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GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## State Water Resources Control Board

JUN 14 2013

### CERTIFIED MAIL

[via U.S. Mail and email]

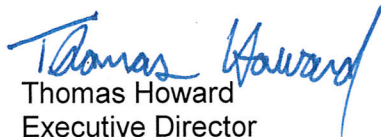
### TO ALL PETITIONERS AND THEIR COUNSEL OF RECORD:

PETITIONS OF CITIES OF CARSON, EL MONTE, GARDENA, LAWNSDALE, AND SIERRA MADRE FOR STAY OF NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT ORDER NO. R4-2012-0175 [NPDES NO. CAS004001] WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE CITY OF LONG BEACH MS4), LOS ANGELES REGIONAL WATER BOARD: DENIAL OF STAY REQUESTS **SWRCB/OCC FILES A-2236(n) (Gardena), (u) (El Monte), (y) (Carson), (z) (Lawndale) and (cc) (Sierra Madre)**

Review of the above-referenced requests for stay is complete. This review indicates that the requests for stay in this matter fail to comply with the prerequisites for a stay as specified in California Code of Regulations, title 23, section 2053. Accordingly, the requests for stay identified above are denied. The petitions filed with the State Water Resources Control Board concerning the above-mentioned matter are still under review. You will be notified of further action on the petitions. The enclosed memorandum explains the deficiencies in the stay requests.

If you have any questions about this matter, please contact Bethany Pane, Senior Staff Counsel, in the State Water Board's Office of Chief Counsel, at (916) 341-7173.

Sincerely,

  
Thomas Howard  
Executive Director

Enclosure

cc: See next page

JUN 14 2013

cc: **[via email only]**  
Exhibit A – Petitioners and Their  
Counsel of Record

**[via email only]**  
Exhibit B – MS4 Dischargers List

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Lyris List

## State Water Resources Control Board

**TO:** Thomas Howard  
Executive Director  
**EXECUTIVE OFFICE**

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

**DATE:** May 30, 2013

**SUBJECT:** PETITIONS OF CITIES OF CARSON, EL MONTE, GARDENA, LAWNDALE, AND SIERRA MADRE FOR STAY OF NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT ORDER NO. R4-2012-0175 [NPDES NO. CAS004001] WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE CITY OF LONG BEACH MS4), LOS ANGELES REGIONAL WATER BOARD: PROPOSED DENIAL OF STAY REQUESTS  
**SWRCB/OCC FILES A-2236(n) (Gardena), (u) (El Monte), (y) (Carson), (z) (Lawndale), and (cc) (Sierra Madre)**

### I. BACKGROUND

On November 8, 2012, the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) adopted Order No. R4-2012-0175 (MS4 Permit) updating requirements for storm water and non-storm water discharges from all municipal separate storm sewer systems (MS4s) within Los Angeles County (with the exception of the City of Long Beach). The MS4 Permit regulates discharges from more than 80 incorporated cities within the coastal watersheds of Los Angeles County. The State Water Resources Control Board (State Water Board) received 37 petitions challenging the MS4 Permit. Only five cities (Carson, El Monte, Gardena, Lawndale, and Sierra Madre [collectively, Petitioners]) requested the State Water Board to partially stay the MS4 Permit. This memorandum solely addresses these Petitioners' stay requests.

### II. ISSUE

Have the Petitioners satisfied the requirements for a stay under the provisions of the California Code of Regulations?

### III. BRIEF ANSWER

No, the Petitioners' stay requests fail to satisfy the heavy burden established by the State Water Board for issuance of a stay. The requests to stay portions of the MS4 Permit (collectively, the

stay requests) outline generalized allegations of substantial harm that would befall Petitioners in the event that a stay is not granted by the State Water Board, a lack of substantial harm to the public interest if the stay is granted, and the substantial questions of fact or law regarding the MS4 Permit. The allegations, however, do not satisfy all three elements required for a stay under the regulations. Petitioners (1) do not show that they will suffer substantial harm if a stay is not granted, and (2) have also provided insufficient proof that staying the MS4 Permit will not substantially harm the public interest. Moreover, the stay requests provide little to no analysis supporting Petitioners' assertions of substantial questions of fact or law.

I recommend denial of the Petitioners' stay requests. Staff will continue to review all 37 petitions challenging the MS4 Permit. The State Water Board can resolve any substantial questions of fact or law regarding the MS4 Permit when the Board reviews the petitions on the merits.

#### IV. DISCUSSION

The California Code of Regulations sets forth the conditions under which a stay may be granted. Title 23, section 2053, subdivision (a) (section 2053) provides that a stay shall be granted when petitioners allege facts and produce proof of *all* the following:

- (1) substantial harm to petitioner 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 fact or law regarding the disputed action.

A stay is an extraordinary remedy. The State Water Board expects parties seeking a stay to fully meet their burdens of proof under all three prongs of section 2053.<sup>1</sup> A party that fails to allege facts and produce proof of each of the foregoing elements is not entitled to a stay.<sup>2</sup>

Furthermore, the issue of whether a stay is appropriate is judged in the temporal sense. Petitioners must prove there will be substantial harm if a stay is not granted for the period of time while the State Water Board reviews their petitions on the merits. The issue here is not whether the Petitioners might eventually prevail on the merits of their claims or whether they will suffer harm over the term of the MS4 Permit, but the narrower issue of whether the Petitioners have carried their burdens of proving all three elements during the period of time while the State Water Board is reviewing their petitions on the merits.<sup>3</sup>

In accordance with section 2053, Petitioners have submitted declarations from their respective City Managers (Carson, El Monte, Gardena, and Lawndale) or Public Works Director and Management Analyst (Sierra Madre), providing support for their stay requests. Petitioners' requests are discussed below, in the order of the section 2053 elements necessary for a stay. Because several of the cities (Carson, El Monte, Gardena, and Lawndale) raised similar (if not verbatim) allegations in their requests for stay, their arguments are consolidated where appropriate.

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<sup>1</sup> State Water Board Order WQ 2012-0012 (*Ocean Mist, et al.*), p.5.

<sup>2</sup> State Water Board Order WQO 2002-0007 (*County of Los Angeles, et al.*), p. 3.

<sup>3</sup> See State Water Board Order WQ 2006-0007 (*Boeing Company*), p.4.

## A. **Substantial Harm to Petitioners or to the Public Interest**

Petitioners contend that they will be substantially harmed if a stay is not granted because of: (1) the costs to achieve compliance with the MS4 Permit's incorporation of Total Maximum Daily Load (TMDL) requirements (i.e., waste load allocations [WLAs] and installation of trash-exclusion devices), and the aggregated effect of these cost burdens on the Petitioners' annual budgets; (2) exposure to potential liability when remediating contaminated sites in accordance with the MS4 Permit's requirements; (3) exposure to potential liability due to the absence of a safe harbor when attempting to comply with the MS4 Permit's receiving water limitations. In addition, the City of Sierra Madre contends that it faces substantial harm from the MS4 Permit's requirements that cities inspect new developments to confirm compliance with best management practices (BMPs) and low-impact-development (LID) standards.

### 1. **Petitioners' Costs to Achieve TMDL Compliance**

#### *Legal Framework for TMDLs and WLAs*

Section 303(d) of the Clean Water Act (33 U.S.C. § 1313) requires states to develop impaired-waters lists (303(d) Lists) for rivers, lakes, coastal waters, and estuaries that do not meet water quality standards.<sup>4</sup> After the State Water Board submits its 303(d) List, regional water quality control boards (regional water boards) develop comprehensive TMDLs for the listed water bodies in their respective jurisdictions. These TMDLs specify the maximum amount of a pollutant that a water body can receive and still meet water quality objectives.<sup>5</sup>

In California, water quality standards and TMDLs to implement applicable standards are most often established in water quality control plans (basin plans). Water quality standards and TMDLs must be approved by the State Water Board, the United States Environmental Protection Agency (U.S. EPA), and the California Office of Administrative Law where required.<sup>6</sup> The regional water boards typically adopt TMDLs through the basin planning process, as was the case with each of the TMDLs raised in Petitioners' costs arguments below. TMDLs assign a WLA to each point source that discharges pollutants into waters of the United States. That assignment constitutes that point source's portion of the TMDL's total pollutant load.<sup>7</sup>

MS4 dischargers (such as Petitioners) are regulated as point sources under the NPDES program.<sup>8</sup> Within all NPDES permits, including the MS4 Permit at issue, effluent limits that

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<sup>4</sup> In California, the Porter-Cologne Water Quality Control Act uses the terms beneficial uses and water quality objectives, which together serve as federal water quality standards for waters subject to the Clean Water Act. (Wat. Code, § 13050, subds. (f) & (h); *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.* (2010) 183 Cal.App.4th 1110, 1115.)

<sup>5</sup> *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1404; 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. part 130.

<sup>6</sup> Wat. Code, §§ 13240, et seq.; 33 U.S.C. § 1313(c) & (d); and Gov. Code, § 11353. The State Water Board also establishes water quality standards through statewide plans (*id.*, § 13170) and, at times, through state policy for water quality control (*id.*, § 13142).

<sup>7</sup> 40 C.F.R. § 130.2(h). See also, *City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th at p. 1404.

<sup>8</sup> 33 U.S.C. § 1342; see *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710.

restrict the discharge of pollutants are developed for applicable pollutants of concern.<sup>9</sup> Depending on other applicable requirements and the determinations of the permitting agency, effluent limitations may be expressed as either numeric or narrative restrictions on pollutant discharges.<sup>10</sup> Once a TMDL is adopted, effluent limitations within NPDES permits must be consistent with the assumptions and requirements of the WLAs in the governing TMDL.<sup>11</sup> So, when NPDES permits such as the MS4 Permit at issue, are reissued or revised, permittees such as Petitioners, become subject to the WLAs assigned in TMDLs.

#### *Analysis of Petitioners' Allegations: WLA Costs*

In accordance with NPDES regulations, the Los Angeles Water Board included MS4 Permit effluent limitations consistent with the applicable WLAs. It did so by incorporating those WLAs into the MS4 Permit, generally as numeric effluent limitations.<sup>12</sup> Regardless of whether the WLAs are expressed as numeric effluent limitations or as narrative requirements implemented through BMPs, U.S. EPA has expressed its expectation that the NPDES permits must implement the WLAs.<sup>13</sup> To achieve these WLAs, the City of Carson estimates its costs at \$9.5 million/year.<sup>14</sup> The City of El Monte estimates its costs at nearly \$3 million/year.<sup>15</sup> The City of Gardena estimates its costs at \$2.95 million/year.<sup>16</sup> The City of Lawndale estimates its costs at

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<sup>9</sup> 40 C.F.R. §§ 122.44 and 125.3.

<sup>10</sup> *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1104.

<sup>11</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B); see MS4 Permit, Part II.K.1; see also *City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th 1392, 1404.

<sup>12</sup> MS4 Permit, Parts II.K.1. and VI.E, and Attachments L through R.

<sup>13</sup> See, e.g., Mem. from Robert Wayland, III and James Hanlon, U.S. EPA Headquarters, to Water Division Directors Regions 1-10 (Nov. 22, 2002) at pp. 4-5 and Mem. from James Hanlon and Denise Keehner, U.S. EPA Headquarters, to Water Division Directors Regions 1-10 (Nov. 12, 2010) at p. 3.

<sup>14</sup> Declaration of David C. Biggs (Biggs Decl.), p. 1, ¶ 3. The WLAs at issue for the City of Carson are those in the Los Angeles River Bacteria TMDL (March 23, 2012 effective date), the Los Angeles River Metals TMDL (November 3, 2011 effective date), the Los Angeles River Trash TMDL (September 23, 2008 effective date), the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL [*sic*] (March 23, 2012 effective date), the Machado Lake Nutrients TMDL (March 11, 2009 effective date), the Machado Lake Toxics TMDL (March 20, 2012 effective date), and the Machado Lake Trash TMDL (March 6, 2008 effective date). (TMDL effective dates available at <[http://www.waterboards.ca.gov/losangeles/water\\_issues/programs/tmdl/tmdl\\_list.shtml](http://www.waterboards.ca.gov/losangeles/water_issues/programs/tmdl/tmdl_list.shtml)> [as of Apr. 30, 2013].) Note, with regard to the Machado Lake Trash TMDL, the City of Carson objects to the costs associated with compliance with installation of trash-exclusion controls, not with the TMDL's WLA. (Biggs Decl., p.1, ¶ 3.)

<sup>15</sup> Declaration of Jesus M. Gomez (Gomez Decl.), p. 1 ¶ 3. The WLAs at issue for the City of El Monte are those in the Los Angeles River Bacteria TMDL (March 23, 2012 effective date), the Los Angeles River Metals TMDL (November 3, 2011 effective date), and the Los Angeles River Trash TMDL (September 23, 2008 effective date). (TMDL effective dates available at <[http://www.waterboards.ca.gov/losangeles/water\\_issues/programs/tmdl/tmdl\\_list.shtml](http://www.waterboards.ca.gov/losangeles/water_issues/programs/tmdl/tmdl_list.shtml)> [as of Apr. 30, 2013].)

Note that the City of El Monte's estimate is for the cost of complying with only one of the TMDLs, the Los Angeles River Bacteria TMDL. The City did not estimate its compliance costs for the Los Angeles River Metals or Trash TMDLs.

<sup>16</sup> Declaration of Mitch Lansdell (Lansdell Decl.), p. 1, ¶ 3. The WLAs at issue for the City of Gardena are those in the Dominguez Channel and Long Beach and Los Angeles Harbors Toxics TMDL [*sic*] (March 23, 2012 effective date). (TMDL effective dates available at <[http://www.waterboards.ca.gov/losangeles/water\\_issues/programs/tmdl/tmdl\\_list.shtml](http://www.waterboards.ca.gov/losangeles/water_issues/programs/tmdl/tmdl_list.shtml)> [as of Apr. 30, 2013].)

\$1 million/year.<sup>17</sup> The cities argue that those estimated costs rise to the level of substantial hardship because of the effects on their respective budgets.<sup>18</sup> There are several problems with these cities' arguments.

First, the four cities offer little to no support for their cost estimates. The City of El Monte estimates nearly \$3 million in costs, with no explanation of how it reached that estimate.<sup>19</sup> The overall cost estimates in the stay requests of Carson, Gardena and Lawndale are each based on a "treatment cost of \$500,000 per square mile."<sup>20</sup> No city, however, explains how it reaches this \$500,000 per-square-mile multiplier. The declarations do not indicate what "treatment" will be done, when it will be done, or anything other than a broad assertion of a cost. Timing is particularly important because the TMDLs referenced by the petitioners have staged implementation. For example, the assertions concerning hypothetical remediation arising from the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL would not occur for several years but, even then, only if the sediment quality assessment required further remediation, and it is unclear whether Petitioners would have any responsibility for that remedial action.<sup>21</sup> Section 2053 requires that the declarations submitted by Petitioners "support" the claims within the stay requests. None did so here.

Second, the TMDL WLAs to which the four cities object were adopted in the period of time between March 2008 and March 2012, ranging from nine months to over four years prior to the adoption of the MS4 Permit.<sup>22</sup> Each TMDL was subject to regulatory notice and comment periods prior to adoption.<sup>23</sup> (In fact, three of the cities submitted written comments to the Los Angeles Water Board on at least three of TMDLs at issue during the respective notice and comment periods.<sup>24</sup>) Each TMDL explicitly assigned WLAs and included statements that the WLAs would be implemented through a reissued MS4 permit to the municipalities. No city sought judicial review of the TMDLs. Each city knew, and had notice to budget for, the fact that the WLAs within those TMDLs would result in effluent limits for the water bodies to which they

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<sup>17</sup> Declaration of Stephen N. Mandoki (Mandoki Decl.), p. 1 ¶ 3. The WLAs at issue for the City of Lawndale are those in the Dominguez Channel Toxics TMDL [*sic*] (Mar 23, 2012 effective date). (TMDL effective dates available at <[http://www.waterboards.ca.gov/losangeles/water\\_issues/programs/tmdl/tmdl\\_list.shtml](http://www.waterboards.ca.gov/losangeles/water_issues/programs/tmdl/tmdl_list.shtml)> [as of Apr. 30, 2013].)

<sup>18</sup> Biggs, Lansdell and Mandoki Decls., each at p. 2, ¶ 5, and Gomez Decl., at p. 3, ¶ 6.

<sup>19</sup> Gomez Decl., at p. 1, ¶ 3.

<sup>20</sup> Biggs, Lansdell and Mandoki Decls., each at p.1, ¶ 3.

<sup>21</sup> See State Water Board Res. 2012-0008, ¶¶ 5, 8, & 9.

<sup>22</sup> See footnotes 14-17, *ante*, pp.4-5.

<sup>23</sup> See 40 C.F.R. § 25.5(b)..

<sup>24</sup> The city of Carson commented on the: (1) Los Angeles River Bacteria TMDL (<[http://www.waterboards.ca.gov/water\\_issues/programs/tmdl/comments\\_lariver\\_indictr.shtml](http://www.waterboards.ca.gov/water_issues/programs/tmdl/comments_lariver_indictr.shtml)> [as of May 3, 2013]); (2) Los Angeles River Trash TMDL (<[http://www.waterboards.ca.gov/water\\_issues/programs/tmdl/comments\\_larvws\\_trash.shtml](http://www.waterboards.ca.gov/water_issues/programs/tmdl/comments_larvws_trash.shtml)> [as of May 3, 2013]); and (3) Dominguez Channel, Los Angeles and Long Beach Waters Toxic Pollutants TMDL (<[http://www.waterboards.ca.gov/public\\_notices/comments/dmngzchnnl/cmmnts102811.shtml](http://www.waterboards.ca.gov/public_notices/comments/dmngzchnnl/cmmnts102811.shtml)> [as of May 3, 2013]).

The City of El Monte commented on the Los Angeles River Bacteria TMDL (<[http://www.waterboards.ca.gov/water\\_issues/programs/tmdl/comments\\_lariver\\_indictr.shtml](http://www.waterboards.ca.gov/water_issues/programs/tmdl/comments_lariver_indictr.shtml)> [as of May 28, 2013]).

The city of Lawndale commented on the Dominguez Channel, Los Angeles and Long Beach Waters Toxic Pollutants TMDL (<[http://www.waterboards.ca.gov/public\\_notices/comments/dmngzchnnl/cmmnts102811.shtml](http://www.waterboards.ca.gov/public_notices/comments/dmngzchnnl/cmmnts102811.shtml)> [as of May 3, 2013]).

discharge.<sup>25</sup> Further, regardless of whether the WLAs were expressed as narrative or numeric effluent limitations they would have required expenditures by the Petitioners to achieve the WLAs.

Because the cities provide no support for their cost estimates (including three of the cities' \$500,000 multiplier), those cost estimates are unreliable and do not support a finding of substantial harm, either as cost estimates or with regard to those estimates' impacts on the cities' budgets.<sup>26</sup> These short-comings are further amplified by the lack of any accounting for how the costs will be incurred during the time the State Water Board considers the petitions on the merits, which the board's precedential orders stress is the relevant time period to analyze substantial harm.<sup>27</sup> Moreover, with respect to the translation of WLAs into the MS4 Permit's effluent limitations, there are no elements of surprise or haste on the part of the Los Angeles Water Board that prevented responsible budgeting on the part of Petitioners, or that could warrant a finding of substantial harm under section 2053 that is traceable to the adoption of the MS4 Permit.

#### *Analysis of Petitioners' Allegations: Trash Costs*

Similar rationales apply to the city of Carson's concern about the \$500,000 estimated cost to install trash-exclusion controls required by the Machado Lake Trash TMDL, and the city of Sierra Madre's nearly \$170,000 in estimated costs and additional efforts to comply with the Los Angeles River Trash TMDL.<sup>28</sup>

With regard to the city of Carson, there is no support in the city's declaration regarding how it arrived at that \$500,000 figure.<sup>29</sup> Second, the Machado Lake Trash TMDL was adopted in March 2008, and the MS4 Permit requires final compliance with its provisions by March 2016, giving the city eight years to budget for the costs associated with that TMDL.<sup>30</sup>

With regard to Sierra Madre, it asserts that it "does not have the immediate financial resources" to satisfy the \$170,000 in its estimated compliance costs. It also argues that substantial harm exists because it is "physically and logistically impossible" to comply by December 28, 2012, because the city needs time to install the trash catch-basin inserts in each of its 231 catch basins, and execute agreements with and obtain permits from the County of Los Angeles for installation and maintenance efforts.<sup>31</sup> The Los Angeles River Trash TMDL was adopted by the Los Angeles Water Board on September 23, 2008. The MS4 Permit requires final compliance

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<sup>25</sup> See 40 C.F.R. § 122.44(d)(1)(vii)(B).

<sup>26</sup> Furthermore, no city discusses why raising revenues to help with the costs of compliance is infeasible. Also, while the cities of Carson and Gardena calculate the impact as a percentage of their general fund budgets, the city of Lawndale only provides the percentage of its smaller public works budget (i.e., the subset of its general fund budget). (See Biggs, Lansdell, and Madoki Decls., each p. 2, ¶ 5.)

<sup>27</sup> See, e.g., State Water Board Orders WQ 2006-0007 (*Boeing Company*), p.4 and WQO 2002-0007 (*County of Los Angeles, et al.*), p. 3.

<sup>28</sup> See Biggs Decl., p. 1, ¶ 3.

<sup>29</sup> *Id.*

<sup>30</sup> TMDL effective dates available at <[http://www.waterboards.ca.gov/losangeles/water\\_issues/programs/tmdl/tmdl\\_list.shtml](http://www.waterboards.ca.gov/losangeles/water_issues/programs/tmdl/tmdl_list.shtml)> [as of Apr. 30, 2013]; See MS4 Permit, Attachment N, ¶ B.2. for Machado Lake Trash TMDL March 2016 compliance deadline.

<sup>31</sup> Declaration of James Carlson (Carlson Decl.), pp. 3-4 [*sic*], ¶¶ 3-6.



with the TMDL by September 30, 2016.<sup>32</sup> By the time compliance is expected, Sierra Madre will have had eight years to budget both the time and money for its compliance efforts.

There is no substantial harm proven that would give rise to the need for a stay. Similarly, to the extent there are speculative future costs, the State Water Board will be able to consider and address those issues on the merits. The cities' allegations with respect to trash costs do not demonstrate substantial harm during the time the State Water Board reviews the petitions on the merits.

## 2. Exposure to Potential Liability

Using another unsupported \$500,000 multiplier, the cities of Carson, El Monte, Gardena, and Lawndale allege substantial harm due to exposure to potential legal liabilities.<sup>33</sup> The cities of Carson, El Monte, Gardena, and Lawndale respectively estimate their potential costs at \$9.5 million/year, \$3.5 million/year, \$2.95 million/year, and \$1 million/year to remediate toxic contamination pursuant to the Los Angeles and Long Beach Harbors Harbors Toxics and Metals TMDL that was incorporated by the Los Angeles Water Board into the MS4 Permit.<sup>34</sup>

The City of Sierra Madre argues that the inclusion of receiving water limitations into the MS4 Permit (presumably due to the lack of an explicit provision excusing violations if Sierra Madre is making good faith efforts to comply) exposes the city to immediate potential liability from the effective date of the MS4 Permit, December 28, 2012. The receiving water limitations language, it argues, gives the city no time to develop an implementation plan to address potential exceedances, or to ensure compliance.<sup>35</sup>

As with the estimated compliance costs analyzed above, the cities of Carson, El Monte, Gardena and Lawndale's liability estimates are unsupported, and therefore insufficient to support a finding of substantial harm. With respect to the Los Angeles and Long Beach Harbors Harbors Toxics and Metals TMDL, it is uncertain whether these cities will need to undertake any "remediation" activity at all based on potential future exceedances. The absence of any substantiated harm also underscores that the harm may not occur during the time the State Water Board considers the petitions on the merits.

Sierra Madre's argument for more time to develop an implementation plan during the State Water Board's review of its petition on the merits is similarly unpersuasive (and unsupported by declaration, as required by section 2053). The receiving water limitations in this MS4 Permit are the same limitations that were in the prior version of this permit since 2001.<sup>36</sup> The city has had

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<sup>32</sup> MS4 Permit, Attachment O, ¶ A.2. Although Sierra Madre's stay request states that it is also impossible to achieve compliance with the interim requirements, the declaration supporting the stay request refers only to installing all 231 catch basin inserts prior to December 28, 2012. (See Carlson Decl. at p. 4, ¶ 6.) The declaration, therefore, does not reflect interim milestones and the temporal element of a stay analysis, but instead, reflects full compliance, which is not required until 2016.

<sup>33</sup> Biggs, Gomez, Lansdell, and Madoki Decls., each at pp. 1-2, ¶ 4.

<sup>34</sup> *Ibid.*

<sup>35</sup> City of Sierra Madre Stay Request, p. 15, Part X.A.

<sup>36</sup> MS4 Permit, Attachment F, p.36; see also MS4 Permit, part B ("Permit History"). To the extent there may be slight refinements to the prior receiving water limitations language, the stay requests provide no indication of how those changes would affect Petitioners' compliance costs or potential liability.

many years to develop an implementation plan; the fact that it has not done so, and may suffer harm as a result, does not support issuance of a stay.

Furthermore, the State Water Board has previously determined that the possibility of final enforcement actions during the period a stay would be in effect is too speculative to warrant a stay.<sup>37</sup> The Board has reasoned that the possibility, or even the probability, of enforcement actions does not justify a stay because it is very unlikely that these actions would be concluded during the time a stay would remain in effect. Should an enforcement action be finalized during the time pending review of the petition, the Petitioners may renew their stay requests.

### 3. Costs to Comply with BMP and LID Requirements

The city of Sierra Madre estimates \$12,000 in annual costs to comply with BMP and LID inspection requirements by permittees. It is unclear which BMP and LID provisions Sierra Madre seeks to stay, whether it is general inspection requirements for new development or those requirements for permittees that elect to participate in the "Watershed Management Program" (WMP).<sup>38</sup> The city argues that this cost amounts to substantial harm because it will have to redirect money away from other city programs in order to comply; that redirection, if later proven unnecessary by the State Water Board's Order on the merits, amounts to substantial harm.<sup>39</sup>

There are several short-comings with the city's argument. As before, the city does not offer support for how it arrived at this estimate. Moreover, the city offers no percentage or ratio as to what impact the expenditure of \$12,000 would have on the city's overall budget. It also offers no explanation of what impact, if any, that redirection would have on the programs or projects from which the money is redirected. These failures to provide information mean that the State Water Board does not have a picture of the alleged substantial harm that the city faces. Further, the MS4 Permit has a time schedule in place for compliance with the WMP provisions, ranging from 12-18 months from the date of adoption.<sup>40</sup> That time schedule gives the city ample time to budget for its estimated \$12,000 cost, irrespective of the State Water Board's determination on the merits.

Finally, to the extent the city of Sierra Madre may be seeking a stay of the additional BMP and LID requirements associated with the WMP process, that is an optional element of the MS4 Permit. Essentially, the MS4 Permit affords the municipalities a choice to participate in a WMP. The city has an option not to incur the costs. The State Water Board has never found that an optional program requirement could support a finding of substantial harm.

For all the foregoing reasons, Petitioners have therefore failed to satisfy the first prong of substantial harm to the Petitioners if a stay is not granted. Because the State Water Board has repeatedly held that all three prongs of section 2053 must be satisfied to grant a stay, the failure to satisfy the first prong is grounds to deny the stay requests.

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<sup>37</sup> *Boeing Company, supra*, p. 10; see also State Water Board Order No. WQ 2009-0013 (*Department of the Navy*), p. 4.

<sup>38</sup> Declaration of Bruce Inman (Inman Decl.), pp. 1-2, ¶ 4; see MS4 Permit, Part VI.C.

<sup>39</sup> City of Sierra Madre Stay Request, p. 16, Part X.A.

<sup>40</sup> MS4 Permit, Part C, Table 9.

**B. Lack of Substantial Harm to Other Interested Persons or to the Public Interest**

As with the first prong, the cities of Carson, El Monte, Gardena and Lawndale make nearly identical arguments: (1) there is no evidence that any of the four cities is causing or contributing to exceedances of ambient standards at their respective outfalls; and (2) no receiving-water monitoring data demonstrate that any of the cities is causing or contributing to exceedances of ambient WLAs. Put another way, these four cities contend there is no evidence that the beneficial uses of the city's respective receiving waters are being impaired by the cities.<sup>41</sup>

In addition, Sierra Madre argues that during the term of a stay, the public interest would not be harmed because the city would continue to make progress to achieve compliance with water quality standards. That is, it will continue to implement BMPs to achieve compliance with receiving water limitations and WLAs. By way of example, the city cites to the fact that it has installed two catch basin inserts in order to test their field efficacy, prior to installing them in the remaining 229 basins.<sup>42</sup> Sierra Madre further argues that staying the receiving water limitations and the numeric WLAs (which create the potential for third-party lawsuits) will not negatively impact water quality. Nor would water quality be harmed by the State Water Board issuing a stay on the provisions regarding the level of new-development LID and BMP inspections.<sup>43</sup>

**1. Analysis of the Arguments Made by the Cities of Carson, El Monte, Gardena and Lawndale**

The stay requests of the cities of Carson, El Monte, Gardena and Lawndale pay rather cursory attention to the second prong of section 2053. Their arguments focus on the absence of harm to the public interest in light of the cities' past practices, rather than in light of the new requirements within the MS4 Permit, and the effect that a stay of those requirements would have on the public interest.<sup>44</sup> They fail to discuss how a stay of the incorporated TMDL requirements (WLAs and installation of trash-exclusion devices) that they challenge would not cause harm to other interested persons or the public interest.

With respect to the WLAs that the four cities seek to stay, the Los Angeles Water Board adopted TMDLs because the water bodies were on the 303(d) List for failing to meet water quality standards. Beneficial uses were not being protected. Each TMDL included not only WLAs but also a schedule of activities and load reductions to provide an orderly means of attaining water quality standards. The practices required to implement the WLAs, whether expressed as numeric or narrative effluent limitations, would assist in protecting beneficial uses. Instead, Petitioners would have the entirety of the requirements stayed. In doing so, the four cities have not articulated how this would not harm the public's interest in protecting beneficial uses and achieving water quality standards. The four cities therefore failed to satisfy their burden under the second prong of the State Water Board's stay regulations.

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<sup>41</sup> Biggs, Lansdell, and Madoki Decls., each at p. 2, ¶ 6; Gomez Decl. at pp. 3-4, ¶ 7.

<sup>42</sup> City of Sierra Madre Stay Request, at pp. 16-17, Part X.B.; Carlson Decl. at p. 3, ¶ 4.

<sup>43</sup> City of Sierra Madre Stay Request, at pp. 16-17, Part X.B. Note, this assertion is unsupported by declaration, as required by section 2053.

<sup>44</sup> Biggs, Lansdell, and Madoki Decls., each at p. 2, ¶ 6; Gomez Decl. at pp. 3-4, ¶ 7.

## 2. Analysis of the Arguments Made by the City of Sierra Madre

The city of Sierra Madre's stay request undercuts its own arguments with respect to harm to the public interest and other persons.

Under the first prong of section 2053, the city implied that the six years it had under the previous permit to develop a receiving-water-limitations implementation plan was insufficient. But, under this second prong, it would have the State Water Board believe that during the short term of a stay, it would "continue to...achieve compliance."<sup>45</sup> Under this second prong, it recognizes that it has installed 2 of 229 catch-basin inserts during the four years that the Los Angeles River Trash TMDL's existence; while under the first prong, it stressed that it does not have time or money to achieve compliance, and apparently made insufficient efforts in those four years to reach permitting and monitoring arrangements with the County of Los Angeles.<sup>46</sup>

As its fellow Petitioners did above, Sierra Madre also fails to analyze the harm to the public interest if a stay of the provisions it challenges were to be granted. So, for example, its argument that \$12,000 could be saved if the LID and BMP requirements were stayed, fails to inform the State Water Board how the public interest will not be harmed by a stay of those inspection requirements.

The Petitioners have the burden of proving the elements of all three prongs of the State Water Board's stay regulations. Each Petitioner has failed to satisfy the second prong of no substantial harm to the public interest.

### C. Substantial Questions of Fact or Law Regarding the Disputed Action

Petitioners contend that substantial issues of law are presented by their stay requests. Specifically, the cities of Carson, El Monte, Glendale and Lawndale assert that (1) the MS4 Permit impermissibly revises the non-stormwater discharge prohibition to include discharges from and through the MS4 in addition to "to" or "into" the MS4; and (2) the State Water Board needs to resolve the MS4 Permit's alleged failure to comply with federal and state law and State Water Board water quality orders, correct ambiguities in the MS4 Permit, and remedy violations of administrative procedures for "proper" public review and comment.<sup>47</sup>

The city of Sierra Madre asserts that (1) the MS4 Permit's receiving water limitations are inconsistent with federal law, not supported by substantial evidence, and do not represent good policy; (2) numeric limits for TMDL WLAs are not required by federal law, and such limits are not feasible; and (3) the 12-month timeframe within the MS4 Permit is not sufficient time for the city to develop an adequate and comprehensive WMP.<sup>48</sup>

Since Petitioners have failed to satisfy the first two prongs of the stay regulations, it is unnecessary to resolve whether there are substantial questions of fact or law.<sup>49</sup> Along with the

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<sup>45</sup> City of Sierra Madre Stay Request, at pp. 16-17, Part X.B.

<sup>46</sup> *Ibid.*

<sup>47</sup> Biggs, Lansdell, and Madoki Decls., each at p. 2, ¶¶ 7-8; Gomez Decl., at pp. 1-4, ¶¶ 4-5, 8-10

<sup>48</sup> City of Sierra Madre Stay Request, at pp. 17, Part X.C.

<sup>49</sup> State Water Board Order WQ 2006-0007 (*Boeing Company*), p. 4.

issues raised above, substantial questions of law and fact may well be presented in the 37 petitions for review.<sup>50</sup> The State Water Board can resolve any necessary factual and legal questions during its review on the merits.

#### V. CONCLUSION

Petitioners have not shown that they will suffer substantial harm if a stay is not granted. Petitioners have also provided insufficient proof that a stay will not substantially harm the public interest. For these reasons, I recommend that the request for stay be denied. A letter to that effect is attached for your signature.

Attachment

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<sup>50</sup> In this case, it is very difficult to determine whether there are any substantial questions of law or fact supporting the requests for a stay, because Petitioners have provided little to no analysis beyond their assertions. Further, other than Sierra Madre, Petitioners have not provided separate points and authorities supporting their stay requests.