with the requirement to inventory industrial and commercial sites. Industrial inventories are one of the basic requirements of the Phase I storm water regulations and are required in the permit applications.[10] The fact that costs are necessary to a storm water program does not constitute substantial harm, since comparable costs will be borne by all dischargers. In addition, Aliso Viejo has already prepared a preliminary inventory of commercial sites within its jurisdiction.[11] Looking at this list, it is clear that Aliso Viejo is well on its way towards compliance with the inventory and prioritization requirements of the Permit. Finally, implementation of the challenged inspection program is not required until at least

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[8] Aliso Viejo, Exhibit A (McGowan testimony), at pp. 1-3.

[9] *Id.*

[10] For example, co-permittees are to "provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by *each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity.*" 40 C.F.R. § 122.26(d)(2)(ii) (emphasis added).

[11] Aliso Viejo, Exhibit 2.

February 13, 2003.[12] Any inspections that may occur between February 13 and the date of the decision on the merits will not comprise substantial harm because the petition could be resolved soon thereafter.[13] We also note that the prior MS4 permit required the enforcement of municipal storm water ordinances through inspections, although it did not specify the details of an enforcement program, and therefore Aliso Viejo would presumably have conducted some inspections during this period of time. For these reasons, we find that Aliso Viejo did not produce proof of substantial harm related to the Permit's new industrial, commercial, and construction components.

Next, Aliso Viejo alleges that Finding 26 causes it substantial harm. The finding includes a numerical interpretation of a prohibition in the Basin Plan that forbids toxic discharges in toxic amounts.[14] Finding 26 defines acute toxicity as any acute discharge test that exceeds TUa=0.[15] Aliso Viejo contends that the standard is statistically unattainable and will force the city to perform expensive Toxic Identification Evaluations.[16] While the Regional Board suggests that the co-permittees have flexibility in establishing a receiving water monitoring program, we find validity in Aliso Viejo's concerns. Also, we are concerned that this "unattainable" standard may result in violation of discharge prohibition A.4, immediately forcing many co-permittees into the iterative process of revising the storm water management program.[17] In the absence of a stay, the acute toxicity standard of Finding 26 may cause substantial harm to the 13 co-permittees because it will force them into immediate noncompliance and potentially force them to expend substantial monies, while the discharge may not be causing any acute toxicity under a more flexible interpretation of the Basin Plan prohibition.

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[12] February 13, 2003, is the deadline for the submission of Jurisdictional Urban Runoff Management Programs, where the co-permittees will establish the proposed "inspection frequencies." Permit, at H.1.a.

[13] Aliso Viejo has requested that its petition on the merits be held in abeyance. Therefore, there is not a planned date for resolution of the petition. Aliso Viejo may, at any time, request that its petition be activated.

[14] Permit, at Finding 26.

[15] According to Ms. McGowan's testimony, TUa exceeds zero when less than 100 percent of test organisms survive in the receiving water. TUc=1 when there is no observable difference between the chronic effects of the receiving water in question and receiving waters unaffected by the receiving waters in question. Aliso Viejo, Exhibit A, at p. 5.

[16] *Id.*, at p. 4.

[17] Permit, at C.2.

B. Mission Viejo's Contention of Substantial Harm

Finding: Mission Viejo requested a limited stay by specifying a number of provisions that allegedly will cause it substantial harm. These include the industrial, commercial, and construction components, provisions on sanitary sewer overflows, and receiving water limitations language.[18] As its proof of harm, it produced cost reports created by Orange County and Charles Abbott Associates (CAA). For fiscal year 2002/2003, Mission Viejo will owe Orange County $340,515 for shared work done on Mission Viejo's behalf.[19] Also, Mission Viejo will likely pay CAA $685,859 in consulting fees linked to permit compliance.[20] These total costs are for first-year compliance with all Permit provisions. The proof presented was not linked to the challenged provisions and, therefore, did not establish the precise costs Mission Viejo would face if these provisions were not stayed.[21] We do note, however, that the lion's share of costs appeared to originate from the industrial, commercial, and construction enforcement requirements. In light of our discussion regarding a similar claim by Aliso Viejo, we conclude that these enforcement costs do not constitute substantial harm to the co-permittees.

Despite its failure to prove substantial harm for most of the challenged provisions, we find that Mission Viejo has produced proof of substantial harm caused by provision F.5.f. of the Permit, which, among other things, requires all co-permittees to prevent and clean up sewage spills.[22] The provision outlines how the MS4 operators must "prevent, respond to, contain and clean up all sewage . . . spills that may discharge into its MS4 . . . ."[23] Also, they "shall coordinate spill prevention, containment, and response activities throughout all appropriate departments, programs, and agencies . . . ."[24] Like the other challenged provisions, F.5.f. takes

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[18] See, generally, Mission Viejo's Further Points and Authorities and Evidence Supporting Request for Stay (June 7, 2002); and Mission Viejo's Policy Statement in Support of Request for Stay (June 27, 2002).

[19] Mission Viejo, Supplemental Declaration of Dennis Wilberg (June 7, 2002), at paragraph 5.

[20] *Id.*, at paragraph 6.

[21] While Mission Viejo estimates the total costs of the challenged provisions to "exceed $200,000," we find no proof in the record to justify this claim. See Mission Viejo, Second Supplemental Declaration of Dennis Wilberg (July 25, 2002) at paragraph 11.

[22] We note that the Natural Resources Defense Council (NRDC), in a written request dated August 1, 2002, asked the State Board to strike Mission Viejo's sanitary sewer testimony and exhibits because NRDC did not receive them until after the July 29 hearing. We find that NRDC waived this objection by failing to raise it during Mission Viejo's testimony, or at any time during the July 29 hearing. Moreover, NRDC was allowed to extensively cross-examine the witnesses for Mission Viejo, and it was therefore not harmed.

[23] Permit, at F.5.f.

[24] *Id.*

effect on February 13, 2003. The record shows that three separate water districts operate these sewers within Mission Viejo, and are regulated by a sanitary sewer NPDES permit issued by the Regional Board.[25] Mission Viejo alleged that the duplication of effort that would ensue by having Mission Viejo also be responsible for preventing and responding to sanitary sewage spills could lead to delayed responses as agencies try to determine jurisdiction and primary responsibility. Orange County's cost table for the upcoming year estimated total co-permittee costs of $56,512 to implement this requirement.[26] While these costs, by themselves, do not constitute substantial harm, we find that the duplicative nature of the costs, combined with potential response delay and confusion, do.

Except for its proof of harm linked to provision F.5.f., we find that Mission Viejo failed to produce proof of the substantial harm of all challenged provisions.[27] For these provisions of the Permit, we conclude that Mission Viejo has not established the first prong of substantial harm if a stay is not granted.

C. Leisure World's Contention of Substantial Harm

Finding: Leisure World, a community comprising 90 percent of Laguna Woods' population, sought a stay of the entire Permit, alleging that increased compliance costs required by two separate MS4 permits cause it substantial harm. Leisure World did not participate in the hearing. Because its request was based solely on affidavits, and there was no opportunity to cross-examine the affiants, it has not produced proof of substantial harm We will deny its request for stay.

2. Contention: Petitioners contend there will not be substantial harm to interested persons and to the public interest if a stay is granted.

Aliso Viejo. Because Petitioners must produce proof of all three factors listed in our regulations, we will only discuss in detail those provisions found in the previous section to constitute substantial harm. However, we do mention that a stay of the industrial, commercial,

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[25] Mission Viejo, Declaration of Richard Schlesinger (June 27, 2002), at paragraph 8. See also San Diego Regional Board Order No. 96-04.

[26] Mission Viejo, A1 (Final Estimated Municipal NPDES Costs and Proposed Budget 2002-2006), at p. 59. Mission Viejo submitted three separate sets of exhibits. For citation purposes, we have assigned each exhibit a prefix, depending on the submission date. For the June 26, 2002, submittal, the prefix is A; for July 24, it is B, for July 25, it is C.

[27] We find that Mission Viejo's allegation concerning other provisions of the Permit was supported by little or no evidence.

and construction components would likely amount to substantial harm to the public. At the hearing, Aliso Viejo conceded that its claimed "incremental costs" of the new Permit were due to the creation and implementation of entirely new inspection programs. In other words, under the prior permit, it was not performing any inspections to determine compliance with its storm water ordinance. The lack of any enforcement component could cause substantial harm to the public interest.[28]

With regard to the challenged toxicity finding, we find that a stay will not cause substantial harm to the public pending review of the petition.[29] By staying this finding, the narrative Basin Plan standard (and all related Permit provisions) remains intact. Also, the definition of chronic toxicity is unchanged. Therefore, the Permit continues to prohibit toxic discharges in toxic amounts. Because of this, we find that a stay of the last sentence of Finding 26 does not cause substantial harm to the public.

Mission Viejo. We now address whether substantial harm will occur if provision F.5.f., regarding sanitary sewer overflows, is stayed. At the hearing, Mission Viejo provided proof that the Regional Board's existing sanitary sewer permit regulates sanitary sewer operation, and specifically requires updated overflow prevention plans and response plans.[30] The sanitary sewer permit, like all NPDES permits, allows for enforcement for violations. We find that these permits reduce the risk of sanitary sewage spills to the MS4, without causing overlap and potential delays in responding to overflows. Staying provision F.5.f. will not result in substantial harm to the public.

3. Contention: Petitioners contend there are substantial issues of law and fact.

Finding: We find that the two provisions that we will stay—the definition of acute toxicity and the provision regarding sanitary sewer overflows—involve substantial questions of law and fact. The determination of what constitutes acute toxicity in storm water runoff is a complex issue, and the use of a simple numeric criterion could result in significant requirements to perform extensive remedial actions. Similarly, the regulation of sanitary sewer

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[28] We do not make any determination on the merits of the petition, which concerns the propriety of the specific inspection and enforcement requirements included in this Permit.

[29] We note that Aliso Viejo's petition is currently in abeyance. The Regional Board may request activation of Aliso Viejo's petition so that the State Board can address this issue on the merits.

[30] See San Diego Regional Board Order No. 96-04. See also Mission Viejo, B3 (Santa Margarita Sanitary Sewer Overflow Prevention Plan), and Mission Viejo, B4 (Santa Margarita Sanitary Sewer Overflow Response Plan).

overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities. For example, the Permit appears to assign primary spill prevention and response coordination authority to the co-permittees. While the federal regulations clearly assign some spill prevention and response duties to the co-permittees,[31] we find that the extent of these duties is a substantial question of law and fact. Finally, we find that requirements for enforcement and inspection of industrial, commercial, and construction activities may raise substantial issues of law and fact, but we have already concluded that these requirements do not meet the other prongs of the test for a stay.

III. SUMMARY AND CONCLUSION

The State Board concludes that Aliso Viejo and Mission Viejo have met their burden of proving each of the three conditions required for issuance of a partial stay. Accordingly, we will stay provision F.5.f. We will also stay part of the last sentence of Finding 26, which will read, "Urban runoff discharges are considered toxic when the toxic effect observed in a chronic toxicity test exceeds one Toxic Unit Chronic (TUc=1)."

IV. ORDER

IT IS HEREBY ORDERED that provision F.5.f. of the Permit is stayed. Also, part of the last sentence of Finding 26 is stayed. In the interim, this sentence reads "Urban runoff discharges are considered toxic when the toxic effect observed in a chronic toxicity test exceeds one Toxic Unit Chronic (TUc=1)."

Dated: August 15, 2002

Arthur G. Baggett, Jr.
Chair

[31] MS4 permittees must have "procedures to prevent, contain, and respond to spills that may discharge into the MS4." 40 C.F.R. § 122.26(d)(2)(iv)(B)(4).