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10 **STATE WATER RESOURCES CONTROL BOARD**

11
12
13 NATURAL RESOURCES DEFENSE
14 COUNCIL, LOS ANGELES
15 WATERKEEPER, and HEAL THE
16 BAY,

15 Petitioners,
16 v.

17 CITIES OF ARTESIA, NORWALK,
18 LA MIRADA, SIGNAL HILL,
19 HUNTINGTON PARK, BELL
20 GARDENS AND PICO RIVERA

19 Respondents.

SWRCB/OCC File A-2386

**MOTION AND SUPPORTING
MEMORANDUM TO REJECT AS
UNTIMELY AND MOOT
CHALLENGE FILED BY NATURAL
RESOURCES DEFENSE COUNCIL,
INC., LOS ANGELES
WATERKEEPER, AND HEAL THE
BAY TO LA REGIONAL BOARD
DECISION ON WMPs**

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page No.

I.	THE PETITIONERS’ “ADDENDUM” SHOULD BE REJECTED AS UNTIMELY AND THE ORIGINAL PETITION SHOULD BE DISMISSED AS MOOT	3
II.	THE PETITION ADDENDUM IS BOTH NEW AND UNTIMELY	4
A.	The Original Petition was limited to a challenge to the LA Executive Officer’s conditional approval issued in April 2015.....	4
B.	The Addendum raises new issues about the LA Regional Board’s decision taken in September 2015.....	5
1.	The LA Board found the WMPs sufficient in a September 10, 2015 hearing.	5
2.	The “Addendum” to the Original Petition seeks to overturn the September 10, 2015 ruling by the LA Board.....	6
3.	Both statute and regulation requires a petition within 30 days of an “action” by a regional board.	6
4.	The “Addendum” was filed more than 30 days after the LA Board’s September 10, 2015 decision.	8
III.	THIS BOARD SHOULD NOT TAKE UP THE SEPTEMBER 10, 2015 DECISION ON ITS OWN MOTION	8
A.	Petitioners are well aware of the 30-day limit for seeking review of an action by a regional board.	8
B.	Petitioners already had a full and fair hearing before the LA Board.	9
IV.	THE ORIGINAL PETITION IS MOOT IN LIGHT OF THE EXECUTIVE OFFICER’S FINAL APPROVAL OF THE REVISED WMPs.....	10
V.	CONCLUSION.....	11

1 **I. THE PETITIONERS' "ADDENDUM" SHOULD BE REJECTED AS**
2 **UNTIMELY AND THE ORIGINAL PETITION SHOULD BE DISMISSED**
3 **AS MOOT**

4 Four cities involved in the Lower San Gabriel River (LSGR) watershed
5 management group, specifically Artesia, La Mirada, Norwalk and Pico Rivera, the
6 City of Signal Hill, lead permittee in the Lower Los Angeles River watershed
7 management group, and the Cities of Bell Gardens and Huntington Park,
8 permittees in the Upper Reach 2 Los Angeles River watershed management group,
9 (collectively, "Respondents" or "Real Parties in Interest"), jointly file this motion to
10 reject as untimely the "addendum" to the petition and request to deem the original
11 petition as moot.

12 In their joint "Addendum for Petition for Review of Los Angeles Regional
13 Water Quality Control Board Executive Officer's Action to Conditionally Approve
14 Nine WMPs Pursuant to the L.A. County MS4 Permit" ("Addendum"), the Natural
15 Resources Defense Council, Inc. (NRDC), Los Angeles Waterkeeper, and Heal the
16 Bay (collectively, "Petitioners") seek to convert a prior challenge to nine watershed
17 management programs (WMPs) and a procedural approval by the LA Regional
18 Water Quality Control Board's ("LA Board") Executive Officer (Mr. Samuel Unger)
19 into a new challenge to three WMPs and separate actions taken by the LA Board.
20 But Petitioners failed to file this appeal within 30 days of the LA Board's decision
21 taken on September 10, 2015. (Cal. Code of Regulations ("CCR"), tit. 23, § 2050(a);
22 RB-AR18434 [Certified Transcript for Sept. 10, 2105 LA Board Meeting]). The
23 Respondents accordingly move to reject the Addendum as untimely.

24 Respondents further move to dismiss Petitioners' initial May 28, 2015
25 "Petition for Review of Los Angeles Regional Water Quality Control Board
26 Executive Officer's Action to Conditionally Approve Nine WMPs Pursuant to the
27 L.A. County MS4 Permit" ("Original Petition") as moot in light of two subsequent
28 events: (1) the LA Board Executive Officer's subsequent *final approval* of the nine

1 WMPs; and (2) the LA Board’s decision to ratify its Executive Officer’s final
2 approval. These subsequent events render the Original Petition’s claims and
3 arguments moot and therefore the Original Petition should be dismissed.¹

4 **II. THE PETITION ADDENDUM IS BOTH NEW AND UNTIMELY**

5 **A. The Original Petition was limited to a challenge to the LA Executive**
6 **Officer’s conditional approval issued in April 2015.**

7 As Petitioners themselves describe it, on May 28, 2015 (within 30 days of a
8 series of April letters issued by the LA Board’s Executive Officer), they filed a
9 petition challenging the Executive Officer’s conditional approval of the nine
10 WMPs, pursuant to Section 2050 of Title 23 of the California Code of Regulations.
11 (“Original Petition” as described in Addendum at p. 3, Ins. 8-12). Petitioners clearly
12 knew of that Section’s 30-day time limit, because they filed their Original Petition
13 within that 30-day limit. (See Original Petition Memorandum at p. 1, Ins. 10-12
14 [“However, the California Water Code requires all improper actions by the
15 Executive Officer be appealed...within 30 day [sic] of such action.”]).

16 The Original Petition challenged the Executive Officer’s April 28, 2015
17 decision to conditionally approve nine separate WMPs that were initially
18 submitted in June 2014, revised after substantial LA Board staff comments, and
19 resubmitted in January 2015. (Original Petition at pp. 4-5). The Original Petition
20 argued that the Executive Officer lacked authority to “conditionally approve” the
21 WMPs. According to Petitioners, the Executive Officer was constrained by the term
22 “approve or disapprove” contained in one line of the LA MS4 Permit. Petitioners
23 argued that the Executive Officer’s action in “conditionally approving” was

24 _____
25 ¹ Respondents reserve the right to file a separate set of responses to the substantive
26 issues raised in the Petitioner’s Addendum to Petition (and the separate Original
27 Petition) by January 15, 2016. Nothing in this motion and supporting
28 memorandum should be deemed a waiver of the right to respond to the substance
of the Petitioner’s arguments in their two separate filings before this Board.

1 “illegal” and beyond his scope of authority. (*Id.* at pp. 6-9).

2 The Original Petition also challenged the Executive Officer’s substantive
3 decision to conditionally approve all of the nine submitted WMPs, although it only
4 expressly articulated arguments about the inadequacy of three specific WMPs,
5 including the one submitted by the LSGR Group. (Original Petition at pp. 11-15; *see*
6 RB-AR18211 [statement of “significant issues and responses” prepared for LA
7 Board September 10, 2015 meeting describing issues raised in Original Petition]).

8 **B. The Addendum raises new issues about the LA Regional Board’s**
9 **decision taken in September 2015.**

10 **1. The LA Board found the WMPs sufficient in a September 10,**
11 **2015 hearing.**

12 On September 10, 2015, the LA Board heard evidence and argument over the
13 prior “conditional approval” by its Executive Officer of nine WMPs. (RB-AR18297
14 [agenda item no. 16]).² After considering over 7,000 pages of materials on a disc
15 (RB-AR18761 [comments of Member Glickfield]) and additional oral and written
16 submittals at the meeting, the LA Board approved all nine of the WMPs as
17 sufficient. The LA Board discussed the substance of the WMPs under the terms of
18 the LA MS4 Permit and found the WMPs were indeed adequate. (RB-AR18763-
19 18801 [LA Board discussion on “second issue” of sufficiency of plans and vote
20 approving same]).

21 The LA Board’s action on September 10, 2015 was openly announced at the
22 end of the meeting by its secretary: “Six to one, the motion passes.” (RB-AR18800
23 [statement of Ms. Moffett]).³ Although there was a brief colloquy between Board
24

25 ² Respondents cite to the Appellate Record (AR) in the same format as presented by
the LA Board.

26 ³ Actually, Member Glickfield abstained (RB-AR18799), so the vote should have
27 been recorded as 6-0-1. But, however one describes the vote, the LA Board clearly
approved the sufficiency of all nine WMPs by a solid majority.

28

1 Chair Stringer and legal counsel Fordyce immediately after the vote, it ended with
2 the conclusion that: "If we've done our job we're done. Okay, thank you very
3 much." (RB-AR18801 [statement of Chair Stringer]).

4 There was no additional remaining issue to decide after the vote; the LA
5 Board had affirmed the Executive Officer's authority under the LA MS4 Permit and
6 his earlier determination that the submitted WMPs were sufficient under the LA
7 MS4 Permit terms. This determination was made on September 10, 2015.

8 **2. The "Addendum" to the Original Petition seeks to overturn**
9 **the September 10, 2015 ruling by the LA Board**

10 In their "Addendum", Petitioners concede that what they now seek is not
11 reversal of the Executive Officer's April 2015 conditional approval of various
12 WMPs, but rather to "overturn" the Regional Board's action taken on September
13 10, 2015. (Addendum at p. 27, lns. 9-12). Indeed, Petitioners describe the purpose of
14 their October 30, 2015 "Addendum" as "to challenge the LA Board's *September 10,*
15 *2015 decision* and approval of the Los Angeles River Upper Reach 2, Lower San
16 Gabriel River, and Lower Los Angeles River final WMPs." (Addendum at p. 3, lns.
17 21-23 [emphasis added]). Petitioners now focus almost exclusively on the LA
18 Board's action in September, which they describe rhetorically as "inappropriate,
19 improper, and an abuse of discretion." (Addendum at p. 2, lns. 7-8). Accordingly,
20 what Petitioners filed with the State Board is not an "addendum" to their Original
21 Petition of May 28, 2015, but rather a new petition challenging a wholly separate
22 action of the LA Board.

23 **3. Both statute and regulation requires a petition within 30 days**
24 **of an "action" by a regional board.**

25 Petitioners file their Addendum pursuant to Water Code Section 13320.
26 (Addendum at p. 3, lns. 25-26 [citing Code]). But, Section 13320(a) is unequivocal in
27 terms of time limits within which to file a petition for review:
28

1 (a) *Within 30 days of any action or failure to act by a regional*
2 board under subdivision (c) of Section 13225, Article 4 (commencing
3 with Section 13260) of Chapter 4, Chapter 5 (commencing with
4 Section 13300), Chapter 5.5 (commencing with Section 13370),
5 Chapter 5.9 (commencing with Section 13399.25), or Chapter 7
6 (commencing with Section 13500), an aggrieved person may petition
7 the state board to review that action or failure to act.
8 (Water Code Sec. 13320(a)[emphasis added]).

9 While the Water Code provides that a petitioner aggrieved by a “failure to
10 act” can have up to 60 days after the initial request to act was filed (*id.*), that 60-day
11 period has no application to the facts of this petition. The LA Board clearly “acted”
12 to approve all nine of the WMPs submitted for approval to its staff, and the
13 Petitioners participated in the hearing when that “act” was made.

14 This Board’s own regulation governing the filing of a petition for review of
15 an “action” by a regional board is similarly unequivocal in terms of time limits:

16 (b) Service of a petition may be made by U.S. mail, by hand
17 delivery, by facsimile with hard copy to follow, or via e-mail by
18 prior arrangement to waterqualitypetitions@waterboards.ca.gov.
19 The petition must be received by the state board *no later than 5:00*
20 *p.m. 30 days following the date of the action or inaction by the regional*
21 *board, . . .*

22 (CCR, tit.23, § 2050(b) [emphasis added]).

23 The State Board has expressly recognized the 30-day rule and stated that the
24 rule will be strictly enforced as to a late supplemental submittal in the form of an
25 “amended petition” filed by a municipal petitioner, the City of El Monte:

26 Water Code section 13320, subdivision (a) provides that a
27 petition for review of a regional water quality control board (regional
28 water board) action must be filed within 30 days of the regional water
board’s action. *The State Water Board interprets that requirement strictly
and petitions filed more than 30 days from regional water board action are
rejected as untimely.*

(Cal. State Water Board Order, WQ 2015-0075 at p. 7 [emphasis added]).

1 4. **The “Addendum” was filed more than 30 days after the LA**
2 **Board’s September 10, 2015 decision.**

3 The Petitioners filed their “Addendum” seeking new remedies (overturning
4 the decision of the Regional Board) on October 30, 2015. (Addendum at p. 27,
5 signature block date of October 30, 2015). By any measure, Petitioners are late in
6 challenging the September 10, 2015 action by the LA Board. The “Addendum” is in
7 effect a new petition challenging a different action, and it should be rejected as
8 untimely under the statute and regulation, which this Board “strictly interprets.”

9 **III. THIS BOARD SHOULD NOT TAKE UP THE SEPTEMBER 10, 2015**
10 **DECISION ON ITS OWN MOTION**

11 Water Code Section 13320(a) does allow this Board to take up any “action”
12 by a regional board on its own motion. Respondents submit that the State Board
13 should not exercise this power in this case for two reasons: (1) The Petitioners had
14 full knowledge of the 30-day limit and cannot seek to excuse their untimely failure
15 on a technical basis; and (2) Petitioners have already had a full and fair hearing
16 before the LA Board on the very issue in question—the substantive adequacy of the
17 three WMPs previously submitted to that Board’s staff—and their challenge was
18 denied in a 6-0-1 vote.

19 **A. Petitioners are well aware of the 30-day limit for seeking review of**
20 **an action by a regional board.**

21 Petitioners filed their Original Petition seeking to overturn the actions of the
22 Executive Officer in conditionally approving various WMPs within 30 days of the
23 date that Mr. Unger issued such approvals. (Original Petition at p. 1). The
24 Petitioners expressly cited Water Code Section 13320 as authority for filing such a
25 petition. They exhibited no confusion about the 30 day limitation for seeking such a
26 review. (*See* Original Petition Memorandum at p. 1, Ins. 10-12 [“However, the
27 California Water Code requires all improper actions by the Executive Officer be
28 appealed...within 30 day [sic] of such action.”]).

1 **B. Petitioners already had a full and fair hearing before the LA Board.**

2 The LA Board notified all parties that it would consider the Original Petition
3 filed on May 29, 2015 at its September 10, 2015 regular meeting. (RB-AR18044
4 [notice sent out to all interested parties]). At this meeting, the LA Board effectively
5 acted as an appellate review body, reviewing the action of its Executive Officer. As
6 the LA Board agenda put it, the item (no. 16) was: "Consideration of Petition for
7 Review of the Executive Officer's Action to Approve with Conditions, Nine
8 Watershed Management Programs. . ." (RB-AR18297 [agenda item no. 16]). The LA
9 Board's legal counsel for this item, Ms. Fordyce, introduced the background and
10 legal contentions raised in the petition by indicating in part that: "[omitted] Part
11 VI.A.6 of the permit provides that any permittee or interested person may request
12 *review by the Board* of any formal determination or approval made by the Executive
13 Officer pursuant to the permit." (RB-AR18625, lns. 22-25 [emphasis added]).

14 After Ms. Fordyce's introduction, what followed was a full and complete
15 examination of both the procedural challenge to the Executive Officer's authority
16 to "conditionally approve" a WMP and the substantive challenge to the merits of
17 his decision to approve the WMPs. That discussion was focused almost exclusively
18 on the three WMPs that are now the current subject of the "Addendum" petition
19 for review.

20 Thus, unlike an initial decision by a regional board on a specific factual issue
21 (such as the extension of a discharge permit with new conditions), in this case, the
22 Petitioners have already had effective "review" of the action of the LA Board's
23 Executive Officer, in this case by the LA Board, which independently considered
24 (and ultimately approved) his decision. There is no need for the State Board to
25 conduct a second review of the previously reviewed decision of the LA Board's
26 Executive Officer.

1 **IV. THE ORIGINAL PETITION IS MOOT IN LIGHT OF THE EXECUTIVE**
2 **OFFICER'S FINAL APPROVAL OF THE REVISED WMPs**

3 The Original Petition challenged the Executive Officer's conditional approval
4 of the nine WMPs. (Original Petition, p. 3). The Executive Officer issued his
5 conditional approval letter on April 28, 2015 and gave each WMP group time to
6 address the conditions of approval. (RB-AR17808). For example, the LSGR Group
7 was given until June 12, 2015 to address the conditions contained in the Executive
8 Officer's letter addressed to that Group. The LSGR Group timely submitted a
9 revised final WMP on June 12, 2015. On July 22, 2015, the Executive Officer, on
10 behalf of the LA Board, issued a confirmation of approval letter of the LSGR WMP,
11 which states in pertinent part:

12
13 After review of the final LSGR WMP submitted on June 12, 2015, I
14 have determined that the LSGR Group's WMP satisfies all of the
15 conditions identified in my April 28, 2015 approval letter. The WMP
16 dated June 12, 2015 hereby constitutes the final approved WMP for the
17 LSGR Group.⁴ (RB-AR18145).

18 Thus, the claims contained in the Petitioners' Original Petition, particularly
19 the claim that the Executive Officer's approval was unlawfully "conditional," are
20 moot because the Executive Officer subsequently issued a final approval letter
21 without any conditions.⁵ Moreover, on September 10, 2015, the LA Board ratified
22 the Executive Officer's final approval of the LSGR, Lower Los Angeles River and

23 ⁴ The Executive Officer, acting on behalf of the Board also issued final approval
24 letters as to the Lower Los Angeles River and the Upper Reach 2 Los Angeles River
25 watershed groups. (RB-AR18141).

26 ⁵ Petitioners are well aware of this action by the Executive Officer, because they
27 attached as Exhibit A to their "Addendum" copies of various final approval letters.
28 The second letter in Exhibit A to the Addendum is specific to the LSGR group. The
first letter in Exhibit A relates to the Los Angeles River Upper Reach 2, and the
third letter in Exhibit A confirms the final approval issued by the Executive Officer
for the revised WMP submitted by the Lower Los Angeles River management
group. These are the only three WMP approvals Petitioners seek to challenge in
their Addendum to Petition.

1 Upper Reach 2 Los Angeles River plans as well as the other eight WMPs that had
2 satisfied the Executive Officer’s conditions of approval. Both the Executive
3 Officer’s final approval and the LA Board’s subsequent ratification together fully
4 resolved the issues raised by the Original Petition and render the Original Petition
5 moot. *See Santa Monica Baykeeper v. City of Malibu*, 193 Cal.App 4th 1538, 1547-48
6 (2011) (“An appeal should be dismissed as moot when the occurrence of events
7 renders it impossible for the appellate court to grant appellant any effective relief.”;
8 held that challenge to EIR for construction of city’s Legacy Park project was moot
9 when before determination of appeal the park was already completed).

10 In the Original Petition, the Petitioners seek a remedy – reversal of a
11 conditional approval – when the conditions have already been met and a final
12 approval letter has been issued and subsequently ratified by the LA Board. Thus,
13 as in *Santa Monica Baykeeper*, this Board should dismiss the Original Petition’s
14 claims as moot.

15 **V. CONCLUSION**


16 What is good for the municipal permittee “goose” (Respondents and entities
17 such as El Monte) is also good for the environmental Petitioners’ “gander” (NRDC,
18 LA Waterkeeper, and Heal the Bay). This proverb restates in colloquial terms the
19 policy of strict and evenhanded enforcement of a 30-day clock on filing a petition
20 challenging an action by the LA Board. Without equal enforcement of its own
21 statutory and regulatory guidance, the State Board risks being perceived as
22 unfairly favorable to a party class of stakeholders before it. The State Board should
23 avoid any such perception and take the appropriate procedural step of *rejecting* the
24 “Addendum” filed by the Petitioners on October 30, 2015 and *dismissing* the
25 Original Petition filed on May 28, 2015.

26 Respondents request that the State Board issue an order without further
27 proceedings or hearing: (1) Rejecting as untimely the “Addendum” filed by
28 Petitioners on October 30, 2015; and (2) Dismissing as moot the Original Petition

1 filed on May 28, 2015 by Petitioners given both the subsequent final approval by
2 the Executive Officer and the September 10, 2015 hearing and affirmation of that
3 decision by the LA Board.

4
5 Dated: January 8, 2016

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