



How to Comply with and Fund Stormwater Programs

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HOW TO COMPLY WITH AND FUND STORMWATER PROGRAMS

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I. Introduction: The Growing Area of Stormwater Compliance

Urban runoff has been cited as the number one cause of water pollution in the U.S. Stormwater falls onto urban hardscapes sweeping up various natural and non-anthropogenic pollutants, such as gasoline, copper and heavy metals, trash, fertilizers, toxins, bacteria and other constituents. Irrigation runoff from overwatering, agriculture and other watering during dry weather also picks up pollutants. These waters collect on city streets and in storm sewers and flood channels, and are discharged into natural waterbodies.

In recent years, stormwater requirements have significantly increased. Although federal law does not require a city operating a municipal separate storm sewer system (“MS4”) to strictly



comply with numeric effluent limits or receiving water limitations, the State Water Resources Control Board has concluded as a matter of state law that MS4s must comply with such limits as part of their NPDES permit obligations. This has the effect of exposing a jurisdiction to third party lawsuits under the Clean Water Act, as most jurisdictions cannot comply with their permit limits and with the load allocations from the total maximum daily loads (“TMDLs”)¹ that are incorporated into the permit. This is particularly the case for wet weather conditions where most jurisdictions cannot comply.

In light of these regulatory developments, MS4s are seeing third party citizen suits under the CWA increase in addition to permits becoming more stringent as they are reissued. This has caused higher compliance costs as well as increased challenges to funding stormwater programs.

This paper first discusses the federal and state laws as to whether MS4s need to comply with water quality standards. It then summarizes strategies for compliance and funding.

II. Federal Law Does Not Require MS4s to Strictly Comply with Water Quality Standards

With the passage and amendment of the federal Clean Water Act (“CWA”) in the 1970s, Congress sought to protect so-called “waters of the United States”² by regulating the discharge of

¹A TMDL is a regulatory document or a plan for restoring impaired waters that identifies the maximum amount of a pollutant that a body of water can receive while still meeting water quality standards.

²In 2015, the Army Corps of Engineers and US EPA adopted a new rule regarding the test for determining a water of the United States, which utilized the significant nexus test set forth by Justice Kennedy in his opinion in *Rapanos v. United States*, 547 U.S. 715 (2015) (“*Rapanos*”). The new presidential administration has proposed rescinding

pollutants into surface waters, including lakes, rivers, streams, wetlands and coastal areas. The goal of the CWA is to reduce pollution and “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³ At the time of its enactment, however, the CWA was only designed to regulate point source⁴ discharges from industrial facilities (*e.g.*, manufacturing, mining, shipping and oil and gas extraction), municipal facilities (*e.g.*, sewage treatment plants) and animal feedlots. Stormwater runoff from industrial sources and municipal storm drains and flood control channels was not specifically addressed by the CWA. Further, U.S. EPA declined to regulate stormwater discharges since runoff was considered diffuse and could not be efficiently controlled. In 1977, however, a federal appellate court ruled in favor of an environmental group that EPA lacked the authority to exempt any particular category of point source from the CWA holding that stormwater discharges were subject to regulation under the CWA.⁵

In 1987, Congress amended the Clean Water Act (“CWA”) authorizing the regulation of stormwater discharges through the issuance of NPDES permits.⁶ Section 402(p) of the CWA sets

this rule and replacing it with the test articulated by Justice Scalia in *Rapanos*. *See generally* <https://www.epa.gov/wotus-rule>.

³33 U.S.C. § 1251.

⁴The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. CWA § 502(14).

⁵*NRDC v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977); *see also Md. Dep’t of the Env’t v. Riverkeeper*, 222 Md. App. 153, 161(2015) (“*Costle*”).

⁶33 U.S.C. § 1342(p).



forth the basic program for regulating municipal and industrial discharges and establishes priorities, deadlines, and application requirements. Congress established two different standards for stormwater discharges – one of industrial discharges, and one for MS4 discharges.⁷ Industrial dischargers are required to strictly comply with numeric limits in their NPDES permits through technology-based standards.⁸ That is, industrial dischargers must use the best available control technology to treat their stormwater discharges, and they are expressly prohibited from exceeding numeric limits in their permit. In contrast, MS4s are regulated by NPDES permits that:

⁷33. U.S.C. § 1342(p)(3).

⁸33. U.S.C. § 1311.

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) 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 [EPA] Administrator or State determines appropriate for the control of such pollutants⁹

The reduction of pollutants to the maximum extent practicable is more commonly referred to as the “MEP” standard. MEP is a pollution control standard that is based on technically and economically feasible techniques and control practices.

The MEP standard is not defined by federal or state law, but historically has been interpreted by the courts as meaning that MS4s do not have to strictly comply with water quality standards and that numeric limits are not required in MS4 permits. In 1999, the 9th Circuit Court of Appeals issued a seminal decision that the CWA does not require MS4s to strictly comply with water quality standards.¹⁰ In the case of *Defenders of Wildlife v. Browner*, environmental groups challenged the issuance by EPA to several Arizona municipalities of a MS4 permit that did not

⁹33 U.S.C. § 1342(p)(3)(B)(i)-(iii) (emphasis added).

¹⁰191 F.3d 1159 (1999) (“*Browner*”).

contain numeric limits. The environmental groups argued that the CWA required municipal stormwater to be treated the same as industrial stormwater. The court rejected this argument and held that Congress only contemplated that MS4s meet the MEP standard and that MS4s were not subject to the same controls as industrial dischargers. Despite this favorable ruling, however, the court also held that EPA and the states had discretion whether or not to impose numeric limits in NPDES permits, and in this case, EPA exercised its discretion not to impose more stringent requirements.¹¹

A California state appellate court has also held that Congress did not intend to require MS4s to comply with water quality standards. In *Divers' Environmental Conservation Org. v. State Water Resources Control Bd.*, environmental organizations challenged a NPDES permit issued to the U.S. Navy that did not contain numeric limits for the Navy's stormwater discharges, but required the permittee to limit its discharges by implementing BMPs.¹² In examining EPA regulations, the court found that NPDES permits can contain BMP requirements when meeting numeric limits is infeasible, or when BMP practices are reasonably necessary to achieve effluent limitations.¹³ The court stated, "As the Regional Board points out and the EPA has repeatedly

¹¹*Browner* at 1166-1177. "Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide for the attainment of water quality standards."

¹²145 Cal. App. 4th 246 (2006) ("*Divers*").

¹³*Id.* at 257.

noted, stormwater consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a basis which is only as predictable as the weather.”¹⁴ The court reasoned that there was no legal requirement that effluent limitations be expressed numerically¹⁵ and that the CWA only required municipalities to reduce “pollutants to the maximum extent practicable.”¹⁶ The court recognized, however, that EPA and the State Board had “wide discretion” in regulating stormwater runoff.¹⁷

Other courts outside California have reached the same conclusion as the *Browner* and *Divers*’ courts. More recently, the Maryland Court of Appeals (what is equivalent to our California Supreme Court) concluded that TMDL compliance is subject to the MEP standard of the CWA. In examining state and federal cases on the application of MEP to stormwater discharges, the Maryland Court stated “MS4s are not, however, required to impose effluent limitations necessary to meet water quality standards . . . MS4s are subject to effluent limitations that are consistent with [wasteload allocations] of EPA-approved TMDLs.”¹⁸ Thus, the Court reiterated that federal law does not require MS4s to be in strict compliance with water quality standards or that permits need to contain numeric limits. It is the discretion of EPA and the States to do so.

¹⁴*Id.* at 258.

¹⁵*Id.* at 259 citing *Communities for a Better Environment v. State Water Resources Control Bd.*, 109 Cal. App. 4th 1089, 1104-1105 (2003).

¹⁶*Id.* at 261, fn 5.

¹⁷*Id.* at 261.

¹⁸*Md. Dep’t of the Env’t v. Riverkeeper*, 447 Md. 88, 104 (2016)

III. The State Board Requires MS4s to Comply With Water Quality Standards

Although various courts have held that numeric limits are not required in MS4 permits, those same courts have held or intimated that the State has discretion to require numeric limits if it (or a regional board) deems necessary. The MEP standard is not defined by federal or state law, but historically has been interpreted by US EPA and the State Board to include use of BMPs in a stormwater management program (“SWMP”) to attain water quality standards and utilization of the iterative process should exceedances occur. Due to the variable nature of stormwater and the way in which flood control systems are designed and operated, MS4s have not been required to use best available control technologies or meet numeric limits. Instead of immediate compliance with water quality standards, the State Board has recognized that MS4s had flexibility to come into compliance through long-term compliance schedules that emphasized the development of BMPs before costly end-of-pipe treatment.¹⁹ The State Board has also recognized that MS4s can comply with water quality standards through the iterative process through the implementation of BMPs over time.²⁰ In 1999, however, the State Board at the behest of US EPA issued an order including new receiving water limitations language for MS4 permits that still exists today. “The

¹⁹State Water Board Order WQ 91-03, pg. 36.

²⁰State Water Board Orders WQ 96-13 and 98-01 (permittees “will not be in violation of receiving water limitations so long as they are in compliance with” an iterative process of successive BMPs). The State Board also held: “In fact, narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reduction of pollutants to the maximum extent practicable, and water-quality based requirements of the CWA. Order 98-01 at pg. 5.

“SWMP shall be designed to achieve compliance with Receiving Water Limitations.”²¹ Despite this action requiring compliance with numeric receiving water limits, however, the State Board indicated that compliance would still be maintained through a BMP iterative approach. In 2001, the State Board clarified this position in a precedential order resolving an appeal of the County of San Diego’s MS4 permit. In citing the *Browner* decision discussed above, the State Board indicated that its receiving water limitations language “does not require strict compliance with water quality standards. Our language requires that stormwater management plans be designed to achieve compliance with the water quality standards. Compliance is achieved over time, through an iterative approach requiring improved BMPs.”²²

In 2011, however, the 9th Circuit Court of Appeals issued a decision in the case of *Natural Resources Defense Council v. County of Los Angeles* that turned compliance with numeric limits through the iterative process on its head.²³ In this case, NRDC sued the County for exceedances at mass monitoring stations located in the middle of two MS4s that were also deemed to be receiving waters. The County argued that MS4s did not have to meet numeric limits and that the iterative process was the mechanism for compliance with the permit. The Court of Appeals disagreed and found that “no such ‘safe harbor’ is present in this Permit” and that the iterative

²¹State Water Board Order WQ 99-05, pg.1.

²²State Water Board Order No. WQ 2001-15, pp. 11-12.

²³673 F.3d 880 (2011).

process did not shield the County from liability for violations of permit terms prohibiting exceedances of water quality standards.²⁴

The U.S. Supreme Court accepted review of the case on the limited issue of whether the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway qualifies as a “discharge” under the CWA. In a 9-0 decision, the Court found that a discharge had not occurred.²⁵ The Court did take up the receiving water limitations issue, and thus the 9th Circuit’s decision on the effect of the iterative process on receiving water limits still remains and is binding in California. And, despite the Court’s reversal on the discharge issue, the 9th Circuit ignored the Supreme Court’s holding and found a discharge in the channel on the grounds that it had occurred upstream.²⁶ The County eventually settled the case for \$3.3 million in attorney’s fees and \$4.5 million of funding toward a low impact development project in south Los Angeles.

In 2012, the Los Angeles Regional Water Quality Control Board (“LA Regional Board”) adopted 33 new TMDLs into the LA MS4 permit, thus solidifying the enforceability of them against the MS4 permittees. The LA Regional Board, however, fashioned an “alternative compliance option” that allowed permittees to develop watershed management plans in lieu of

²⁴*Id.* at 897.

²⁵*Los Angeles County Flood Control Dist., v. National Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013).

²⁶*NRDC v. County of LA*, 725 F.3d 1194 (2013).

immediate compliance with the permit. A watershed management plan is a long-term plan to attain water quality standards in waterbodies that are impaired for pollutants. Plans must have measurable and concrete goals, strategies and implementation plans to address pollutants of concern within the permittee's watershed. Upon approval of the watershed management plan by the Regional Board, and diligent and rigorous implementation efforts, a permittee is deemed to be in compliance with the permit even if exceedances continue to occur.

Upon the adoption of the Permit, the NRDC challenged the alternative compliance option. In its 2015 order on the Permit, the State Board declined to adopt the iterative process as the mechanism for attaining water quality standards and instead directed the regional boards to require compliance with receiving water limitations in MS4 permit.²⁷ In lieu of requiring immediate compliance, however, the State Board upheld the alternative compliance approach finding that MS4s could not achieve water quality standards in the near term. The State Board directed regional boards to adopt similar watershed management compliance approaches in their permits for those permittees that were willing to develop "well-defined" and "finite" paths to permit compliance.²⁸

The NRDC challenged the State and Regional Board's alternative compliance approach in Los Angeles Superior Court. On January 24, 2017, Judge Hogue denied NRDC's petition for writ of mandamus finding that the Permit did not violate the CWA because MS4s were not required to

²⁷State Board Order No. WQ 2015-075, pg. 76.

²⁸*Id.*

meet effluent limits.²⁹ She reasoned that under *Browner*, the alternative compliance option was lawful as MS4s were not required by federal law to meet water quality standards and attain numeric effluent limitations. (It should be noted that the decision of a California superior court is not binding on other courts until it has been affirmed by a state appellate court.) NRDC has appealed the decision, and the outcome of the case is pending. The Cities of Gardena and Duarte have also filed separate petitions challenging the LA MS4 permit, including, among other things, the unlawfulness of alternative compliance option and the incorporation of numeric limits into the permit. The matters are set for trial in November 2017.

IV. Strategies for Stormwater Compliance

A. Historical Stormwater Management Program

The historical stormwater management program focused on street sweeping, educational outreach, monitoring and other non-structural best management practices (“BMPs”) in order to meet the MEP standard. Although many jurisdictions continue to implement these programs, it is unlikely that implementation of such BMPs, by themselves, will satisfy regulatory permitting requirements. Jurisdictions preferring not to develop and implement watershed management plans will likely be implementing additional structural and offsite BMPs to comply with their TMDL requirements.

²⁹*National Resources Defense Council, Inc. v. State Water Resources Control Board*, Case no. BS156962 (Jan. 24, 2017).

B. Watershed Management Plans (aka Alternative Compliance)

Many jurisdictions are developing or have developed watershed management plans designed to address water quality issues across municipal boundaries on a regional, watershed basis. Upon initiation of a plan, or in some cases, approval of the plan by the regional water board, the permittees developing the plan are deemed to be in compliance with the permit. The drawbacks to watershed management planning are the considerably high costs to develop and implement plan, in some cases costing a few hundred million dollars per jurisdiction in a 10-year period. Courts have yet to determine whether a permittee with a regional board approved watershed management plan precludes a third party citizen suit.

C. TMDLs

In many cases, older TMDLs are based on water quality standards that cannot be attained or wasteload allocations that contain exceptionally low pollution limits and arbitrary implementation schedules and compliance timelines. Those jurisdictions that face TMDL deadlines that are about to expire or have expired should consider seeking a time schedule order from the respective regional water board to allow more time to attain standards. Ultimately, jurisdictions should evaluate their current BMP practices and seek to offer further studies that support changing the water quality standard and obtaining a new compliance schedule.

The State Water Board is considering adopting a variance policy that would allow permittees facing pending TMDL deadlines to temporarily change the water quality standard

allowing more time for compliance. Unfortunately, variances have been approved infrequently by EPA and have been done mostly outside of California.

V. Strategies for Funding

Most jurisdictions have limited funding options for water quality compliance and are looking for options to supplement General Fund revenues.

A. Special Funds

Most city stormwater programs are funded through the agency's general funds. Additionally, some stormwater programs are funded through a combination of funding sources in addition to the General Fund using road funds, flood control district funds, and park funds. If such funds are to be considered for stormwater program requirements, a more thorough analysis of the fund's uses and limitations should be conducted as there may be limited situations where these funds can be used.

1. Flood Control District Funds

One of the primary sources of funding for countywide stormwater programs come from flood control districts. Flood control district funds are generated from property tax revenues and are primarily used for the control of flood and stormwaters throughout the flood control district's service area for the protection of life and property. Flood control districts generally have additional powers to expend funds to conserve water and for water quality purposes related to the district. A permissible flood control district expenditure is determined by a showing of a meaningful

relationship between the expenditure and the flood control facility or obligation. District funds can often be used district-wide even if the assessed land is outside of a particular area of benefit.³⁰

2. *Gas Taxes*

In some cases, stormwater programs and projects are partially funded through an agency's Road Funds. Highway Users Tax revenue ("gas tax funds") is generated by State excise taxes on motor vehicle fuel for use on public streets and highways.³¹ Gas taxes are collected by the State and are allocated to counties and cities pursuant to various statutory formulas, where they are required to be deposited into an agency's Road Fund. Cal. Sts. & Hwy Code §§ 2104-2122. Gas tax funds may be expended on stormwater projects if the expenditure is limited to the "research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for nonmotorized traffic), including the mitigation of their environmental effects, the payment for property taken or damaged for such purposes, and the administrative costs necessarily incurred in the foregoing purposes."³² To determine whether gas tax funds may be used for a stormwater purpose related to public streets and highways, there must be a reasonable basis for the determination such that a meaningful relationship exists between the expenditure and the road purpose.³³

³⁰*Los Angeles v. Los Angeles County Flood Control Dist.*, 11 Cal. 2d 395 (1938).

³¹Cal. Const. art. XIX; Cal. Sts. & Hwy Code § 2100 *et seq.*

³²Cal. Const. art. XIX, § 1(a); Cal. Sts. & Hwy. Code § 2101(a).

³³*City of Costa Mesa v. Connell*, 74 Cal. App. 4th 188, 193 (1999) (finding no reasonable relationship between a road project and the city's use of gas tax funds to make lease-back payments on two municipal golf courses); 58

3. *Park Funds*

Some agencies also use park funds for stormwater program expenditures. This again is a fact determinative analysis that is specific to the particular jurisdiction. Generally, the use of park funds is subject to the same determination of whether there is a meaningful relationship between the expenditure and park facility or obligation.

4. *Drainage Fees*

Since 1974, the California Legislature has authorized counties and cities to impose drainage fees through local ordinances that can be used for the construction of drainage and sewer facilities.³⁴ Currently, some agencies are examining the use of existing drainage fee programs as an analog for the development of an *in lieu* fee collection program for land development projects that are required to meet certain onsite stormwater retention requirements as part of their obligations for the low impact development under their MS4 permit. The legislative body of a city or county may adopt a fee structure based on the cost of the required facilities after the preparation and adoption of a Master Plan of Drainage for the local drainage area. Fees may then be collected from projects as a condition of approval of final subdivision maps, final parcel or tract maps or collected at the time of issuance of building permits. Many jurisdictions have established drainage fees, notable of which is the City of Anaheim, with fees ranging from \$19,080 to \$52,132 per net

Ops. Cal. Atty. Gen. 844 (1975) (opining that gas taxes may be used to purchase land for park purposes if the park would mitigate the environmental impact of a street construction project); *California State Controller, Guidelines Relating to Gas Tax Expenditures: For Cities and Counties* (Aug. 2015).

³⁴Cal. Gov't Code § 66483.

acre of land development depending on the land use. Most jurisdictions with drainage fees address flood control infrastructure and capacity to manage 25 and 100-year storm events, and do not contain any water quality, low impact development or hydromodification facilities. Use of existing drainage fee programs to fund water supply augmentation projects would need to be further analyzed.

B. Stormwater Fee Programs & Stormwater Resource Plans

Several jurisdictions have stormwater fees that fund a city's stormwater program. Although each city prepares a somewhat different calculation for determining the fee, the general methodology is to use a parcel's estimated contribution of runoff, which can be determined by an estimate of the impervious area on that parcel. Impervious areas include such things as buildings and pavement that prevent or restrict stormwater from getting into the soil and increase runoff from a parcel. Most fee programs surveyed fund storm drain improvements, operations and maintenance and water quality compliance. A few cities include water supply considerations.

C. Unfunded State Mandates

A final funding consideration is the state mandates process. On August 29, 2016, the California Supreme Court rendered a favorable decision in *Dep't of Finance v. Commission on State Mandates*,³⁵ holding that MS4 permit requirements are "state" mandates if the requirements are not expressly required by federal law or regulations such that the State had made a "true choice"

³⁵1 Cal. 5th 749 (2016).



to impose them. Eleven test claims are currently pending before the Commission on State Mandates. Test claims by Orange County and Bay area permittees will be the first to be heard in September 2017, and include reimbursement requests for several activities such as TMDLs, low impact development and hydromodification requirements, public educational efforts, and other activities. A state appellate court is also deciding a case out of the County of San Diego regarding the test for when MS4 permit requirements are “unfunded.” The State has taken the position that MS4s have the ability to impose taxes to support stormwater management programs, and that a tax or fee should fail a vote of the electorate before it can be deemed to be “unfunded.” The County is arguing that Prop 218 allows a municipality to “propose” a fee or tax, but not impose the requirement.

In order to be deemed eligible for an unfunded state mandates claim, the permit must impose a new requirement or increased activity. A jurisdiction is required to file a claim within one year of the requirement being adopted (*i.e.*, Permit) or in the fiscal year in which the costs were first incurred. Although some of these issues are currently being litigated, actions that are undertaken voluntarily are not considered “mandates.” It is unclear at this time what the effect of voluntarily developing a watershed management plan is on a mandates claim since this issue has not yet been heard by the Commission, and may not until 2018 when the Commission hears the first permits with watershed management plan options in them.