

MEMORANDUM

TO: San Francisco Regional Water Quality Control Board

FROM: Morrison & Foerster LLP on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program and its Co-Permittees

DATE: February 28, 2008 FILE: 43117-1

RE: **Legal Comment (No. 1) Concerning Unfunded State Mandates Contained in Proposed Municipal Regional (Stormwater) Permit**

The following comment concerning the presence of numerous unfunded State mandates contained in the proposed Municipal Regional Permit is being submitted on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program and its 15 members who are designated as co-permittees.^{1, 2}

I. THE TENTATIVE ORDER CONTAINS NUMEROUS UNFUNDED STATE MANDATES

The Tentative Order contains numerous unfunded State mandates. Unless funding is provided for the implementation by local governments of these aspects of the Municipal Regional Permit, they will violate Article XIII B, Section 6, of the California Constitution.³ To avoid the effective suspension or removal of these requirements from the permit by the Commission on State Mandates or, if necessary, the State's courts, the Regional Board should: (1) direct staff to revise those aspects of the Municipal Regional Permit that exceed federal minimum requirements in a manner reflective of a consensus with local governments concerning priority-setting and phasing over time, or (2) absent the achievement of such a consensus, otherwise condition the effectiveness of such discretionarily imposed stormwater

¹ The co-permittees are: Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, Santa Clara County, and the Santa Clara Valley Water District.

² The Santa Clara Program will be submitting additional comments under its own letterhead, and its 15 members who are co-permittees may be submitting separate programmatic, technical, and/or legal comments as well. All of these, and any comments submitted by other Bay Area municipal stormwater programs and co-permittees (and/or their legal counsel) and the Bay Area Stormwater Management Agencies Association (BASMAA), are hereby incorporated by reference.

³ Section III of this comment contains a more detailed discussion of the legal framework surrounding these State unfunded mandate issues and addresses the erroneous and inappropriate legal analysis of them set forth in the so-called "Fact Sheet" circulated by the Regional Board staff in conjunction with the Tentative Order.

management, monitoring, and reporting requirements on local government receipt of funding from the State. (See “Request” below for suggested addition to permit language to effectuate this.)

As discussed in Section II below, the Tentative Order imposes many obligations that exceed those set forth in federally-issued municipal stormwater permits, making them State mandates for “new programs and/or higher levels of service” intended to provide greater benefits to the public. Trying to improve local water quality through additional stormwater management program elements and increased service levels is undoubtedly a noble goal that Bay Area municipalities by and large share. However, there are also real limits to that which our local governments can afford due to competing priorities for local revenues (e.g., police, fire, parks) and restrictions on raising them imposed by the voters and the courts. Hence, when the Regional Board exercises *discretion* to create permit requirements that go beyond federal minimums, and in ways or at a pace with which municipalities have not endorsed, State Constitutional provisions that were enacted by voter initiative to protect local governments from unfunded State-prescribed mandates become a significant legal constraint.

Consequently, to avoid a meltdown which threatens to consume large amounts of resources on litigation that could instead be spent on water quality improvement, the Tentative Order should be revised in a manner reflecting consensus with Bay Area local governments on priorities and realistic implementation timetables (which in some cases may have to be phased into future permit terms) and/or the relevant requirements must be conditioned on the receipt of State funding guaranteed to help the municipalities staff and finance their implementation.

As practical matter, priority-setting, phasing, and State funding is also required because many of the new programs and higher levels of service envisioned in the Tentative Order are extremely expensive, staff intensive, or otherwise impracticable without such measures moderating their burden on local governments (as is explained at length in comments separately being submitted by the Bay Area municipalities, Countywide Stormwater Programs, and the Bay Area Stormwater Management Agencies Association). Indeed, Regional Board staff members have acknowledged the significant funding problems facing local governments. According to a status report issued by the Regional Board staff on February 13, 2008:

Another big challenge is local funding constraints due to Prop. 218, which was passed by voters in 1996 and requires a two-thirds vote to approve any increase in stormwater management fees. We recognize that Bay Area stormwater management programs are underfunded.

The same staff report went on to outline possible funding sources, including \$138 million in grant funds available under Proposition 50 for integrated regional water management planning and grant funding available under Propositions 84 and 1E to address flood control, stormwater management, and water quality. However, *possible* funding sources are not the same as assuring *actual* funding to help Bay Area municipalities implement permit

requirements, and they are undoubtedly less than what the voters required when they amended the State's Constitution to add unfunded mandate protections for local governments.

Request: Unless substantially streamlined and revised in a manner reflecting consensus with local governments on priorities and phasing, we request that the Regional Board expressly condition implementation of the items outlined in Section II below on the permittees' *actual* receipt of State funding by means of placing the following qualification language in the relevant provisions of the final permit:

The Permittees and the Regional Board staff shall work cooperatively to obtain State funding (grant, bond, or otherwise) to address this requirement; in the event that such funding from the State is not forthcoming, the implementation deadline for this requirement shall be suspended until such time as such funds from the State are received by the Permittees, in which event implementation shall be effectuated within a time equivalent to the number of months originally provided.

Conditioning implementation of the Municipal Regional Permit's requirements in this way would not only avoid a constitutional violation and the prospect of costly litigation, it would also greatly reduce the financial strain posed by the permit and allow Bay Area municipalities to more effectively focus their efforts on addressing the highest priority water quality issues within the confines of their limited resources.

II. NUMEROUS PROVISIONS IN THE TENTATIVE ORDER CONTAIN STATE UNFUNDED MANDATES

The federal Clean Water Act does not require municipalities to perform many of the obligations imposed by the Tentative Order. It only requires municipalities to adopt: (1) effective prohibitions on non-stormwater discharges into their storm sewers and (2) controls (in the form of stormwater management programs) to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B). Both federal and State courts have made clear that further municipal stormwater requirements may indeed be imposed to help achieve water quality standards, but those same court decisions make equally clear that such a policy choice by a Regional Water Board is a matter of *discretion* going beyond the federal floor. See *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159; *City of Burbank v. State Water Res. Control Bd.* (2005) 35 Cal. 4th 613.

The following provisions of the Tentative Order arise from the exercise of discretion and constitute new programs or higher levels of service going beyond federal requirements, causing them to constitute State unfunded mandates.⁴

⁴ This list is not exclusive, but is comprised of some of the more burdensome requirements for local governments to implement.

- Inspection of industrial facilities directly permitted by the State or Regional Water Boards and which pay NPDES permit fees to the State to help defray the cost of administering and overseeing compliance with such permits;
- Inspection and cleaning of *all* catch basins prior to the rainy season;
- Compliance with prescriptive street sweeping/sweeper specifications;
- Mandating imposition of new development and redevelopment numeric treatment standards for projects 10,000 square feet or smaller;
- Requirement for stormwater treatment on trails, bicycle lanes, and existing road rehabilitation projects;
- Requirements for regulation of single-family home projects;
- Excessive and highly prescriptive monitoring requirements with an additional layer of monitoring/investigation activities triggered based on monitoring results and with *no upper resource limit*;
- Prescriptive pump-station pilot program (i.e., stormwater diversion from pump stations to the sanitary sewer) and associated monitoring;
- Hydromodification (peak flow regardless of pollutant content) management requirements;
- Mandatory inspection of field operations of mobile businesses such as landscapers and carpet cleaners where business is based and registered outside of co-permittee's boundary line;
- Prescriptive control measures for trash collection and management (especially purchase, installation and maintenance of full capture devices);
- Mandatory monitoring and bench marks for potable water discharges from hydrants and leaks;
- Requirement for effectuating abatement/remediation of privately-owned properties identified as having elevated levels of PCBs or mercury;
- Creation and implementation of a plan to assess and manage the discharge of PBDE; and
- Prescriptive formatting and excessive paperwork/data management and reporting requirements.

To bring forward just one concrete example from the above to illustrate the larger point, the federal Clean Water Act regulations set forth those facilities required to be inspected by municipalities. Those facilities are solely municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of Title III of the Superfund Amendment and Reauthorization Act of 1986, and industrial facilities that a municipality has determined to be contributing a substantial pollutant loading to the municipal storm sewer system. *See* 40 C.F.R. § 122.26(d)(2)(iv)(C). Unlike the Tentative Order, the federal regulations do not require inspections of additional industrial facilities or construction sites which have their own NPDES stormwater permit coverage (for which they pay fees to the State – fees that have *not* been shared with local governments to defray the costs of these delegated oversight responsibilities).

It is predictable that some will argue that the bulleted items above fall within the federal Clean Water Act's maximum extent practicable (MEP) standard, but a comparison of the municipal stormwater permit requirements the U.S. Environmental Protection Agency issues and those set forth in the Tentative Order belie that position. A municipal stormwater permit relatively recently issued by EPA Region 9 is attached as Exhibit A for purposes of facilitating such a comparison. It consists of 24 pages as opposed to 190 for the Tentative Order (of which 95 pages contain the highly prescriptive requirements to be imposed on the municipalities) and, unlike the Tentative Order, contains no 100+ page long reporting form.

Perhaps more importantly, instead of the highly prescriptive approach set forth in the Tentative Order, the EPA-issued permit also accords the subject municipalities far more discretion in determining the scope and level of implementation of the various components of their stormwater management programs, such that they can be tailored commensurate with the availability of resources. Nor is the attached EPA Region 9-issued permit unique; in fact, our review of municipal stormwater permits issued directly by EPA elsewhere in the country confirms that it is fairly typical and no EPA-issued municipal stormwater permits even approach the length or level of prescriptiveness of the Tentative Order.

Request: Exhibit B contains a more complete side-by-side comparison of EPA-issued municipal stormwater permit requirements and those set forth in the Tentative Order which constitute State unfunded mandates. We request that a response to comments address *each* row of this table individually and specifically set forth evidence of where EPA has issued an MS4 permit requirement parallel to that contained in the Tentative Order and the level of prescriptiveness/flexibility EPA accorded the subject municipality in that instance.

III. LEGAL FRAMEWORK

A. STATUTORY AND CASE LAW BACKGROUND

Section 6 of Article XIII B of the California Constitution provides that: "Whenever the Legislature or any state agency⁵ 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 increased level of service" Cal. Const., art. XIII B, § 6 (emphasis added). Approved by California voters as Proposition 4 in 1979, Section 6 was included in Article XIII B in recognition that Article XIII A of the Constitution, adopted earlier through Proposition 13, severely restricted the taxing powers of local governments. *See County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 61. Thus, the provision "was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task." *County of Fresno v. State of California* (1991) 53 Cal. 3d 482, 487; *see also County of Sonoma v. Comm'n on State Mandates* (2000) 84 Cal. App. 4th 1264, 1282 (quoting Ballot Pamp., Special Statewide Elec. at 18 (Nov. 6, 1979)) ("[S]ection 6 of Proposition 4 was intended to prevent state government attempts to 'force programs on local

⁵ Regional water quality control boards are state agencies for subvention purposes. *County of Los Angeles*, 150 Cal. App. 4th at 904.

governments without the state paying for them.”). The “central purpose of the principle of state subvention,” therefore, “is to prevent the state from shifting the cost of government from itself to local agencies.” *Hayes v. Comm’n on State Mandates* (1992) 15 Cal. App. 4th 1564, 1593.

Accordingly, Section 6 provides for “reimbursement,” through subvention, “to local governments for the costs of complying with certain requirements mandated by the state.” *County of Los Angeles v. Comm’n on State Mandates* (2007) 150 Cal. App. 4th 898, 905 (citation and alteration omitted). “Subvention” generally requires “a grant of financial assistance, or a subsidy.” *Id.* at 906. The reimbursement requirement is triggered by an increase in costs that a local government is required to incur as a result of a statute, or an agency order implementing a statute, that mandates a “new program” or “higher level of service.” Cal. Gov. Code § 17514; *County of Los Angeles*, 150 Cal. App. 4th at 908. In the unfunded mandates context, the term “program” refers to “programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments.” *County of Los Angeles*, 43 Cal. 3d at 56.

A number of obligations imposed by the Tentative Order are such programs because they are uniquely governmental functions and are expressly imposed on the municipalities that are permittees, not the general public. Many of these obligations are “new” programs because the Regional Board did not exercise its discretion to impose these requirements in earlier permits. *See County of Los Angeles v. Comm’n on State Mandates* (2003) 110 Cal. App. 4th 1176, 1189.

Moreover, even where not wholly “new,” other obligations have been increased and/or made significantly more prescriptive in comparison to those set forth in prior stormwater permits the Regional Board has issued to Bay Area municipalities (and in comparison to what EPA requires of municipalities it permits), such that they constitute higher levels of service. A “higher level of service” refers to State-mandated increases in the services provided by local agencies. *County of Los Angeles*, 43 Cal. 3d at 56. A higher level of service exists where the mandate results in an increase in the “actual level or quality of governmental services provided.” *San Diego Unified Sch. Dist. v. Comm’n on State Mandates* (2004) 33 Cal. 4th 859, 877.

B. THE FACT SHEET’S ASSERTION THAT THE TENTATIVE ORDER DOES NOT CONTAIN ILLEGAL UNFUNDED MANDATES IS INAPPROPRIATE AND ERRONEOUS

The Fact Sheet that accompanies the Tentative Order contains a lengthy assertion that the Order does not contain illegal unfunded mandates subject to subvention under the California Constitution. The statement exceeds the Regional Board staff’s jurisdiction, reflects an advocacy position being utilized by the State Board legal staff elsewhere, is not entitled to any weight, and lacks merit in any event.

As an initial matter, the Regional Board staff’s legal assertion is inappropriate because the Commission on State Mandates was established to resolve claims for subvention by local

government agencies. *See* Cal. Gov. Code §§ 17525, 17551. Only the Commission has the jurisdiction to determine, “in the *first* instance,” whether a cost incurred by a local government arises from carrying out a State mandate for which subvention is required. *County of Los Angeles*, 150 Cal. App. 4th at 907, 917-18 (emphasis added); *Lucia Mar Unified Sch. Dist. v. Honig* (1988) 44 Cal. 3d 830, 837.

In addition, the staff’s statements in the Fact Sheet appear to reflect advocacy positions developed by the State Board legal staff concerning unfunded mandates resulting from their unsuccessful litigation in *County of Los Angeles*, 150 Cal. App. 4th at 917-18. It is not appropriate for the Regional Board staff to include such an advocacy piece in a permit “fact” sheet. *See* 40 C.F.R. §§ 124.8, 124.56.

Furthermore, the substantive arguments in the Fact Sheet are erroneous. The staff contends that, because the MRP constitutes a federal NPDES permit and implements requirements mandated by Section 402(p)(3)(b) of the Clean Water Act, *all* obligations within the MRP are federally mandated. That argument lacks credibility on its face and is without merit.

First, as a theoretical matter, federally mandated appropriations are those “required to comply with mandates of the courts or the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the provision of existing services more costly*.”⁶ *County of Los Angeles*, 150 Cal. App. 4th at 907 (quoting Cal. Const., art. XIII B, § 9(b)) (emphasis in original). California courts “are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under *all* circumstances.” *Id.* at 914 (emphasis added). In fact, the California Supreme Court has acknowledged that an NPDES permit may contain both federally mandated terms as well as terms exceeding federal law. *See City of Burbank*, 35 Cal. 4th at 618, 627-28. And other courts have found that “the potential for non-federally mandated components of an NPDES permit is acknowledged under both federal law and state law.” *County of Los Angeles*, 150 Cal. App. 4th at 916. Where state-mandated activities exceed federal requirements, those mandates constitute a reimbursable state mandate. *See Long Beach Unified School District v State of California* (1990) 225 Cal. App. 3d 155, 172-73.

Second, whether an obligation imposed on a municipality results from a federal law or program does not, by itself, render that obligation a “federal mandate” for subvention purposes. Rather, “where the manner of implementation of the federal program [is] left to the true discretion of the state,” the state’s decision to shift the burden to municipalities gives rise to subvention. *Id.* Although the federal Clean Water Act does impose certain obligations directly on municipalities, the Tentative Order goes beyond the mandates of

⁶ “There is no precise formula or rule for determining whether the ‘costs’ are the product of a federal mandate.” *County of Los Angeles*, 150 Cal. App. 4th at 907 n.2. “A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.” *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, 76.

federal law. Under the Clean Water Act, municipalities are required to (i) prohibit non-stormwater discharges into the storm sewers and (2) reduce the discharge of pollutants in stormwater to the maximum extent practicable (MEP). *See* 33 U.S.C. § 1342(p). While the Regional Board possesses authority to impose permit requirements going beyond the maximum extent practicable (MEP) to facilitate the achievement of water quality standards, *see Defenders of Wildlife*, 191 F.3d at 1163, that constitutes an exercise of discretion subjecting those requirements to the State Constitution's subvention requirement.

Likewise, in arguing that the Tentative Order is a federal mandate the Regional Board puts too much weight on the federal nature of Total Maximum Daily Load (TMDL) requirements. Although NPDES permits must contain requirements "consistent with" applicable waste load allocations (WLAs) in TMDLs, the specific manner in which the TMDL is implemented in an NPDES permit is not a federal mandate, but rather is left to the state's discretion. *See Pronsolino v. Marcus* (9th Cir. 2002) 291 F.3d 1123, 1140. Therefore, under California case law, implementation of the TMDL requirements does not cure the Tentative Order of its constitutional violation. *See Hayes*, 15 Cal. App. 4th at 1593-94.

Third, the Fact Sheet statement maintains that subvention is not required because the obligation imposed on municipalities by the Tentative Order are less stringent than the obligations imposed on some nongovernmental dischargers by other NPDES permits. The staff fails to explain how this comparative burden is legally significant or even relevant. Indeed, this argument is not relevant for purposes of subvention. Nowhere do the applicable constitutional provisions, statutes, or case law require that state mandates be more burdensome for local governments than private parties in order to trigger subvention. The single case relied upon, *County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, is completely inapposite. In that case, the California Supreme Court held that costs incurred by local agencies in providing employees with the same increase in workers' compensation benefits as employees of private entities did not require subvention because the program was administered by the state, not local governments. *Id.* at 57-58. The case simply does not support the Regional Board's proposition that "costs incurred by local agencies to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental discharges."

Fourth, the Fact Sheet asserts that, because the municipalities have the authority to levy service charges, fees, and other assessments to fund compliance with the Tentative Order, the Order is not an unfunded mandate. This begs the question of whether the requirement being imposed violates the State Constitution in the absence of the necessary funding being provided by the State (such that municipalities won't need to look to the local tax base). The contention that such fees are easily levied by local governments is also legally and factually incorrect. *See, e.g., Pajaro Valley Water Mgmt. Agency v. Amrhein* (2007) 150 Cal. App. 4th 1364, 1384-93; *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 215-17. In fact, the Regional Board staff has effectively acknowledged this in its February 13 status report.

Fifth, according to the Fact Sheet, the Tentative Order is not an unfunded mandate because the municipalities requested permit coverage in lieu of compliance with both numeric restrictions on their discharges and the complete prohibition against the discharge of pollutants contained in Section 301 of the Clean Water Act. There is no such request with respect to this permit in the record. Moreover, the expert panel assembled by the State Board concluded that “[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges.”⁷ Storm Water Panel on Numeric Limits, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial, and Construction Activities* 8 (2006).

Finally, the Fact Sheet contends that the Tentative Order is not an unfunded mandate because the municipalities’ duties pre-date the enactment of Article XIII B, Section 6, of the California Constitution. This argument was recently rejected by the California Court of Appeal in *County of Los Angeles*. 150 Cal. App. 4th at 916 n.5. Furthermore, municipal separate storm sewer systems (MS4s) were not required to obtain NPDES permits until the 1990s, after the voters amended the State Constitution to provide municipalities with these protections.

⁷ Furthermore, the case law cited in the Fact Sheet does not support the argument. For example, the staff cites *County of San Diego v. State of California* (1997) 15 Cal. 4th 68, in support of the proposition that, to the extent the municipalities have voluntarily availed themselves of the Tentative Order, the Order is not a state mandate. The case does not support that statement, however. In that case, the California Supreme Court held that counties that participated in a State healthcare program for the indigent had to spend at least as much as they received in grants from the state. *Id.* at 107-08. Participating in the healthcare program in that case was entirely voluntarily; counties could opt out completely if they wished. *Id.* By contrast, there is no opt-out opportunity for municipalities here. The Fact Sheet also relies on *Environmental Defense Center v. U.S. Environmental Protection Agency* (9th Cir. 2003) 344 F.3d 832. That case involved the Tenth Amendment of the U.S. Constitution, not subvention under the California Constitution. *Id.* at 845-48. Consequently, it is inapplicable.