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TO: Acting Chairman Destache and San Diego Regional Water Quality Control Board Members

FROM: Catherine George Hagan, Senior Staff Counsel
Office of Chief Counsel

DATE: October 26, 2010

SUBJECT: **Tentative Order No. R9-2010-0016, Regulation of Non-Storm Water Discharges, Consideration of Economics and Unfunded State Mandates**

During the California Regional Water Quality Control Board, San Diego Region's (San Diego Water Board) proceedings last year to consider and reissue National Pollutant Discharge Elimination System (NPDES) Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) draining the watersheds of Orange County within the San Diego Region (the Orange County MS4 permit), San Diego Water Board members requested that Board counsel respond to public comments and Board member questions on issues such as Water Board regulation of non-storm water discharges, unfunded state mandates and the extent of applicable requirements to consider economic information in adopting MS4 permits. Similar legal comments have been raised in the San Diego Water Board's proceeding to consider Tentative Order No. R9-2010-0016. the Riverside County MS4 Permit (Tentative Order). This legal memorandum, provided for your consideration along with Responses to Comments, addresses some of the key legal issues and has been updated to reflect recent legal developments since the Orange County MS4 proceeding ending in December of 2009.

I. Regulation of Non-Storm Water Discharges

Commenters assert that regardless of whether a discharge is composed entirely of storm water or non-storm water, any pollutants discharged *from* an MS4 are subject to the maximum extent practicable (MEP) standard and related iterative process, despite the Clean Water Act's (CWA) more stringent requirement that discharges of non-storm water into an MS4 be "effectively prohibited." Copermittees in the Orange County MS4 permit proceeding made essentially the same argument there to oppose proposed numeric effluent limitations for non-storm water discharges. Numeric effluent limitations were not adopted for the Orange County MS4 permit and are not proposed in this Tentative Order. But commenters raise the argument that non-storm water discharges from the MS4 need only be subject to the MEP standard and related iterative process in their objections to the Tentative Order's requirement that the Copermittees must effectively prohibit certain categories of previously

exempt non-storm water discharges, now identified as sources of pollutants, from entering the MS4.

For reasons stated in the Responses to Comments and elaborated on below, Board counsel does not agree with the comments that conclude non-storm water discharges from the MS4 are subject only to the MEP standard. The CWA employs the strategy of prohibiting the discharge of any pollutant from a point source into waters of the United States unless the discharger of the pollutant(s) obtains an NPDES permit pursuant to CWA Section 402. The 1987 amendment to the CWA includes provision 402(p) that specifically addresses NPDES permitting requirements for storm water discharges from MS4s. Section 402(p) prohibits the discharge of pollutants from specified MS4s to waters of the United States except as authorized by an NPDES permit and identifies two substantive standards for MS4 storm water permits. MS4 permits (1) "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers[ ]" and (2) "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants." (CWA § 402(p)(3)(B)(ii-iii).)

In November 1990, the United States Environmental Protection Agency (USEPA) published regulations addressing storm water discharges from MS4s. (Vol. 55 Federal Register (Fed. Reg.) 47990 and following (Nov. 16, 1990) (Phase I Final Rule).) The regulations establish minimum requirements for MS4 permits, and generally focus on the requirement that MS4s implement programs to reduce the amount of pollutants found in storm water discharges to the MEP. The Clean Water Act's municipal storm water MEP standard does not require storm water discharges to strictly meet water quality standards, as is required for other NPDES permitted discharges. Compliance is achieved through an iterative approach of continuous implementation of improved best management practices (BMPs). This distinction reflects Congress's recognition that variability in flow and intensity of storm events render difficult strict compliance with water quality standards by MS4 permittees. In describing the controls that permits must include to reduce pollutants in storm water discharges to the MEP, the statute states that the controls shall include: "management practices, control techniques and system, design and engineering methods, and such other provisions as the [permit writer] determines appropriate for the control of such pollutants." (CWA § 402(p)(3)(B)(iii).)

In contrast, non-storm water discharges from the MS4 that are not authorized by separate NPDES permits, nor specifically exempted (see 40 C.F.R. § 122.26(d)(2)(iv)(B)), are subject to requirements under the NPDES program, including discharge prohibitions, technology-based effluent limitations and water quality-based effluent limitations. (40 C.F.R. § 122.44.) The regulations also require the MS4's program to include an element to detect and remove illicit discharges and improper disposal into the storm sewer. (40 CFR § 122.26(d)(2)(iv)(B).)

While "non-storm water" is not defined in the CWA or federal regulations, the federal regulations define "illicit discharge" as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer and discharges resulting from fire fighting activities)." (Id., at § 122.26(b)(2).) This definition is the most closely applicable definition of "non-storm water" contained in federal law. As

stated in the Phase I Final Rule, USEPA added the illicit discharge program requirement to begin implementation of the 'effective prohibition' requirement to detect and control certain non-storm water discharges to their municipal system. USEPA stated: "Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit (other than the permit for the discharge from the [MS4])." (55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).)[1]

Thus, federal law mandates that permits issued to MS4s must require management practices that will result in reducing storm water pollutants to the MEP yet at the same time requires that non-storm water discharges be effectively prohibited from entering the MS4. The argument that non-storm water discharges, prohibited from entry into the MS4 in the first instance, should be held to comply with only the less stringent MEP standard developed for storm water discharges is contrary to and potentially renders the "effectively prohibit" requirement in section 402(p)(3)(B)(ii) meaningless. Consistent with federal law, unless non-storm water discharges to the MS4 are authorized by a separate NPDES permit or are specifically exempted under federal regulations, non-storm water discharges are appropriately subject to the effective prohibition requirement in the CWA and regional water boards are not limited by the iterative MEP approach to storm water regulation in crafting appropriate regulations for non-storm water discharges.

B. Obligation to Consider Cost (Water Code § 13241)

Many commenters assert that provisions in the Tentative Order are new permit terms that exceed federal law and therefore the San Diego Water Board is required, but has failed, to consider factors in Water Code section 13241, including cost information, prior to approving the Tentative Order.

In *City of Burbank v. State Water Resources Control Board, et al.* ((2005) 35 Cal.4th 613) (*Burbank*), the California Supreme Court considered whether regional water boards must

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[1]As released for public comment, the Tentative Order included reference to State Water Board Order WQ 2009-0008 as a precedential order on the topic of regulation of non-storm water discharges. The memorandum prepared by Board counsel for the Orange County MS4 permit included citations to State Water Board Order WQ 2009-0008 in support of the above conclusions. State Water Board Order WQ 2009-0008 arose from the State Water Board's review of amendments to a Los Angeles Water Board MS4 permit to incorporate the implementation of summer dry weather Total Maximum Daily Load waste load allocations. In July 2010, the Superior Court for Los Angeles County remanded the Los Angeles Water Board's permitting action based upon procedural irregularities at the adoption hearing. This remand had the result of setting aside and voiding State Water Board Order WQ 2009-0008. The court set aside the order "without prejudice to the State Water Resources Control Board's consideration of the matters addressed in Order WQ 2009-0008 based on any new administrative record that may come before it . . . ." (*County of Los Angeles, et al. v. State Water Resources Control Board, California Regional Water Quality Control Board, Los Angeles Region, et al.,* Case No. BS1222724 (July 16, 2010) Judgment Granting Writ of Mandate, Exhibit 1, p. 2.). Thus, although commenters are correct that State Water Board Order WQ 2009-0008 is no longer a precedential State Water Board order (and was voided and set aside on October 11, 2010) and references to its precedential effect have been removed through errata, its substantive provisions were not reviewed by the court and it is appropriate for the San Diego Water Board to continue to agree with its reasoning, based upon evaluation of applicable federal authorities.

comply with Water Code section 13241 by taking into account the costs a permit holder will incur in complying with permit requirements when issuing waste discharge requirements under Water Code section 13263, subdivision (a). The court concluded that whether it is necessary to consider such cost information "depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act." (*Burbank,* 35 Cal.4th at 627.) The court reasoned that "[Water Code s]ection 13377 specifies that wastewater discharge permits must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1322(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost [citations]. Because [Water Code] section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards." (*Burbank,* 35 Cal.4th at 625.)

Therefore, while the *Burbank* decision does require an analysis of Water Code section 13241 factors including cost when the state adopts permit conditions that are more stringent than federal law (*id. at 618*) the Tentative Order, including Finding F.6., reflects that all of the challenged provisions of the Tentative Order are required to implement federal law. Thus, the Regional Board is not required to consider economic information to justify a "dilution of the requirements" established in federal law. Nonetheless, as staff has noted extensively in Responses to Comments, to the extent that economic information has been provided in connection with compliance and as to other costs associated with challenged permit provisions, the Tentative Order reflects staff has fully considered this information.

C. Unfunded State Mandates

Commenters in this proceeding have raised the issue of unfunded state mandates in connection with many of the proposed permit provisions. Some commenters have argued that a number of the provisions in the Tentative Order go beyond what is required under federal law and therefore constitute unfunded state mandates that may not be imposed without necessary funding first being provided to the Copermittees. Other commenters assert that the San Diego Water Board lacks jurisdiction to render an opinion on whether any of the Tentative Order's provisions exceed federal law and findings to that effect should be removed. Board counsel disagrees with both types of comments.

State Mandate Law

Briefly, Section 6 of Article XIII B of the California Constitution provides, in relevant part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or higher level of service . . . ." These subvention requirements are commonly referred to as a prohibition on unfunded state mandates. The California Supreme Court has recognized that requirements that flow from federal requirements are not state mandates and are therefore exempt from reimbursement

requirements. The Commission on State Mandates (Commission) evaluates local government "test claims" that seek reimbursement for claimed unfunded state mandates. This evaluation culminates with the Commission's written decision, which is a final agency action that may be challenged in superior court. Under mandates law, eligible local governments will receive a reimbursement for each fiscal year that the state mandate remains in effect. The reimbursement is provided as a line item in the Budget Act. If the Legislature fails to provide a subvention of funds, the local government may file a lawsuit to have the mandate declared unenforceable.

Recent Commission Proceedings

In September 2009, the Commission issued a Final Statement of Decision in a storm water permit Test Claim filed by the County of Los Angeles and several additional copermittee test claimants. (*Municipal Storm Water and Urban Runoff Discharges,* 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21 (Los Angeles Regional Water Quality Control Board Order No. 01-182 (July 31, 2009) (Los Angeles Test Claim).) The Commission found that all but one of the challenged provisions issued by the Los Angeles Water Board in its MS4 permit did not qualify as unfunded state mandates as they did "not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit." (Los Angeles Test Claim, Statement of Decision, p. 2.)

In March 2010, the Commission issued its final decision in the San Diego County Test Claim, in which 19 of 21 copermittees challenged multiple provisions in Order No. R9-2007-0001 (National Pollutant Discharge Elimination System (NPDES) No. CAS0108758), Waste Discharge Requirements for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) within San Diego County (San Diego Test Claim). The Commission partially approved the test claim finding the following permit provisions to be state mandates subject to subvention: (1) conduct and report on street sweeping activities; (2) clean and report on storm sewer cleaning; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; and (6) collaborate among copermittees to implement the program. The Commission found hydromodification and low impact development requirements to be state mandates, but not reimbursable mandates because the local agencies could charge fees for these programs.

In its final decisions, the Commission acknowledged that federal regulations require the co-permittees to secure NPDES permit coverage for their storm water discharges and that NPDES permits must include specific controls. But in the Commission's view, the lack of an explicit provision in the federal regulations replicating the permit requirements results in the permit establishing state as opposed to federal mandates. The State Water Board, together with the San Diego Water Board (concerning the San Diego Test Claim) and the Los Angeles Water Board (concerning the Los Angeles Test Claim), disagree that the respective permits exceed the federal mandate in the CWA and have filed petitions for writ of mandate in Sacramento County Superior Court to challenge the final Commission actions. In the

meantime, the provisions found to be reimbursable remain fully enforceable and must be complied with by the copermittees.[2]

With this background, commenters are correct that one factor to be considered in determining whether a requirement is an unfunded state mandate is whether the requirement goes beyond, or exceeds, what is required by federal law. Based upon a Test Claim proceeding to challenge a particular permit in this Tentative Order (once adopted), the Commission will decide whether a particular provision of an adopted order qualifies as an unfunded state mandate for which reimbursement is required. The Commission does not determine the validity of any particular provision; it addresses only whether the State or the local government will be required to pay for that provision. The San Diego Water Board is not, as some commenters assert, precluded from adopting otherwise lawful permit provisions simply because the Commission may subsequently determine that the provisions require reimbursement by the State.

Other commenters assert that the Tentative Order should be silent on the issue of unfunded mandates because the San Diego Water Board lacks jurisdiction to make such a determination. As stated above, the Commission will administratively decide whether one or more provisions are reimbursable mandates. However, it is entirely appropriate for the San Diego Water Board to set forth its legal bases to support the provisions in the Tentative Order, finding them to be necessary and appropriate to meet the federal MEP standard.

Board counsel will be available to answer any questions you may have at the hearing on the Tentative Order.

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[2] See attached memorandum from State Water Board Chief Counsel Michael Lauffer to Regional Water Board Executive Officers.

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Arnold Schwarzenegger
Governor

TO: Regional Water Board Executive Officers **[via email only]**

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

DATE: May 20, 2010

SUBJECT: RECENT DECISIONS ISSUED BY THE COMMISSION ON STATE MANDATES CONCERNING MUNICIPAL STORM WATER PERMITS

In two recent decisions, the Commission on State Mandates (Commission) found that certain provisions within two municipal storm water permits constituted reimbursable state mandates within the meaning of the California Constitution. The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board), the San Diego Regional Water Quality Control Board (San Diego Water Board), and the State Water Resources Control Board (State Water Board) (collectively, the Water Boards) will challenge these decisions in court. In the meantime, regional water quality control boards (regional water boards) should understand the immediate effects of the decisions.

This memorandum briefly summarizes the two decisions and provides information on their immediate consequences, so that the regional water boards have a common understanding of the decisions.

BACKGROUND

State Mandates Law

Section 6 of Article XIII B of the California Constitution provides, in relevant part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or higher level of service. . . ." These subvention requirements are commonly referred to as a prohibition on unfunded state mandates.

Local governments seeking reimbursement for state mandates must file test claims with the Commission. The Commission evaluates test claims and determines whether laws or "executive orders" that are the subject of the test claim constitute state mandates. If the Commission determines a law or executive order is a state mandate, it then determines whether the local government can assess fees to offset the cost of the state mandate. If the

Commission determines the local government cannot assess fees for the state mandate, the state must provide a subvention of funds.

Subsequent proceedings before the Commission determine the local governments entitled to reimbursement and the amount of the reimbursement. Under mandates law, eligible local governments will receive a reimbursement for each fiscal year that the state mandate remains in effect. The reimbursement is provided as a line item in the Budget Act. If the Legislature fails to provide a subvention of funds, the local government may file a suit to have the mandate declared unenforceable.[1]

The Los Angeles Decision

In 2003 and 2007, the County of Los Angeles and 14 cities within the county (the Los Angeles claimants) submitted test claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. The test claims asserted that provisions of Los Angeles Water Board Order 01-182 constitute reimbursable state mandates. Order 01-182 is the 2001 renewal of the municipal storm water permit for Los Angeles County and most of its incorporated cities, and serves as a national pollutant discharge elimination system (NPDES) permit. The permit provisions require the Los Angeles claimants to install and maintain trash receptacles at specified transit stops and to inspect certain industrial, construction, and commercial facilities for compliance with local and/or state storm water requirements.

On September 3, 2009, the Commission issued a final decision entitled *In re Test Claim On: Los Angeles Regional Quality Control Board Order No. 01-182, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21* (Los Angeles Decision). The Los Angeles Decision partially approved the test claims. The Commission found the trash receptacle requirement to be a reimbursable state mandate.

The San Diego Decision

In 2007, the County of San Diego and 21 cities within the county (the San Diego claimants) submitted test claim 07-TC-09. The test claim asserted that many provisions of San Diego Water Board Order R9-2007-0001 constitute reimbursable state mandates. Order R9-2007-0001 is the 2007 renewal of the municipal storm water permit for San Diego County and many of its incorporated cities, and serves as an NPDES permit. The challenged permit provisions require the San Diego claimants to: (1) conduct and report on street sweeping activities; (2) clean and report on storm sewer cleaning; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; (6) collaborate among co-permittees to implement the program; (7) implement hydromodification management plans; and (8) implement plans for low impact development.

On March 30; 2010, the Commission issued a final decision entitled *In re Test Claim on: San Diego Regional Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09* (San Diego Decision). The San Diego Decision partially approved the test claim. The

[1] Gov. Code, § 17612, subd. (c).

Commission's decision took the relatively narrow Los Angeles Decision to its logical conclusion. The Commission found the following permit requirements to be reimbursable state mandates: (1) conduct and report on street sweeping activities; (2) conduct and report on storm sewer cleaning activities; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; and (6) collaborate among co-permittees to implement the program. The Commission found the hydromodification and low impact development requirements to be state mandates, but not reimbursable mandates because the local agencies could charge fees to pay for these programs.

DISCUSSION

The Water Boards will challenge both the Los Angeles and San Diego decisions and seek to have them overturned on a variety of grounds. In the meantime, the Office of Chief Counsel has received questions from the various regional water boards about the immediate consequences of the decisions. The summary below responds to many of those questions, both in terms of what the decisions do – and do not – mean for the municipal storm water program.

1. *The Decisions' Direct Effects Are Limited to the Storm Water Permits Identified in the Test Claims*

The decisions directly affect only the municipal storm water permits identified by the two test claims. That is, the effect of the decisions is limited to the provisions of Los Angeles Water Board Order 01-182 and San Diego Order R9-2007-0001 identified by the Commission as reimbursable state mandates. No other municipal storm water permits (or provisions therein) in California are directly affected by the decisions, even if those permits contain similar provisions.

2. *The Decisions' Effects Cannot Extend to Storm Water Permits Issued to State or Federal Agencies*

Under federal storm water regulations, entities that operate municipal separate storm sewer systems are subject to NPDES permitting requirements. Municipal separate storm sewer systems include systems owned or operated by federal and state agencies. For example, the California Department of Transportation is currently regulated by a municipal storm water permit.

Because state and federal agencies cannot receive state reimbursement pursuant to Article XIII B of the California Constitution, the Commission does not have any jurisdiction over municipal storm water permits issued to those agencies. Reimbursement requirements can only apply to mandates imposed upon "local government."[2]

[2] Cal. Const., art. XIII B, § 6, subd. (a).

3. *The Claimants Must Continue to Comply With the Permits While the Reimbursement Phase Proceeds*

The Los Angeles and San Diego claimants must, respectively, continue to comply with all provisions of their municipal storm water permits. These permits are still valid in their entirety. The Commission proceedings were not about validity of the permits; the proceedings are and have always been about funding. The Commission has determined that the state must reimburse the claimants for the costs of complying with the identified permit provisions, not that the provisions are invalid.

While, as described below, a provision of state law could affect the permits' enforceability should the state fail to provide reimbursement, that provision cannot apply until the Legislature considers a local government claims bill towards the end of the reimbursement phase or affirmatively indicates that it will not provide reimbursement for a specific fiscal year as part of a Budget Act.[3] The reimbursement phase includes, but is not limited to, the Commission's adoption of Parameters and Guidelines, the State Controller's adoption of Claiming Instructions, and the Legislature's consideration of a local government claims bill as part of the annual Budget Act.

4. *If the Legislature Does Not Provide Reimbursement, the Provisions May Become Unenforceable as a Matter of State Law*

As mentioned above, the Legislature ultimately considers a local government claims bill in order to provide the necessary reimbursement. At that point, the Legislature could choose not to provide a reimbursement of funds in the annual Budget Act. If the legislature deletes funding from the annual Budget Act, the affected municipalities could bring suit in Sacramento Superior Court to render unenforceable the permit provisions identified by the Commission as reimbursable mandates.[4] For that fiscal year, the provisions would be unenforceable for the purposes of state law.[5] Alternatively, the Legislature may affirmatively indicate that it will not provide a reimbursement for a particular fiscal year, which as a matter of state law suspends the mandate.[6]

CONCLUSION

The Los Angeles and San Diego decisions could have significant long-term consequences on California's municipal storm water program, but the immediate effects are limited. While the Water Boards' challenges to the Commission's decisions are pending, the regional water boards should understand the following: (1) the decisions' effects are limited to the storm water permits identified in the test claims; (2) the decisions' effects cannot extend to storm water permits issued to state or federal agencies; (3) the claimants must continue to comply with the permits

[3] Gov. Code, § 17581, subd. (a).

[4] *Id.*, § 17612, subd. (c).

[5] *Ibid.* It is unclear whether a legislative failure to provide the required reimbursement would relieve the permittees of their obligations under federal law to comply with the permits.

[6] *Id.*, § 17581, subd. (a).

while the reimbursement phase proceeds; and (4) the provisions may become unenforceable as a matter of state law if the legislature does not provide reimbursement or affirmatively indicates that it will not provide a reimbursement.

If you have any questions about this matter, please contact Alex P. Mayer of my staff at (916) 341-5051.

cc: **[All via email only]**

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