

1 CITY OF LOMPOC
Office of City Attorney
2 Matthew W. Granger
City Attorney
3 100 Civic Center Plaza
Lompoc, CA 93436
4 Phone: (805) 875-8235
Facsimile: (805) 736-8681

5
6 SOMACH SIMMONS & DUNN
A Professional Corporation
PAUL S. SIMMONS, ESQ. (SBN 127920)
7 THERESA A. DUNHAM, ESQ. (SBN 187644)
CASSIE N. AW-YANG, ESQ. (SBN 233697)
8 813 Sixth Street, Third Floor
Sacramento, CA 95814-2403
9 Telephone: (916) 446-7979
Facsimile: (916) 446-8199

10 Attorneys for City of Lompoc

11
12 BEFORE THE
13 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
14

15 In the Matter of the Petition of the City of
Lompoc for Review of Action and Failure to Act
16 by Central Valley Regional Water Quality
Control Board.

SWRCB/OCC File _____
17 PETITION FOR REVIEW
[Water Code, section 13320]

18
19 In accordance with Water Code section 13320, Petitioner City of Lompoc (City or
20 Petitioner) hereby petitions the State Water Resources Control Board (State Water Board) to
21 review provisions of Resolution No. R3-2008-0071 of the Central Coast Regional Water Quality
22 Control Board (Regional Water Board) and its other actions or inactions. Resolution
23 No. R3-2008-0071 approves the City's Storm Water Management Program (SWMP) with or
24 subject to required modifications to which the City objects. A copy of the City's Draft Storm
25 Water Management Program and its appendices is attached hereto as Exhibit A. The City files a
26 Statement of Points and Authorities in support of this petition concurrently herewith as required
27 by title 23, section 2050(a)(7) of the California Code of Regulations.
28

1 The City requests the opportunity to file supplemental points and authorities in support of
2 this petition once the administrative record becomes available. The City also reserves the right to
3 submit additional argument and evidence in reply to the Regional Water Board's or other
4 interested parties' responses to this petition filed in accordance with title 23, section 2050.5(a) of
5 the California Code of Regulations.

6 1. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL ADDRESS OF
7 PETITIONER

8 The Petitioner is the City of Lompoc, California, which operates and maintains the City's
9 Master Storm Drain System. Petitioner's address is as follows:

10 City of Lompoc
11 c/o Stacy L. Lawson
12 Senior Environmental Coordinator
13 P.O. Box 8001
14 Lompoc, CA 93438-8001
15 Phone: (805) 875-8275
16 Email: s_lawson@ci.lompoc.ca.us

17 In addition, the City requests that all materials in connection with the petition and
18 administrative record be provided to the City's counsel and special counsel:

19 Matthew W. Granger, Esquire
20 City Attorney
21 100 Civic Center Plaza
22 Lompoc, CA 93436
23 Phone: (805) 875-8235
24 Email: m_granger@ci.lompoc.ca.us

25 Theresa A. Dunham, Esquire
26 Somach Simmons & Dunn
27 813 Sixth Street, Third Floor
28 Sacramento, CA 95814
Phone: (916) 446-7979
Email: tdunham@somachlaw.com

29 2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL WATER BOARD
30 WHICH THE CITY REQUESTS THE STATE WATER BOARD TO REVIEW

31 The City petitions the State Water Board to review the Regional Water Board's adoption
32 of Resolution No. R3-2008-0071 and the Table of Required Revisions attached thereto.
33 Resolution No. R3-2008-0071 approves the City's SWMP, but requires the City to amend the
34 SWMP no later than February 28, 2009, as provided in the Table of Required Revisions. The

1 City challenges Required Revision Nos. 16, 17, 18, and 20 and requests that the State Water
2 Board determine that these provisions are improper. A copy of the Resolution and the Table of
3 Required Revisions attached thereto is attached hereto as Exhibit B.

4 3. THE DATE ON WHICH THE REGIONAL WATER BOARD ACTED OR REFUSED
5 TO ACT

6 The Regional Water Board adopted Resolution No. R3-2008-0071 and the Table of
7 Required Revisions on October 17, 2008.

8 4. A STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT IS
9 INAPPROPRIATE OR IMPROPER

10 As explained in more detail in the Statement of Points and Authorities, Required Revision
11 Nos. 16, 17, 18, and 20 are inappropriate and improper because they are inconsistent with the
12 maximum extent practicable (MEP) standard under the National Pollutant Discharge Elimination
13 System (NPDES) program of the Clean Water Act (CWA), the *Waste Discharge Requirements*
14 *(WDRs) for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems*
15 *(General Permit)*, Water Quality Order No. 2003-0005-DWQ (NPDES General Permit
16 No. CAS000004) (General Permit or Order No. 2003-0005), other federal and state requirements
17 for small municipal separate storm sewer systems (MS4s), and Water Code sections 13263(a) and
18 13241. In addition, the Required Revisions are unreasonable, arbitrary and not supported by the
19 evidence.

20 The Required Revisions require the City to prepare a hydromodification plan, adopt
21 interim hydromodification criteria that are equivalent to specific numeric criteria set forth by the
22 Regional Water Board in a letter sent to all Central Coast Phase II communities in February of
23 2008, and revise local plans and permit processes for long-term watershed protection. Required
24 Revision No. 16 requires the City to have adequate development review and permitting
25 procedures to impose conditions of approval or other enforceable mechanisms to implement
26 numeric criteria for hydromodification control. (Table of Required Revisions at p. 9.) Required
27 Revision No. 17 directs the City to develop interim hydromodification criteria and an associated
28 schedule, including a three-week review by staff of the proposed criteria that are "as effective" as

1 the interim criteria in the February Letter. (*Id.* at pp. 9-11.) Required Revision No. 18 calls for
2 the City to develop long-term hydromodification criteria and control measures that result in
3 numeric criteria for runoff rate, volume control and stream stability impacts. (*Id.* at pp. 11-12.)
4 Required Revision No. 20 obligates the City to develop quantifiable measures to assess the
5 effectiveness of its watershed protection efforts to achieve desired watershed conditions and
6 evaluate existing land use policies, plans, ordinances, etc. for watershed protection. (*Id.* at
7 pp. 12-13.)¹

8 A. The Required Revisions Are Inconsistent with the MEP Standard and
9 General Permit

10 The MEP standard is flexible and part of an iterative process that allows permittees under
11 the General Permit and other storm water permits to take into account site-specific factors, such
12 as public acceptance, technical feasibility and cost when developing best management practices
13 (BMPs) to implement SWMPs. BMPs in SWMPs must reduce discharges of pollutants in storm
14 water to the MEP. The Regional Water Board states that the Required Revisions are necessary to
15 ensure that the SWMP is consistent with MEP. (Resolution No. R3-2008-0071 at p. 2.) The
16 Regional Water Board's decision and determination that the Required Revisions are necessary to
17 ensure that the SWMP meets MEP are not supported by any evidence in the record. At most, the
18 Regional Water Board staff amended its Staff Report the day before the hearing to add references
19 to a report prepared by ECONorthwest that summarized other studies and a U.S. EPA study.
20 (Calif. Regional Water Quality Control Bd., Central Coast Region, Supplemental Sheet No. 3 for
21 Regular Meeting of Oct. 17, 2008, for Item 9, "Response to Comments on Staff Report for City
22 of Lompoc Storm Water Mgmt. Plan Approval" (prepared Oct. 16, 2008).) However, the record
23 fails to include any evidence that demonstrates that the Regional Water Board considered local,
24 site-specific conditions pertinent to the City when it adopted the Required Revisions at issue here.

25 _____
26 ¹ To the extent the Regional Water Board relied on the criteria expressed in the Executive Officer's February 15,
27 2008 letter for Required Revision Nos. 16, 17, 18, and 20, such criteria are inappropriate and improper as they are
28 un-adopted regulations or policies being imposed on the City and others without public notice and comment or
compliance with procedures required by law. The City reserves its right to assert this claim in any appropriate
circumstance or forum. The City generally reserves the right to pursue any other remedies related to the Regional
Water Board's action that are not provided under Water Code section 13320.

1 In particular, the record fails to provide evidence that the Regional Water Board considered
2 public acceptance, technical feasibility or cost in its determination that the Required Revisions are
3 necessary for the SWMP to meet MEP. Accordingly, the Regional Water Board's action to adopt
4 the Required Revisions is not supported by evidence in the record and Required Revision
5 Nos. 16, 17, 18, and 20 should be removed from the Table of Required Revisions.

6 B. The Required Revisions Are Inconsistent with Other Federal and State Regulatory
7 Requirements for Small MS4s

8 When the Regional Water Board adopted Required Revision Nos. 16, 17, 18, and 20, it
9 inappropriately ignored the purposeful differences between the small and large MS4 programs.
10 Congress and the EPA intended to develop a regulatory program that includes different
11 requirements and milestones for small MS4s as compared to large MS4s. Further, the State
12 Water Board recognized this intended distinction in the General Permit. Specifically, the State
13 Water Board anticipates that the more established Phase I program may serve to inform the
14 Phase II program over time. In this case, the Regional Water Board reversed Congress, EPA and
15 the State Water Board's intended framework. This is despite the fact that the Phase I program is
16 much better established than the Phase II program, and that Phase I communities have more
17 resources than Phase II communities.

18 In addition, the Required Revisions are more restrictive than requirements currently
19 adopted or considered for *large* MS4 permits. As a general policy, it is inappropriate to impose
20 more restrictive requirements on small MS4s that have much more limited resources than Phase I
21 MS4s. As previously described, the federal and state regulatory scheme dictates a framework of a
22 more established NPDES storm water program for large MS4s. This framework is purposefully
23 efficient. It capitalizes on the ability of large MS4s to employ greater resources to the optimal
24 benefit of both the small and large MS4 programs. Further, the Required Revisions are premature
25 as they precede the State Water Board's development of a new General Permit for small MS4s.
26 The new or revised General Permit may include requirements related to Low Impact
27 Development (LID) and controls for hydromodification.
28

1 The Regional Water Board provides no explanation or evidence in the record as to why it
2 is necessary to adopt the Required Revisions here in advance of such requirements being included
3 in large MS4 permits or a revised General Permit for Phase II communities. As such, the
4 Regional Water Board's action is improper and the Required Revisions at issue should be
5 removed from the Table of Required Revisions.

6 C. The Regional Water Board Failed to Consider the Factors in Water Code
7 Section 13241 for Permit Requirements that Exceed Federal Law

8 Required Revision Nos. 16, 17, 18, and 20 mandate that the City revise its SWMP. The
9 requirements are more stringent than those required by federal law. In accordance with Water
10 Code section 13263(a), the Regional Water Board thus had a duty to consider the public interest
11 factors of Water Code Section 13241 prior to adopting the requirements. (See also *City of*
12 *Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 626-627 (*Burbank*)). The
13 factors listed in Water Code section 13241 include, but are not limited to, environmental
14 characteristics of the hydrographic unit under consideration; water quality conditions that could
15 reasonably be achieved through the coordinated control of all factors which affect water quality in
16 the area; and economic considerations. Although Resolution No. R3-2008-0071 contains a
17 finding that suggests that the Regional Water Board did consider such factors, there is no
18 evidence in the record to support the conclusory statements in the Resolution. Further, the
19 Regional Water Board failed to conduct the required balancing of public interest factors under
20 Water Code section 13241. Because the Regional Water Board failed to consider adequately and
21 properly the factors of Water Code section 13241, the Required Revisions that exceed federal law
22 must be removed from the Table of Required Revisions.

23 D. The Required Revisions Are Unreasonable, Arbitrary and Not Supported by the
24 Evidence

25 Under Water Code sections 13000 and 13001, the Regional Water Board has a duty to be
26 reasonable when it regulates water quality. The Regional Water Board also has a duty to "bridge
27 the analytic gap between the raw evidence and the ultimate decision or order." (*Topanga Assn.*
28 *for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) This serves to

1 “conduce the administrative body to draw legally relevant sub-conclusions supportive of its
2 ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood
3 that the agency will randomly leap from evidence to conclusions.” (*Id.* at p. 516.)

4 The Regional Water Board failed to satisfy these duties when it adopted Required
5 Revision Nos. 16, 17, 18, and 20. In particular, these Required Revisions are unreasonable,
6 arbitrary and not supported by the evidence.

7 There is no scientific or technical basis in the record to require the numeric standards
8 specified for the interim criteria for hydromodification. To the contrary, the record is replete with
9 information and evidence supporting that the application of the interim hydromodification criteria
10 is infeasible and impractical as applied to the City. For example, the interim criteria would
11 require a great deal of land with appropriate soil and groundwater conditions to implement.
12 These factors are simply not present in this case. Several practical, technical and economic
13 constraints make maximization of infiltration difficult to achieve in areas of redevelopment and
14 infill development, as opposed to new development of large parcels of land. It would be difficult
15 (if not impossible) for the City to maximize infiltration based on the relevant hydromodification
16 criteria. Examples of such constraints include, but are not limited to:

- 17 • The City is primarily built-out; little developable land remains within the City’s
18 jurisdiction. Surrounding development severely constrains the undeveloped land
19 (much of which is currently under land use entitlement) that remains.
- 20 • Lots within the City are primarily small commercial and residential lots, many of
21 which were created when the community was established in 1877.
- 22 • The City, less the United States Bureau of Prisons’ controlled property, is only about
23 seven square miles in size.
- 24 • Most of the soil in the City is expansive and requires over-excavation and re-
25 compaction-at-depth prior to development. The alluvial soils that cover the majority
26 of the City incorporate clay lenses and fine silts, which further limit infiltration. As a
27 result, mechanisms installed to maximize infiltration will not achieve the desired rate
28 and volume of infiltration and will result in long-term nuisance ponding and soil

1 saturation. This is detrimental to structures and improvements and can encourage the
2 spread of West Nile Virus.

- 3 • The City lies directly above the aquifer that serves as the water supply for the City.
4 As a result, City policy is not to allow storm water runoff from paved areas used by
5 vehicles or other high pollutant sources to infiltrate the soil. The City requires storm
6 water filters that capture oils and grease to be installed in new and substantially
7 reconstructed areas of vehicle travel and parking to reduce the potential for
8 groundwater contamination.

9 As a consequence of the local, site-specific conditions in the City, the prescriptive,
10 inflexible interim modification criteria are likely to result in the abandonment of infill
11 development and smart growth practices. The interim criteria will serve to encourage new
12 development outside of urban centers, which will contribute to urban sprawl and exacerbate the
13 loss of agricultural lands and open space. This in turn, is expected to result in greater water
14 quality impacts, as less and less open space remains.

15 Other technical experts (including the Center for Watershed Protection (CWP)) also
16 recognize that hydromodification criteria, similar to those at issue in this petition are not practical
17 or feasible. There are several conditions under which significant infiltration is not desirable or
18 feasible. These include infill and redevelopment situations where adjacent developed properties
19 cannot handle increased soil saturation due to infiltration from neighboring properties. Increased
20 percolation can damage structural foundations and increase land slippage where soils and/or
21 original grading and drainage design did not account for increased saturation. Maximizing
22 infiltration is not appropriate or feasible in some areas because of adverse soil characteristics.
23 The CWP analyzed LID BMPs and determined that it is difficult to implement them in
24 redevelopment when the project site is an older, highly urban sub-watershed with small lots on
25 flat terrain and where development occurred prior to the advent of storm water requirements.
26 These conditions exist throughout the City.

27 In addition, hydromodification will not be a significant or meaningful factor within the
28 City's jurisdiction for the practical reasons that follow:

- 1 • The only creek that runs through the City is San Miguelito Creek, a water body
2 contained in a concrete trapezoidal channel. Therefore, hydromodification of the
3 creek will not occur.
- 4 • The City receives on average only 15-16 inches of rain each year, deposited in three to
5 five storms. At times, the City receives as little as five to six inches of rain annually.
- 6 • The City is primarily flat and low in elevation, located approximately nine miles east
7 of California's coast.
- 8 • The City's storm water conveyance system is well established and is primarily a
9 surface flow system, in which properties are graded to drain to streets.
- 10 • The City is primarily residential in nature, with required front, side and rear yards.
11 Much of the rain that falls on the community already percolates into the ground of
12 these residential properties.
- 13 • The City has received the Tree City USA Award each year since 1988 and maintains
14 nearly 18,000 trees on public rights-of-way and in City parks.

15 In addition, Required Revision No. 20 for long-term watershed protection expands the
16 City's SWMP beyond the requirements of the General Permit and Phase II storm water program.
17 Required Revision No. 20 obligates the City to develop quantifiable measures to assess the
18 effectiveness of its watershed protection efforts to achieve desired watershed conditions and
19 evaluate existing land use policies, plans, ordinances, etc. for watershed protection. (Table of
20 Required Revisions at pp. 12-13.) Required Revision No. 20 also obligates the City to develop
21 quantifiable measures that indicate how the City's watershed protection efforts achieve desired
22 watershed conditions, evaluate existing watershed protection efforts and adapt or change the
23 existing efforts, if warranted. (Table of Required Revisions at pp. 12-13.)

24 The subject "watershed" is much larger than the City's jurisdiction. Indeed, the majority
25 of the nearly 900 square mile watershed of the Santa Ynez River is outside of the City's
26 jurisdictional boundaries and control. Absent the area controlled by the United States Bureau of
27 Prisons, the City comprises only seven square miles at the lower end of the Santa Ynez River
28 Watershed. In addition, besides Lompoc, there are only a few other small, urbanized areas within

1 the watershed (e.g., City of Solvang and City of Buellton). The majority of the watershed is
2 either in agricultural production or under the jurisdiction of the U.S. Forest Service.

3 For these reasons, the Regional Water Board not only failed to impose requirements
4 consistent with the MEP standard as previously explained, but adopted requirements that are not
5 feasible or practicable. The Regional Water Board's action to adopt the Required Revisions is
6 unreasonable, arbitrary and not supported by the evidence. Thus, Required Revision Nos. 16, 17,
7 18, and 20 must be removed from the Table of Required Revisions.

8 5. THE MANNER IN WHICH PETITIONER IS AGGRIEVED

9 The Required Revisions challenged place the City in the untenable position of expending
10 significant public resources to comply with SWMP requirements that are not necessary,
11 reasonable nor supported by the evidence. Resolution No. R3-2008-0071 and Required Revision
12 Nos. 16, 17, 18, and 20 of the Table of Required Revisions mandate that the City revise its
13 SWMP in a manner that is inconsistent with: the legal standard of MEP for storm water programs
14 under the NPDES program of the CWA; General Permit; other federal and state requirements for
15 MS4s; Water Code sections 13263(a), 13241, 13000, 13001 and 13002; and the record.

16 6. THE SPECIFIC ACTION REQUESTED BY PETITIONER

17 Based on this petition, evidence in the record and the arguments set forth in the Statement
18 of Points and Authorities and record, the City requests that the State Water Board adopt an order
19 striking Required Revision Nos. 16, 17, 18, and 20 from the Table of Required Revisions of
20 Resolution No. R3-2008-0071. In the alternative, the City requests that the State Water Board
21 remand Resolution No. R3-2008-0071 and the Table of Required Revisions consistent with the
22 State Water Board's direction.

23 7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES
24 RAISED IN THIS PETITION

25 A Statement of Points and Authorities in support of this petition is submitted concurrently
26 herewith as required by title 23, section 2050(a)(7) of the California Code of Regulations.
27
28

1 8. A STATEMENT THAT THIS PETITION WAS SENT TO THE REGIONAL WATER
2 BOARD

3 In accordance with title 23, section 2050(a)(8) of the California Code of Regulations, the
4 City mailed a true and correct copy of this petition and the accompanying Statement of Points and
5 Authorities by First Class mail on November 14, 2008, to the Regional Water Board at the
6 following address:

7 Roger W. Briggs, Executive Officer
8 Central Coast Regional Water Quality Control Board
9 895 Aerovista Place, Suite 101
10 San Luis Obispo, CA 93401-7906

11 Petitioner is the discharger. Therefore, Petitioner did not mail a separate copy of the
12 petition or Statement of Points and Authorities to the discharger.

13 9. A STATEMENT REGARDING WHETHER PETITIONER RAISED THE
14 SUBSTANTIVE ISSUES OR OBJECTIONS IN THE PETITION TO THE REGIONAL
15 WATER BOARD

16 Petitioner raised the substantive issues and objections in the petition to the Regional Water
17 Board in written comments and testimony before the Regional Water Board on October 17, 2008.

18 SOMACH SIMMONS & DUNN

19 DATED: November 14, 2008

20 By Cassie Aw yang
21 Cassie Aw-yang
22 Attorneys for Petitioner CITY OF LOMPOC
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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is Hall of Justice Building, 813 Sixth Street, Third Floor, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On November 17, 2008, I served a true and correct copy of:

PETITION FOR REVIEW
[Water Code, section 13320]

X (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

Roger W. Briggs, Executive Officer
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401-7906

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on November 17, 2008, at Sacramento, California.



Crystal Rivera