



California Regional Water Quality Control Board

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Arnold Schwarzenegger
Governor

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

Catherine George Hagan

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

DATE: 5 November 2009

SUBJECT: Regulatory Authority for Imposing Numeric Effluent Limits on Dry Weather, Non-Storm Water Discharges, in Municipal Storm Water Permits

At the July 1, 2009, San Diego Regional Board Meeting, Regional Board members received public comments regarding the inclusion of regulations specific to non-storm water discharges in Tentative Order No. R9-2009-002, the reissuance of National Pollutant Discharge Elimination System (NPDES) Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) draining the watersheds of Orange County within the San Diego Region (South Orange County Municipal Storm Water Requirements). At the July meeting, Regional Board members requested that Board Counsel respond to public comments and Board member questions regarding the Regional Board regulation of non-storm water discharges. Commenters assert that the definition of "storm water" in the federal regulations includes drainage and surface runoff entirely unrelated to precipitation events. They also comment 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) requirement that discharges of non-storm water into an MS4 be "effectively prohibited." As a result, commenters assert that numeric effluent limitations on dry weather, non-storm water discharges are inappropriate. Board members also sought clarity on the claims by copermitees that many provisions in the Tentative Order are unfunded state mandates, requiring reimbursement by the State. This memorandum addresses both the non-storm water and unfunded mandate issues.

I. Regulatory Background

The Clean Water Act (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 a NPDES permit pursuant to Section 402 of the Clean Water Act. 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 Section 402(p)(3)(B)(ii-iii).)

On November 16, 1990, USEPA published regulations addressing storm water discharges from MS4s. (Vol. 55 Federal Register (Fed. Reg.) 47990 and following (Nov. 16, 1990).) 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 maximum extent practicable. However, 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).) “Illicit discharges” defined in the regulations is the most closely applicable definition of “non-storm water” contained in federal law and the terms are often used interchangeably. The State Water Board has concluded that “U.S. EPA added the illicit discharge program requirement with the stated intent of implementing the Clean Water Act’s provision requiring permits to ‘effectively prohibit non-storm water discharges.’” (State Board Order WQ 2009-0008 (*County of Los Angeles*), p. 4.)

II. Definition of Storm Water and Non-Storm Water

Federal regulations define “storm water” as “storm water runoff, snow melt runoff, and surface runoff and drainage.” (40 C.F.R. § 122.26(b)(13).) While “surface runoff and drainage” is not defined in federal law, USEPA’s preamble to the federal regulations demonstrates that the term is related to precipitation events such as rain and/or snowmelt. (55 Fed. Reg. 47990, 47995-96.) For example, USEPA states: “In response to the comments [on the proposed rule] which requested EPA to define the term ‘storm water’ broadly to include a number of classes of discharges which are not in any way related to precipitation events, EPA believes that this rulemaking is not an appropriate forum for addressing the appropriate regulation under the NPDES program of such non-storm water discharges Consequently, the final definition of storm water has not been expanded from what was proposed.” (*Ibid.*) The State Water Board recently considered and rejected in its precedential *Los Angeles County* order, WQ 2009-0008, the very arguments made here by commenters that storm water includes dry weather flows, completely unrelated to precipitation events. The State Water Board concluded that “U.S. EPA has previously rejected the notion that ‘storm water,’ as defined at 40 Code of Federal Regulations section 122.26(b)(13), includes dry weather flows. In U.S. EPA’s preamble to the storm water regulations, U.S. EPA rejected an attempt to define storm water to include categories of discharges ‘not in any way related to precipitation events.’ [Citations.]” (*County of Los Angeles*, Order WQ 2009-0008, p. 7.)

The storm water regulations themselves identify numerous categories of discharges including landscape irrigation, diverted stream flows, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, and street

wash water as “non-storm water.” While these types of discharges may be regulated under storm water permits, they are not considered storm water discharges. (40 CFR § 122.26(d)(2)(iv)(B).) Applicable regulations do not prohibit these and other categories of non-storm water discharges that are not expected to be a source of pollutants. But where, as in the Tentative Permit, certain categories of non-storm water discharges have been identified by the municipality to be sources of pollutants, they are no longer exempt and become subject to the effective prohibition requirement in section 402(p)(3)(B)(ii). This process would be wholly unnecessary if MEP were the governing standard for these non-storm water discharges.

Not only does a review of the storm water regulations and USEPA’s discussion of the definition of storm water in its preamble to these regulations strongly support the interpretation that storm water includes only precipitation-related discharges, the Regional Board is bound to follow the State Water Board’s interpretation of the definition of “storm water” set forth in the precedential State Water Board Order WQ 2009-0008 which rejects the commenters’ interpretation. Therefore, while commenters assert that dry weather, non-precipitation related discharges are nonetheless storm water discharges (and therefore subject to the MEP standard in CWA section 402(p)(3)(B)(iii)), their interpretation is not supported and does not conform to applicable State Water Board precedent.

III. Non-Storm Water Regulation

Oral and written comments received by the Regional Board throughout this proceeding assert that the *discharge* of non-storm water, like storm water, from the MS4 is subject to the MEP standard and may not be regulated appropriately with numeric effluent limitations. Several commenters assert that once pollutants contained in prohibited non-storm water enter the MS4, the MEP standard and related iterative approach to storm water regulation is the most stringent means available to require those discharges to comply with water quality standards. In other words, the commenters assert that it is inappropriate for a Regional Board to regulate non-storm water discharges with numeric effluent limitations. As explained below, this interpretation is incorrect. Building on the effective prohibition against non-storm water discharges, the Clean Water Act requirement to reduce pollutants discharged from the MS4 to the MEP standard necessarily is limited to storm water discharges.

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. 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, 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.) USEPA’s preamble to the storm

water regulations also supports the interpretation that regulation of non-storm water discharges through an MS4 is not limited to the MEP standard in CWA section 402(p)(3)(B)(iii):

“Today’s rule defines the term “illicit discharge” to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the Clean Water Act. Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to “effectively prohibit” non-storm water discharges from the municipal separate storm sewer...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.” (55 Fed. Reg. 47990, 47995.)

USEPA has recently affirmed its support for the Tentative Order’s regulatory approach to non-storm water discharges in comments submitted in this proceeding. As noted above, the State Water Board concluded in its recent Order WQ 2009-0008 that “U.S. EPA added the illicit discharge program requirement with the stated intent of implementing the Clean Water Act’s provision requiring permits to ‘effectively prohibit non-storm water discharges.’” (State Board Order WQ 2009-0008 (*County of Los Angeles*), p. 4.) Along these same lines, the State Water Board also explained that “the Clean Water Act and the federal storm water regulations assign different performance requirements for storm water and non-storm water discharges. These distinctions in the guidance document . . . , the Clean Water Act, and the storm water regulations make it clear that a regulatory approach for storm water - such as the iterative approach we have previously endorsed - is not necessarily appropriate for non-storm water.” (State Water Board Order WQ 2009-0008, *County of Los Angeles*), p. 9.)

Some commenters place extensive reliance on various State Water Board water quality orders, the State Water Board’s expert storm water panel (also known as the “Blue Ribbon Panel”) report entitled, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* (June 2006), and other references, to assert that it is inappropriate to include numeric effluent limitations for dry weather non-storm water discharges from the MS4. It is important to note that the Blue Ribbon Panel neither considered nor made any determination on how non-storm water discharges from MS4s that adversely affect receiving waters are to be addressed. The discussion of the feasibility of numeric and/or narrative water quality-based effluent limitations and the MEP standard within these documents is applicable to discharges of storm water from MS4 systems, and does not pertain to non-storm water discharges from the MS4. Similarly, commenters also identify a superior court ruling in (*Cities of Arcadia, et al., v. State Water Resources Control Board* (Super. Ct. Orange County, 2007, No. 06CC02974)) (*Arcadia II*) to support its interpretation that numeric effluent limitations are not legally appropriate for the non-storm water discharges identified in the Tentative Order. Again, these references pertain to storm water and not non-storm water discharges and are inapposite here.

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.

Consistent with USEPA's position, the State Water Board has clearly indicated that Regional Boards are not limited by the iterative approach to storm water regulations in crafting appropriate regulations for non-storm water discharges. (State Water Board Order WQ 2009-0008, *County of Los Angeles*, p. 9.) 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 in recognition of the variable quality of storm events, is contrary to and potentially renders the "effectively prohibit" requirement in section 402(p)(3)(B)(ii) meaningless. While water quality based effluent limits, expressed as numeric effluent limitations, are not *required* to be imposed on dry weather, non-storm water discharges from the MS4, it is legally permissible to do so.¹

IV. Water Code Section 13241

Many commenters assert that provisions in the Tentative Order, including NELs, storm water action levels (SALs), and implementation of the Baby Beach TMDL requirements, are new permit terms that exceed federal law. Therefore, the commenters argue that the Regional Board is required, but has failed, to consider Water Code section 13241 factors, including economic considerations, prior to approving any of these provisions. The City of Dana Point cites extensively to the California Supreme Court case, *City of Burbank v. State Water Resources Control Board, et al.* ((2005) 35 Cal.4th 613) (*Burbank*), particularly the concurring opinion of Justice Brown, as supportive of its assertions.

The *Burbank* court stated: "[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.)

While the *Burbank* decision does require an analysis of Water Code section 13241 factors when the state adopts permit conditions that are more stringent than federal law (*id.* at 618) the Tentative Order reflects that all of the challenged provisions 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

¹ Commenters have also claimed that TMDLs are inappropriately included as numeric effluent limitations on both dry and wet weather discharges. This is not the case. The Tentative Order requires the Copermittees to implement BMPs capable of achieving the interim and final Waste Load Allocations (WLA) and Numeric Targets in the approved TMDL. The BMPs apply to the discharges, while compliance with the WLAs and Numeric Targets occurs in receiving waters. Further, the Copermittees have 10 years to meet the final allocations and targets established for wet weather. Finally, these provisions within the Tentative Order comply with federal regulations [40 CFR 122.33(d)(1)(vii)(B)] by being consistent with the assumptions and requirements of the Waste Load Allocations of an adopted and applicable TMDL.

noted extensively in responses to comments, to the extent that economic information has been provided in connection with compliance and other costs associated with challenged permit provisions, staff has fully considered this information. Under these circumstances, the *Burbank* case does not require more.

V. Unfunded State Mandates

Both prior to and at the July 1, 2009, Regional Board meeting on an earlier version of the Tentative Order, commenters raised the issue of unfunded state mandates in connection with many of the proposed permit provisions. Board members indicated that they would appreciate clarification about the subject of unfunded state mandates. In recently submitted written comments, the City of Dana Point and others again assert 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 absent necessary funding first being made available to Permittees.

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. However, the commenters are incorrect that the provisions in the Tentative Order exceed federal law. Moreover, there are a number of other factors that also must be established before a requirement will be found to be an unfunded state mandate warranting state reimbursement. Finally, unless and until a particular provision is determined by the State of California, Commission on State Mandates (Commission) to be an unfunded state mandate for which reimbursement is required, the Regional Board is not, as some commenters assert, precluded from adopting such provisions.

State Mandate Law

Article XIIIB, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. The process for establishing that a requirement is subject to reimbursement as an unfunded state mandate involves the filing by a local agency of a Test Claim with the Commission on State Mandates. There are several exceptions and limitations to the subvention requirements that provide bases for the Commission to determine that one or more provisions in a Test Claim are not subject to subvention. Article XIIIB, Section 6 provides, "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 increased level of service." Implementing statutes clarify that no subvention of funds is required if: (1) the mandate imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation (Govt. Code, § 17556, subd. (c)); or (2) the local agency proposed the mandate (*id.*, subd. (a)); or (3) the local agency has the authority to levy service charges, fees, or assessments sufficient to pay (*id.*, subd. (d)).

Numerous judicial decisions have further defined limitations on the requirements for subvention of funds. Specifically, subvention is only required if expenditure of tax monies is

required, and not if the costs can be reallocated or paid for with fees. (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976.) In addition, reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not entitled to subvention. *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46. The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required. *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

If the Commission determines that provisions in a permit in fact constitute reimbursable state mandates, the determination may be challenged through the judicial process. There also exists a Commission process for determining appropriate reimbursement of state mandates. If a determination that a provision constitutes an unfunded state mandate is upheld, the State likely would decide whether to reimburse the local agency for the program or the Regional Board could decide to withdraw a provision from a permit.

Recent Commission Proceedings

Recently, 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 co-permittee 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) (County of Los Angeles Test Claim).) In the Commission's Statement of Decision, 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." (County of Los Angeles Test Claim, Statement of Decision, p. 2.)

As you know, on June 20, 2008, the County of San Diego filed a Test Claim with the State of California, Commission on State Mandates (Commission), challenging multiple provisions in Order No. R9-2007-001 (National Pollutant Discharge Elimination System (NPDES) No. CAS0108758), Waste Discharge Requirements for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority), adopted on January 24, 2007 (2007 MS4 Permit). The County filed the Test Claim on behalf of 18 of the 20 MS4 Co-permittees (Claimants). Only the San Diego Unified Port District and the San Diego County Regional Airport Authority did not join in the Test Claim. The San Diego Water Board and State Water Board responded to the Test Claim. It is still pending and a draft staff analysis has not yet been issued for comment.

A similar process would need to be followed by the Orange County permittees in order to establish that any of the Tentative Order's provisions constitute unfunded state mandates entitling them to reimbursement by the state.