

To: Board of Supervisors

From: Transportation, Water and Infrastructure Comm

Date: March 9, 2009



Contra
Costa
County

Subject: Report on the Impacts of the Proposed Municipal Regional Permit

RECOMMENDATION(S):

The following recommendations are for consideration of the TWIC to forward to the full Board for approval.

- ACCEPT the following report on the Municipal Regional Permit (MRP):
- AUTHORIZE the Chair of the Board to sign two comment letters on the MRP addressed to the San Francisco Bay Regional Water Quality Control Board (RWQCB), one regarding significant issues/problems from the unincorporated County's perspective and the other from the FCD's perspective.
- AUTHORIZE a Board member to testify before the RWQCB at the May 13, 2009, RWQCB hearing to describe the impacts of the MRP on County government and the Flood Control District;
- DIRECT the County Administrator and the Public Works Director/ex officio Chief Engineer (for the Flood Control District) to work with other affected departments to determine the impacts on their budget, and to seek appropriate revenue sources to offset the additional costs of compliance.

APPROVE

OTHER

RECOMMENDATION OF CNTY ADMINISTRATOR

RECOMMENDATION OF BOARD COMMITTEE

Action of Board On: **03/31/2009**

APPROVED AS RECOMMENDED OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYES _____ NOES _____

ABSENT _____ ABSTAIN _____

RECUSE _____

Contact: **Greg Connaughton, (925) 313-2271**

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

**ATTESTED:
March 31, 2009**

David J. Twa,
County
Administrator and
Clerk of the Board of
Supervisors

By: , Deputy

cc:

RECOMMENDATION(S): (CONT'D)

SIGNATURE: Supervisor Susan Bonilla

FISCAL IMPACT:

The requirements of the MRP will cause substantial fiscal impacts to the County. Although the Public Works Department will bear the brunt of the fiscal impacts, other departments will be significantly impacted.

Currently, the Public Works Department's annual costs to implement the NPDES permit are approximately \$3 million. The estimated total direct cost for the five year MRP-NPDES permit period is \$49.5 million (\$43.5 million for unincorporated County and \$6 million for the Flood Control District). Attachments A, B, and C contain more detail regarding the costs to the Public Works Department and the Flood Control District of implementing the MRP.

BACKGROUND:**INTRODUCTION**

The San Francisco Bay Regional Water Quality Control Board (RWQCB) has initiated proceedings to reissue a National Pollutant Discharge Elimination System (NPDES) permit. The proposed permit, known as the Municipal Regional Permit (MRP), will regulate unincorporated Contra Costa County, the Contra Costa County Flood Control and Water Conservation District (FCD) all the cities within Contra Costa County and most jurisdictions in the greater San Francisco Bay Area.

The MRP was originally released for public comment on December 14, 2007. The Public Works Department, County Watershed Program (CWP) analyzed the MRP and presented a report on its impacts to the Transportation, Water and Infrastructure Committee (TWIC) on February 11, 2008 and the Contra Costa County Board of Supervisors on February 26, 2008. A comment letter from the Board of Supervisors was submitted to the RWQCB on February 29, 2008 and Supervisor Uilkema (along with many other elected officials and municipal staff) gave testimony at the March 11, 2008, public hearing. In response to these written comments and testimony the RWQCB revised the MRP. This latest version of the MRP was released for public comment on February 11, 2009 with written comments due by April 3, 2009, and a public hearing scheduled for May 13, 2009, with an anticipated adoption date of not later than July 1, 2009.

Due to our previous comments and testimony, this Revised Tentative Order of the MRP is significantly improved over the initial version. However, there are still very significant issues and costs associated with this new revised MRP. This report highlights the provisions that we feel are unrealistic and impose an undue burden on the County. The current MRP is quite lengthy (121 pages plus 68 pages of attachments) and at times complicated and confusing. One of our major comments is that some sections of the MRP seem to be in conflict with other sections. Another general comment is that this MRP again attempts to regulate on a "one size fits all" basis. Instead of allowing jurisdictions flexibility to deal with water quality issues on a case by case basis (often allowing for more benefit with less expense), this MRP dictates how municipalities must address the problem even though jurisdictions vary greatly based on size, diversity, social/economic makeup etc. To date, the RWQCB has unfortunately not provided detailed responses to our previous written and oral testimony. With this in mind, rather than highlighting the changes between the previous draft MRP and this current draft MRP, the changes highlighted herein are changes from our existing NPDES permit that will dramatically affect not only the general operations and budget of the County, but will also have far-reaching impacts on the citizens who live and work in (or visit) Contra Costa County and the San Francisco Bay Area. The ramifications the MRP will have on Contra Costa County, our

citizens and businesses, including a potential \$34.5 million demand on the General Fund over the next five years of the MRP's term.

This revised Tentative Order of the MRP as opposed to the previous proposed MRP (or our existing NPDES permit), adds requirements on the Contra Costa County Flood Control and Water Conservation District (FCD). Even though our existing NPDES permit names the FCD as a co-Permittee, the FCD has very limited requirements as would be expected since the FCD has no land use authority, is non-population based, and merely builds, operates and maintains stormwater conveyance facilities. This report will highlight the new FCD requirements. We have drafted two letters to the RWQCB that highlights significant problems with this proposed MRP from the County's perspective and FCD's perspective.

The County supports the RWQCB's overarching goal to improve water quality. The County also supports overall principles of environmental sustainability. However, water quality goals must be reviewed in the context of the County's total responsibilities, such as smart growth, affordable housing, flood control, health and safety of our population and other environmental and social programs.

History:

In an effort to stop pollution of the "Waters of the United States," the Federal Government passed the Clean Water Act (CWA) in 1972. Initially, the U.S. Environmental Protection Agency's (USEPA) implementation of the CWA emphasized control of pollution from Point Sources (e.g. industry, sewage treatment plants, etc.). In 1987, the scope of the CWA was expanded to regulate Non-Point Source Pollution (pollution primarily conveyed by stormwater runoff from urban, suburban and agricultural lands). For Contra Costa County, this is generally the stormwater (originating on both public and private property) that is carried in the public drainage system (underground pipes, drainage channels, etc.) to the "Waters of the U.S." (natural creek systems, the Delta, the San Francisco Bay and the Pacific Ocean).

In 1993, the RWQCB, issued Contra Costa County its first NPDES permit. The NPDES permit required the County, its cities and the Flood Control District to act jointly to implement the permit conditions. The responsibility for (unincorporated) County compliance with the permit was assigned to the Public Works Department (PWD), which created the County Watershed Program (CWP) to manage the overall implementation and administration of NPDES compliance. Since 1993, our NPDES permit has been reissued once (1999), and one major revision has been made to the permit (adding Provision C.3 in 2003). The MRP represents the third NPDES permit for Contra Costa County and is scheduled to be adopted and effective starting July 1, 2009; the MRP will be in effect until June 30, 2014 (or until the next NPDES permit reissuance).

Permit "Approach":

With each new NPDES permit the requirements have grown more stringent and the related costs have increased. In addition, the overall approach of the permits has changed. The first NPDES permit focused primarily on educating the public on ways to reduce pollution of our stormwater - its approach was: "We are here to educate you about how to reduce pollution and help the environment." The second permit expanded this education focus and added enforcement of violations, increased the regulation of municipal operations and new development. The approach was: "We will continue to educate you, but we are also going to regulate you into reducing pollution." This MRP permit represents a further change in the overall philosophy to: "You should already know the right thing to do (to protect the environment) so now we are going to force you (by regulations and fines) to protect the environment."

Up to this point, it has been possible for the Public Works Department's CWP to take almost exclusive responsibility for complying with the County's NPDES permit. The MRP expands County requirements to such an extent that this arrangement will no longer achieve compliance. Since the MRP affects virtually all of our business practices (from the way the County offices are maintained to the way we issue business licenses), the County will benefit from a "team approach" to complying with the permit. The Public Works Department's CWP will continue to oversee the County's NPDES compliance, but the challenges of complying with the new permit will involve a substantially higher level of day-to-day cooperation with other County Departments.

Consequences of Non-Compliance:

If the County is found to be out of compliance with our MRP permit, the penalties can be as high as \$35,000 per day per violation (each area of non compliance could be viewed as a separate violation), plus \$10 per gallon of stormwater discharged into the "Waters of the United States." In addition, if found to be out of compliance with the permit, the County would be vulnerable to 3rd party lawsuits from environmental and "watchdog" groups. The results of these lawsuits could far exceed the penalties that may be imposed by the RWQCB or the USEPA.

MRP REGULATORY AREA

The MRP differs from the County's current NPDES permit in that the MRP will uniformly regulate most of the Bay Area. In addition to Contra Costa County, our incorporated cities and special districts, this MRP also regulates Alameda, Santa Clara, and San Mateo Counties, and several cities and agencies in Solano County including Fairfield-Suisun and Vallejo. Given the regulatory reach of the new permit, we expect increased potential for cooperation among agencies to find regional solutions to our common regulatory requirements.

MRP TIMING

This final draft of the MRP was issued by the RWQCB on February 11, 2009. Written comments regarding the MRP must be submitted to the RWQCB by April 3, 2009. The RWQCB will hold a public hearing regarding the proposed MRP at 9:00 a.m. on May 13, 2009, at 1515 Clay St., in Oakland. This MRP is scheduled to be adopted sometime after that with implementation to commence on July 1, 2009. Under this schedule, the five year MRP will be in effect until June 30, 2014 (or until the next reissuance of the NPDES permit).

It should be noted that some components of the MRP will be phased in, becoming more comprehensive over the five year permit period. Other provisions require immediate implementation upon commencement of the permit and will remain consistent over time. Some MRP provisions do not require additional action by the County until the second, third, fourth or fifth year(s) of the permit. Attachment C provides for the explanation of costs associated with provision timing. We have provided both the anticipated costs (Attachment B) and the implications/challenges associated with each phase of provision implementation (Attachment A).

HIGHLIGHTS OF MAJOR AREAS OF IMPACT TO COUNTY GOVERNMENT

The MRP will affect many County operations. Some of the MRP's proposed changes are simply "ratcheting up" of current provisions and best management practices, while other provisions may require totally new programs. In addition, business practices, program definitions and areas of responsibility may need to be expanded and modified. For example, it may be necessary for the definition of public health to be expanded to include the "health" of the natural environment, thereby enabling the areas of responsibility of some departments to expand to include environmental

protection. The permit will also require extremely costly programs and infrastructure retrofit projects to monitor, reduce and capture litter (with the goal of zero discharges in 15 years!) and other pollutants.

The MRP will also require a number of changes to County policy. These changes range from regulating property uses, such as swimming pools (construction of pools and discharges), to requiring heightened enforcement activities by the County (by requiring the County to issue citations for a wide variety of water quality infractions). The County will be required to develop the authority to regulate water districts (potable water discharges) and fire districts (emergency discharges) and sanitary sewer districts and Publicly Owned Treatment Works (POTWs). The MRP requires the County to consider potential water quality impacts in prioritizing road maintenance projects and in operations of our storm drainage and Flood Control infrastructure.

The departments anticipated to be significantly impacted by the MRP include:

1. Public Works Department
2. Contra Costa County Flood Control and Water Conservation District
3. Department of Conservation and Development
4. Building Inspection Division
5. General Services Department
6. Health Services Department
7. County Counsel's Office
8. District Attorney's Office
9. Department of Agriculture

COMPARISON OF MRP REQUIREMENTS WITH OUR EXISTING NPDES PERMIT

Our current NPDES permit has five major provisions, (for example C.2 "Municipal Operations" is one provision with several components. An example of a component is C.2a "Street Sweeping"). The proposed MRP expands, revises and in some instances eliminates components in each of these five provisions and also adds nine new provisions. The key new/modified requirements include trash capture, increased scope of Provision C.3 ("New Development and Redevelopment"), developing the authority to regulate other entities and enforce additional uses, increased monitoring and reporting, and development of TMDLs (total maximum daily loads) for pollutants.

The two significant components that "appear" to have been removed are street sweeping and catch basin cleaning. They are removed from the requirements of provision C.2 "Municipal Operations", but at the same time they are effectively "required" in provisions C.10 "Trash Reduction", C.11 "Mercury Controls", and C.12 "Polychlorinated Biphenols (PCBs) Controls".

These are two of the most effective means of removing pollutants. In fact, the Water Board's own Finding 16 (of this MRP) concedes specific extraneous pollutants found in urban run-off, including heavy metals, dioxin and PBDE's, are most commonly found deposited on paved and other impervious surfaces and at present the most effective way to capture these pollutants are with effective street sweeping. Our current County street sweeping program captures and removes 1632 cubic yards of material which contains significant amounts of PCBs, Mercury, Copper, Lead, Nickel, Zinc and Petroleum Hydrocarbons in addition to almost 9,000 pounds of oil and grease! Similarly, catch basins are commonly designed and constructed with "sumps" that capture pollutants in the catch basin before being released into the environment. Our current catch basin cleaning program removes over 100 cubic yards of material which again contains significant amounts of Copper, Lead, Zinc and almost 600 pounds of oil and grease!

Without these two highly effective best management practices, these pollutants would not be captured and would be released into our waterways to damage the environment. The RWQCB staff is aware of the fact that street sweeping and catch basin cleaning are two of the most successful Best Management Practices (BMPs) at removing pollutants. As with the previous draft of the MRP, this version demonstrates that the RWQCB staff seems to have very little understanding of the roles and

responsibilities of local municipal government. This MRP dictates local government to make changes to our way of doing business that not only don't make sense, but in many cases are beyond our jurisdiction.

In addition, this revised MRP has removed much of the "grandfathering" language that is present in our current permit. One example of this is with regards to alternative compliance for road projects. Our current NPDES permit allows road projects the option of alternative compliance (for equal or greater impacts) if the impacts from a given road project cannot be dealt with as part of a particular project. For example if we are improving an existing rural road in a hillside location it might be physically impossible or extremely expensive to treat that water on-site. Our current permit would allow us to instead treat an equivalent (or greater) amount of impervious surface (roadway) in a nearby location that might not have the same physical constraints (steep/unstable slopes, limited right of way etc.).

This revised MRP removes that provision and does not grandfather-in projects that have already been started and that have planned to utilize that provision. In effect, as the MRP is written, those projects would be out of compliance with this MRP and the County would be forced to either significantly revise the project including all the California Environmental Quality Act (CEQA) requirements and permits (CA Dept. of Fish and Game, Army Corp. etc.) which in turn will significantly increase the cost of the project or possibly cancel the project (which is typically driven by safety concerns such as the current Vasco Road Safety Improvement Project .) This is just one example of the impacts of this MRP on the County that the RWQCB is either unaware of, or don't seem to care about!

In order to provide a better understanding of the differences between this proposed MRP and our current NPDES permit, we have developed a spreadsheet (see Attachment B), that lays out the major permit provisions by section, identifies where each provision can be found in the permit itself, describes significant components of each provision, and compares how the current permit's requirements relate to the requirements of the proposed MRP. The document evaluates both the policy ramifications and the financial impacts that the MRP is anticipated to have on County government (including the Flood Control district), businesses, and residents.

Three things should be noted about this spreadsheet:

- 1) The costs reported are rough estimates and are intended to provide the scale of budget impacts or "ball park" numbers. Important assumptions are listed both throughout the document and in the "Notes" section at the bottom of the spreadsheet. Since many of these provisions contain vague and unclear language, and others are entirely new, more accurate estimates will need to be developed once the provisions are better defined.
- 2) The MRP has fifteen provisions. Only the major provision changes (ones that will have the greatest impact on our business practices) are included.
- 3) Increased County costs associated with private developments will likely be passed on to the developer/builder in the form of higher permit (pay-for-services) fees and are therefore not accounted for in this report. In addition to this spreadsheet, we have also provided a bar graph (Attachment C). The bar graph shows the relationship between annual costs for NPDES compliance activities (for our existing NPDES permit) and estimated costs (based on the proposed MRP) for each year of the MRP permit period.

CURRENT ACTIONS TO ADDRESS PROPOSED MRP

The PWD - County Watershed Program has solicited comments on the MRP from all departments that have been identified as likely to be significantly affected by the permit. The CWP is currently

working with the Contra Costa Clean Water Program (the 19 incorporated cities within the County, and the Flood Control to develop a unified response to the RWQCB regarding the cost and policy challenges created by the new permit. In addition, the Contra Costa Clean Water Program is collaborating on a joint response to the RWQCB with the Bay Area Stormwater Management Agencies Association (BASMAA), which includes representatives from the Clean Water programs of all the affected Bay Area Counties.

Our overriding current goal is to again convey the County's concerns to the RWQCB to seek further modifications that will render the MRP as user-friendly and implementable as possible. However, sense this draft of the revised MRP is significantly better than the previous draft we have been "unofficially" informed that the RWQCB intends to adopt this version of the MRP without additional changes. However, since many of the provisions and components of this MRP are still overly burdensome, confusing and/or ambiguous we feel it is extremely important to go "on record" with our concerns and requests for further revisions and clarifications.

CWP has developed both Contra Costa County's and the Flood Control Districts comment letters to the RWQCB regarding feasibility issues and challenges associated with implementing the proposed MRP. In other regions of the State, the RWQCBs have not considered costs associated with implementation to be a valid argument for relaxing permit requirements. Court cases, some decided by the California State Supreme court, have upheld the RWQCBs' position on these cost issues. In addition, lack of current legal authority (as long as legal authority can be obtained and is not unconstitutional) is not considered to be a valid argument for relaxing NPDES permit provisions. In addition to addressing cost, policy and legal issues, the comment letters will suggest edits to unclear permit language, and will recommend changes intended to ensure that permit provisions are implementable and actually provide a basis for improving water quality. It is recommended that the Board approve the comment letters and authorize the Chair of the Board to sign the letters and submit them to the RWQCB by the April 3, 2009, due date.

Finally, the Contra Costa Clean Water Program has been conducting an outreach throughout the County to discuss the impacts of the MRP with various key elected officials, city managers, and stakeholders including the Public Managers Association, the Contra Costa County Mayors Conference, the Home Builders Association and the Contra Costa Council.

POTENTIAL FUTURE ACTIONS

Due to the comprehensive scope of the proposed MRP, it will only be possible to reach full compliance by addressing the challenges from many different angles, and by seeking cooperation from many different partners. The County Administrator and the Public Works Department should meet with other affected departments to identify appropriate sources of revenue to fund implementation of the MRP and reduce the potential liability to the General Fund.

The Contra Costa Clean Water Program has been conducting preliminary activities for a ballot measure to develop additional funding for clean water purposes (pursuant to Proposition 218). The Clean Water Program has been conducting public outreach and opinion polls, and is setting aside \$300,000 per year toward the approximately \$1.5 million cost associated with putting a measure on the ballot. However, given the current state of the economy and housing market, a ballot measure of this sort is unlikely to succeed in the immediate future.

CONSEQUENCE OF NEGATIVE ACTION:

Without the comment of this Board, the RWQCB may not consider the effects of the MRP on Contra Costa County and may not revise the permit into a form that is more in-line with the County's business practices and feasible to implement. As a result, the MRP may have an even greater

negative impact on our budget and our ability to provide other vital public services.