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SENT VIA EMAIL & INTER-DEPARTMENT MAIL

TO: Dorothy Rice
Executive Director


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

DATE: July 16, 2008

SUBJECT: *CITIES OF ARCADIA, ET AL. V. STATE WATER RESOURCES CONTROL BOARD, ET AL.*, (SUPER. CT. ORANGE COUNTY, 2007, NO. 06CCO2974):
IMPACT OF PEREMPTORY WRIT OF MANDATE ON ENROLLMENTS UNDER
THE GENERAL INDUSTRIAL AND GENERAL CONSTRUCTION STORM
WATER PERMITS

ISSUE

Following the recent ruling in the above-mentioned matter, may the State Water Resources Control Board (State Water Board) continue processing enrollments under statewide general National Pollutant Discharge Elimination System (NPDES) permits for discharges of construction and industrial storm water within the Los Angeles region?

CONCLUSION

No. The State Water Board must immediately cease enrollments for dischargers within the geographic region of the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) who file notices of intent to comply under the NPDES General Permit for Storm Water Discharges Associated with Construction Activity (Construction General Permit)¹ and under the General Permit for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities (Industrial General Permit).² The prohibition on processing enrollments will remain in effect only so long as the State Water Board remains subject to the prohibitory terms of the writ of mandate.

DISCUSSION

On July 2, 2008, the Superior Court for the County of Orange issued a peremptory writ of mandate in the matter of the *Cities of Arcadia, et al. v. State Water Resources Control Board*,

¹ State Water Board Order No. 99-08-DWQ, adopted 8/19/99.

² State Water Board Order No. 97-03-DWQ, adopted 4/17/97.

et al. (Super. Ct. Orange County, 2007, No. 06CCO2974) (*Arcadia II*).³ The court invalidated the Los Angeles Water Board's triennial review of its Basin Plan, conducted in 2005. While the State Water Board was not a part of the 2005 triennial review, it is a named defendant in the lawsuit because of its role in approving water quality standards contained in the Los Angeles Basin Plan. The court ordered the Los Angeles Water Board and State Water Board (collectively, water boards) to review and, where appropriate, revise the water quality standards in the Los Angeles Basin Plan that apply to storm water.

Until such time as the water boards complete their review process, the court enjoined the water boards from undertaking any activities related to implementation, application and/or enforcement of water quality standards contained in the Los Angeles Basin Plan, as applied to storm water. The prohibition against activities related to implementation, application and/or enforcement of standards applies until the water quality standards have been reviewed and, where appropriate, revised.⁴

While the writ of mandate applies to both the Los Angeles Water Board and the State Water Board, this memorandum specifically addresses one major activity of the State Water Board—enrollments under the statewide storm water permits. This memorandum describes the ruling and explains its application to enrollments under the two general permits. Other activities subject to the writ will be addressed in other memoranda.

Arcadia II Writ of Mandate

In a prior ruling, the *Arcadia II* court concluded that the Los Angeles Water Board had not analyzed the reasonableness of its water quality standards or the Water Code section 13241⁵ factors, as they relate to storm water. The court further concluded that the Los Angeles Water Board's triennial review of its Basin Plan was the appropriate vehicle for analyzing the reasonableness of the water quality standards and the Water Code section 13241 factors, as they relate to storm water. As a result, the court concluded the Los Angeles Water Board was required to consider (1) the reasonableness of water quality standards as applied to storm water, and (2) the economic considerations and other factors contained in Water Code section 13241 pertaining to the water quality standards as applied to storm water. The court also concluded that the Basin Plan inappropriately included "potential" use designations applicable to storm water.

³ The case is referred to as *Arcadia II* to distinguish it from prior litigation by the City of Arcadia challenging a trash total maximum daily load (TMDL) for the Los Angeles region. While the superior court judge signed the writ on July 2, 2008, petitioners did not serve the notice of entry of judgment until July 3, 2008.

⁴ There is a possibility the writ or its prohibition could be modified by subsequent court actions or an appeal.

⁵ Water Code section 13241 provides that each regional water board, in establishing water quality objectives, must consider a number of factors. These factors include, but are not limited to "past, present, and probable future beneficial uses of water," as well economic considerations and water quality conditions that "could reasonably be achieved."

The July 2 writ of mandate directs and commands the water boards:

to cease, desist and suspend all activities relating to the implementation, application and/or enforcement of the Standards in the Basin Plan, as applied or to be applied to Storm Water, whether through TMDLs or other Basin Plan amendments or regulations, or through NPDES permits, water quality policies or otherwise. . . .

(Writ of Mandate, ¶ 4.) As used in the writ of mandate, the term "standards" means "designated beneficial uses of the water as well as the water quality objectives established to achieve such beneficial uses." (*Id.*, fn. 1.)

Effect of Writ with Respect to State Water Board and Existing General Storm Water Permits for Industrial and Construction Activities

In California, the State Water Board has issued general permits for storm water discharges associated with construction activities and industrial activities. Rather than issuing permits on a project-by-project basis or facility-by-facility basis, the general permits allow construction projects and industrial facilities that meet eligibility requirements to enroll under the statewide permits. Persons enroll under the applicable general permit by submitting a "Notice of Intent" (NOI) to comply, an applicable fee, and a site map. The State Water Board must process the NOI before a discharger is enrolled in the applicable general permit and afforded coverage under the applicable NPDES permit. Consistent with federal law,⁶ the Construction General Permit and Industrial General Permit contain provisions requiring compliance with applicable water quality standards.

The current role of the State Water Board in "activities relating to the implementation, application and/or enforcement" of Los Angeles Basin Plan water quality standards applied to storm water includes processing enrollments for dischargers who file notices of intent to discharge under these general permits. An enrollment under either general permit is akin to issuing a person an NPDES permit for storm water discharges. Further, the enrollment of a project or facility in the Los Angeles region will require the facility to develop a storm water pollution prevention plan to implement water quality standards in the Los Angeles region's Basin Plan, and require further actions to actually achieve and implement water quality standards in the Los Angeles region's Basin Plan. Within the terms of the writ, an enrollment under either general permit in the Los Angeles region specifically concerns the "implementation" or "application" of Los Angeles "Basin Plan" "standards" to "Storm Water" "through [an] NPDES permit." Also, the writ extends to "all activities relating to" the foregoing. Enrollment of new dischargers in the Los Angeles region for coverage under these permits would, therefore, constitute implementing and applying the water quality standards contained in the Basin Plan to storm water.

⁶ See 33 U.S.C. §§ 1311(b)(1)(C), 1342(p)(3)(A); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1164-1165

Enrolling a project in the Los Angeles region would violate the terms of the writ. Thus, in order to comply with the court's writ of mandate, the State Water Board must immediately stop processing new NOIs to discharge within the Los Angeles region.

Effect of Writ with Respect to Other State Water Board Activities

This memorandum only addresses the narrow issue of the application of the writ to enrollments under the existing Construction General Permit and Industrial General Permit. Other issues are being addressed through separate memoranda or letters.⁷ In particular, a future memorandum will specifically address the adoption of new statewide storm water permits. Other State Water Board activities pertaining to the Los Angeles region that are potentially subject to the writ include, but are not limited to, enforcement actions, processing of petitions under Water Code section 13320, processing Basin Plan amendments pursuant to Water Code section 13245, and the processing of certain grants or grant payments under the State Water Board's various grant programs.

If you have any questions about this matter, please contact me or Marleigh Wood of my staff.

cc: **[All via email only]**
State Board Members
Jonathan Bishop, Exec
Tom Howard, Exec
Darrin Polhemus, DWQ
Bruce Fujimoto, DWQ
Tracy Egoscue, Los Angeles Water Board
Alexis Strauss, USEPA Region 9

⁷ See, e.g., Memorandum to Tracy Egoscue (Los Angeles Water Board) from Michael Lauffer (Jul. 16, 2008, indicating that writ prohibited State Water Board from processing certain basin plan amendments from the Los Angeles region); Letter to Margaret Rosegay (Counsel for ExxonMobil Oil Corporation) from Michael Lauffer (Jul. 11, 2008, indicating that the writ prohibited the State Water Board from processing ExxonMobil's petition challenging a Los Angeles Water Board NPDES permit).