

**Environmental Quality Policy Committee  
Legislative Agenda- January 2012**

**1. Regional Water Board Reorganization Proposal**

**Summary:**

In early 2012, the Governor's office will be introducing legislation to reorganize the state's nine regional water quality control boards. Most of the suggested changes are in response to low quorums and lack of a quality pool of appointees for the regional boards. Specifically, the proposal would do the following:

1. Reduce from 9 to 7 Members, Remove Associational Requirements. Reduce the number of Regional Water Board members on each board from nine to seven. The proposal would eliminate the existing association requirements and instead use a modified version of the criteria that was proposed in SB 1001 (Perata, 2007) which would read:

*Each member shall be appointed on the basis of his or her demonstrated interest and proven ability in the field of water quality, including water pollution prevention and related water resource management problems in their region or in the beneficial use of water by the region's nonpublic economic sectors. Insofar as practicable, appointments shall be made in such a manner as to result in members of each regional board being drawn from diverse experiential backgrounds.*

*Each member shall be appointed on the basis of his or her ability to attend substantially all meetings of the regional board, and to actively discharge all duties and responsibilities of a member of the regional board.*

2. Adjust the 10-percent NPDES Income Rule to Apply on a Per-Region Basis. Expand the pool of candidates eligible to serve on the Regional Water Boards by revising provisions of state law pertaining to the 10-percent rule so the rule applies on a per-region basis. The 10-percent rule excludes members who receive more than 10-percent of their gross personal incomes from NPDES permittees from serving on a Regional Water Board.
3. Conform Conflict of Interest Rules to the Political Reform Act. Allow the State to fully benefit from the expertise of Water Board members and conform the Water Code's conflict of interest rules to the rules that apply to other state officials under the Political Reform Act.
4. Regional Water Board Chair Selected by Governor. Have the Governor select Chairpersons of the Regional Water Boards. Currently, the Regional Water Boards select their Chairpersons from among members serving on the board. This change will vest the selections of the Chairpersons of the Regional Water Boards in the Governor, and would consistent with the current process in statute for selecting the Chairperson of the State Water Board.
5. Increase Per Diem for Regional Board Members. Increase the per diem compensation from \$100 per day to \$500 per day, and increase the annual cap from \$13,500 to \$60,000 for each Regional

Water Board to better reflect the significant amount of time that Regional Water Board members must invest to understand and access the complex water quality issues facing each region.

**Staff Recommendation:**

Discussion and feedback for League staff on a position based on outline of bill.

**Existing League Policy:**

- The League supports applying the 10-percent rule on a per-region basis.
- The League has no recommendation on reducing the size of the regional water board from nine members to seven, with the exception that at least one person on the regional board should have local government experience.
- The League has no position on confirmation of regional water board conflict of interest rules with the Political Reform Act (*Note: The League's Water Task Force Subcommittee asked for a legal opinion on this issue. The question that was asked was: What are the current conflict of interest rules pursuant to AB 1234. Staff and members of the subcommittee understood this general idea to be similar to what already exists for other state boards*).

**Comments:**

- *What's Old is New Again.* All but the last two provisions of the proposal were sections of a water quality proposal by the State Water Resources Control Board Water Quality Improvement Initiative in 2008. In 2009 and 10, the League's Water Task Force was able to look at the provisions of the Initiative and recommend positions. Those positions were adopted in 2010.
- *SB 900 (Steinberg).* Last year, Senate Pro Tem Steinberg introduced SB 900 to modify the conflict of interest requirements for appointees to the Regional Water Boards including modifying the 10-percent income rule to apply on a per-region basis. That bill was supported by a coalition of agricultural, business and local agencies. The bill was opposed by a coalition of environmental groups who raised issue with the 10-percent rule being a federal requirement, as well as not believing that it is truly a barrier to finding farmers eligible to be appointed. They noted that they believe that the lack of available members of Regional Water Boards stems from low pay and statewide permit conflicts. The League did not take a position on this bill when it came up last spring.

## **2. Water Board Fees and Permits**

### **Summary:**

Over the last several years, cities have faced steep increases in water quality fees. They are currently facing substantial compliance and enforcement costs for proposed updated statewide stormwater permits. Much of the increase in statewide fees has come from shifting support for State programs from the General Fund to fee-based funding. In Fiscal Year 2011-12, cities will face fee increases as high as 44 percent for National Pollutant Discharge Elimination System (NPDES) fees. In addition, this year three existing general permits issued by the State Water Resources Control Board (“State Board”) are in the process of being updated. It will be exceedingly difficult for small cities to meet the estimated costs to comply with and enforce these permits.

While the League will continue to participate in legislative and regulatory discussions at the State Board hearings, legislative hearings and as budget negotiations begin for FY 2012-13, it is very likely that the League will be in a position early in 2012 to support, co-sponsor or sponsor legislation to address key water quality issues involving the State Board.

### **Staff Recommendation:**

In order to position the League to take action, staff recommends discussion by the EQ and TCPW committees and authorization for staff to draft “spot bills” to give the League the option to sponsor legislation on this matter in early 2012.

### **Fiscal Impact:**

Potentially significant fiscal impact to cities for increasing fees and permit compliance costs.

### **Existing League Policy:**

#### **Environmental Quality:**

- Adequate water quality requirements for wastewater discharge into surface water and groundwater to safeguard public health and protect beneficial uses should be supported.
- The League supports the development of objectives and standards to assure high water quality throughout California.
- The League supports the development of economic protocols and guidelines to assist local governments and water boards in determining reasonably achievable, cost effective and environmentally sound regulations.
- The League encourages the water boards to issue permits that are reasonably achievable, based on the unique conditions of a city or region.
- The League supports public access to decision makers, including during the time that new proposed permits and permit terms are being proposed. The League also supports access to pending permittees, outside of the administrative process.

- The League supports legislation to develop economic protocols and guidelines to assist local government and the water boards in determining reasonably achievable, cost effective and environmentally sound regulations, as outlined in Porter-Cologne Sections 13000 and 13241
- The League supports legislation to provide funding for storm water, water and wastewater programs, including a constitutional amendment which would place storm water fees in the category of water and wastewater fees, for the purpose of Proposition 218 compliance.

### **Comments:**

### **Background**

Two federal and State laws-- the federal Clean Water Act (CWA) and the State's Porter-Cologne Water Quality Control Act (Porter-Cologne) provide the basic framework protecting California's water quality by regulating discharges to surface and ground water. Under authority of these acts, the State Board and nine semi-autonomous Regional Water Quality Control Boards ("regional boards") are responsible for protecting the water quality of 10,000 lakes, 200,000 miles of rivers and 1,100 miles of coastline.

The federal CWA seeks to restore and maintain the chemical, physical and biological integrity of the surface waters of the United States. A key provision of this federal law, the National Pollutant Discharge Elimination System (NPDES) prohibits discharge of pollutants from a point source into waters of the U.S. without a permit that complies with the CWA.

In California, both the State Board and regional boards ("boards") issue Waste Discharge Requirements (WDRs) to regulate discharges of waste to surface water and land; those that regulate point source discharges to waters of the U.S. serve as NPDES permits under the Clean Water Act and are issued, monitored and renewed every five years. The more than 50,000 discharge permits are a key enforcement mechanism as the boards regulate more than 100 contaminants.

Water quality regulation: Who does what? California enforces its clean water laws through the State and nine regional boards. Part of the California Environmental Protection Agency, these agencies are charged with assessing, managing, and regulating water quality. The State Board has five members, appointed by the Governor, with expertise in water quality. The State Board's main responsibilities are to set statewide policy, issue statewide permits, develop plans and standards, operate statewide monitoring programs and oversee regional boards as they use these standards to implement water quality programs. The State Board also determines rights to California's surface water.

The nine members of each regional board are also appointed by the Governor and have expertise in areas including water supply, irrigated agriculture, industrial water use, municipal government, county government, recreation, fish or wildlife. The boundaries of each regional board are defined by watersheds. Their main duties are to issue and enforce permits or waivers (NPDES/ Waste Discharge Permits mentioned above). While regional boards issue the majority of permits, in some cases the State Board may do so. Regional boards operate largely independent from one another, creating unique plans to protect water quality within their area. These water quality control or "basin plans" prescribe beneficial uses, water quality objectives and standards, and monitoring

programs in the regions. They are core regulatory documents and serve as the basis for each regional board's permitting and enforcement actions.

The Legislature intended for basin plans to be updated every three years. However as highlighted in the Little Hoover Commission's January 2009 report, *Clearer Structure, Cleaner Water*, the plans are woefully outdated and regional boards rarely have the resources to conduct a full review. Noting the importance of the documents and lamenting the lack of funding, the Commission's report includes this prophetic statement: "Given the state's budget deficit, it seems unlikely that the state will be able to pay for the work needed to update basin plans. Thus, water users and others with a stake in clean water will need to contribute." And beginning this budget year, those contributions have increased dramatically.

Permits: What are they? The boards carry out their required NPDES regulatory activities by issuing five types of permits: Phase 1 and 2 MS4 permits, Construction, Industrial General Permit (IGP) and CalTrans MS4. The Phase 1 MS4 permits are issued by the regional boards; all others are issued by the State Board on a statewide basis. Each permit is to be renewed every five years, however the State is behind in that schedule. Three stormwater permits currently are awaiting renewal: Phase 2 MS4, IGP and CalTrans MS4. At an October 6 hearing of the California Senate Select Committee on California Job Creation and Retention, the Committee heard about the requirements for, costs of, and problems with these new permits.

Since 1990 stormwater discharges in urban areas with populations greater than 100,000 have been regulated through a Phase 1 MS 4 permit issued by regional boards; as of 2003, operators of small municipal separate storm sewer systems are regulated by a State Board issued Phase II MS4 general permit. MS4 permits require dischargers to implement stormwater management programs using best management practices. Each permit must include minimum measures to detect and eliminate illicit discharges, to educate and engage the public, to ensure safe operations and to regulate construction sites.

The Phase II MS4 permit expired in 2008 and is now being reissued, and the draft includes new and costly State-required programs such as water quality monitoring, trash abatement, and business inspections. Of note, cities would be required to inventory a large and diverse number of commercial and industrial facilities for stormwater quality compliance.

The Industrial General Permit (IGP) expired in 2002. Reissuance began in 2003 but stalled as an expert panel was convened to examine the feasibility of numerical effluent limits. In 2006 the panel's report said such limits "may be feasible" and in 2011 a new IGP was finally released. It met with stiff opposition from business groups who argued that the new permit requirements for monitoring and inspection were excessive, the numeric effluent limits were not feasible, requirements for training were a burden to small companies and compliance costs were estimated to increase as much as 2000 percent. While a revised draft has not yet been released, it is expected that the Board will follow staff recommendations to delete the numeric effluent limitations and scale back the required inspections.

In terms of cost increases, the most dramatic are those associated with the new CalTrans MS4 permit which governs stormwater management for all CalTrans projects. Initially issued by regional boards, CalTrans requested a statewide approach and the permit has been so issued since 1999. CalTrans and the State Board have been discussing this permit since it expired in 2004. CalTrans

believes complying with the vague and complex new requirements would cost an annual \$900 Million on top of the \$200 Million it already spends. With no new funds available, these costs would be taken from its \$1.7 Billion budget for highway maintenance and construction. The State Board believes that CalTrans misunderstands the new permit's requirements but has no cost estimates of its own. It promises more discussions and a new draft by early 2012.

### State Board Core Regulatory Fees

Not only are cities and businesses facing skyrocketing compliance costs for these new permits, but the costs of the permits themselves continue to climb as the State increases programs and requirements and shifts costs from the General Fund under a policy called "beneficiary pays".

Funding and fees: the "beneficiary pays" policy: State law requires the Board to assess fees to persons discharging waste to State waters. Fees are charged for the National Pollutant Discharge Elimination System (NPDES), the Waste Discharge Requirement (WDR), and the Stormwater and Land Disposal programs and deposited in the Waste Discharge Permit Fund (WDPF) to fund various State Board and regional board water quality activities. While the boards have the authority to raise fees to meet program costs, they cannot raise fees above the amount set in the budget every year by the Legislature and Governor. Historically these "core" programs have been funded through a combination of fees and General Fund revenues. However, as the State budget has been squeezed, the Administration and the Legislature have increasingly sought more non-General Fund revenues to cover core regulatory programs.

In its analysis of the FY 2008-09 budget, the Legislative Analyst's Office (LAO) recommended instituting "beneficiary pays" and "polluter pays" policies under which all core program costs would be funded through fees paid by those who directly benefit from or violate the terms of water quality requirements. As the report noted, "We think that shifting funding for the board's core water quality management activities to fees would provide greater funding stability to these activities that are the foundation of much of the board's work."

This expansive interpretation of "beneficiary pays" argues that all core water quality management activities should be funded by a broad-based fee on statewide water users because all users, in some way, impact water quality. Specifically the LAO recommended that the NPDES program and basin planning be fully fee supported; the Governor and the Legislature finally agreed. In the FY 2011-12 budget, over \$18 million in costs for two programs were shifted from General Fund to fee support, with costs allocated across water quality programs: \$6.6 million for basin planning and \$11.5 million for the Total Maximum Daily Load program that allocates among users a "share" of pollution that can be discharged to an impaired surface water. Generating revenues from fees to support these programs means that cities will face significantly higher fees in 2011-12.

How are fees established? Setting user fees is a lengthy process. The State Board must adjust fees each year to match the revenue levels in the Budget Act; because the State Board cannot act until the Budget is passed, the fee schedule is adopted in the late fall by emergency regulations. Therefore the regulated community does not know what it will have to pay until well into the fiscal year. In fiscal year 2010-11 for example, the fee schedule was adopted on October 19, 2010.

The fee setting process for FY 2011-12 was further complicated by past overpayment of stormwater program fees. Between 2004 and 2009, these fees generated \$22 million over actual expenditures;

the surplus was used to offset revenue shortfalls in other programs. For 2011-12 fees, the State Board adopted an average increase of 38 percent for all programs; however they also considered reducing the increases for the stormwater program, and requiring *even higher* fees for all other programs to cover the loss of fees from the stormwater program. With these lengthy deliberations, the final fee schedule for FY 2011-12 was not adopted until September 19, 2011.

This delay and unpredictability creates numerous problems for municipalities struggling to maintain their own balanced budgets. By the time the new fee schedule is available, the fiscal year is already underway, requiring even higher mid-year utility rate increases. And with stormwater program fees subject to the Proposition 218 requirement for two-thirds voter approval, increasing rates to cover escalating stormwater permit fees may not be an option even though it is as strictly regulated as wastewater. In addition, many in the regulated community argue that the State's current fee system provides little incentive for the State to control its own costs, or to prioritize its activities, leaving users at the mercy of ever-increasing fees.

The Little Hoover Commission report also noted this lack of priorities and focus, finding the boards concentrated on process rather than results. "It is difficult to determine if the boards' regulatory programs are effectively cleaning and protecting California's waters." At the October 6 hearing, Senator Dutton asked whether the additional regulatory burden was producing cleaner water, warning he did not support "bureaucracy without benefit." Chairman Wright echoed his concern, indicating that the Committee wants to examine the realities, costs and effectiveness of regulatory programs. As stakeholders articulate the problems of increasing regulation and ever-rising fees, it appears both Democrats and Republicans are listening. In fact, over the last several months more than a dozen legislative members have either testified before the State Board or signed letters indicating their concerns over economic impacts of permits and fees.

#### Stakeholders unite: the Legislature responds.

In response to concerns about the draft Phase II MS4 municipal stormwater permit, a group of over 60 local governments formed to advocate for a more realistic approach; as a member of this new Statewide Stormwater Coalition (SSC), the League is also advocating to protect clean water with a more feasible and cost-effective regulatory approach. And cities have powerful allies in the business community, which is also subject to the compliance costs and wildly-fluctuating fees. Recently a business group, the California Council for Environmental and Economic Balance, has joined the effort to lobby the Administration and the Governor on the impact of these permit fees and compliance costs.

The State Board seems to be responding to stakeholder criticism. Even as it raised fees at its September meeting, the Board also directed staff to prepare a report by March, 2012 that "aligns priorities with targets and details the resources necessary to fulfill its statutory obligations, including identifying any opportunities for cost savings." The goal of the report is to show how the fees collected reflect the boards' core program priorities, work conducted and outputs produced. This "Phase 1" report will evaluate funding sources and distribution of resources among State and regional boards and among all fee-funded programs, define the activities that constitute the NPDES and WDR programs and describe the resources for each. The report is also expected to establish methods to set performance targets for the NPDES and WDR programs for FY 2012-13 with a goal to implement management practices that ensure that work outputs are associated with workload standards and driven by established priorities. However cost factors and target-setting methods for

the Stormwater and WDR Land Disposal Programs will not be reviewed until the expanded “Phase 2” report which will also evaluate costs associated with program activities and identify possible cost savings.

The Legislature also appears ready to act. At the Senate’s October hearing, representatives of business, labor and local government had a sympathetic audience as they expressed serious concerns about implementation problems, unnecessarily exceeding federal requirements, and significantly increasing costs without documented evidence of significant improvement in water quality. At the hearing, State Board Executive Officer Tom Howard acknowledged that the new permits required too much change, too quickly and at too much expense. He testified that in assessing the comments received, the permits need “substantial amendments.” As noted earlier, the Board has pledged to revise the Phase II MS4, IGP and CalTrans MS4 permits and restart the public comment process.

However, in order that stakeholders can have meaningful input into the boards’ rulemaking process, the process itself needs substantial reform. The Administrative Procedure Act (APA) sets minimum procedural requirements for quasi-legislative and quasi-judicial actions; notably, each type of action has different rules governing communication between stakeholders and State agencies—called “ex parte” contacts. In quasi-legislative actions, the APA allows interested persons to consult with agency staff prior to regulatory action. In addition, quasi-legislative process requires that a proposed action must be publicly noticed and must include justification for the regulatory action and identification of alternatives to decrease any adverse impact on small business. If the agency rejects those alternatives, it must state its reasons. The agency must also summarize each objection raised and justify its original position or explain how its actions have been changed. In short, the quasi-legislative approach ensures a high degree of agency accountability to the regulated community.

The quasi-judicial process is intended to be simpler and quicker. Quasi-judicial rulemaking allows for an informal hearing procedure which does not require consideration of costs, discussion of alternatives or detailed response to comments. While in past years, the Board regarded NPDES permits and waste discharge requirements as quasi-legislative, they now regard them as being exempt from APA requirements; the Board’s decision to use the quasi-judicial process has resulted in strict limits on ex-parte contacts.

As both permit holders and regulators at the local level, cities’ expertise is a vital contribution to the rulemaking process. However once a regulatory proceeding begins, Government Code Section 11430.10(a) prohibits any communication, “direct or indirect regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.” In practice, the Board’s decision to use a quasi-judicial approach to statewide permits precludes a significant role for the regulated community; unfortunately, those with significant knowledge of the issues and challenges have little real opportunity to engage with the regulators.

In its 2009 report, the Little Hoover Commission called for reform of ex parte rules to allow more communication between decision-makers and stakeholders. “The regulated community should have greater opportunity to talk with board members who have such significant power to influence their activities.” The Legislature may have reached the same conclusion. At October’s Senate hearing, Chairman Rod Wright directed staff to ask Legislative Counsel to examine the Boards use of the

quasi-judicial approach. He seemed to share the Commission's belief that rulemaking should consider cost and encourage input.

## **FUTURE LEAGUE ACTION**

As noted above, while the League will continue to participate in legislative and regulatory discussions at State Board hearings, at legislative hearings and at negotiations for the FY 2012-13 budget, it is very likely that the League will be in a position early in 2012 to support, co-sponsor or sponsor legislation to address key water quality issues involving the State Board. The League will examine any proposals available early in the year and will participate in these legislative efforts so that cities can help shape solutions to the State's complex water quality problems and mitigate unwieldy impacts on municipalities.

### Resources:

- State Water Quality Control Board ([www.swrcb.ca.gov](http://www.swrcb.ca.gov))
- State Water Board Maps of Regions ([http://www.waterboards.ca.gov/waterboards\\_map.shtml](http://www.waterboards.ca.gov/waterboards_map.shtml))
- Further information on Water Board Core Regulatory Fee 2011 Schedule ([http://www.cacities.org/resource\\_files/29974.WDPFStakeholderMeeting8-15-11Handout.pdf](http://www.cacities.org/resource_files/29974.WDPFStakeholderMeeting8-15-11Handout.pdf))
- Link to October 6<sup>th</sup> Hearing of the Senate Select Committee on Job Creation and Retention ([http://www.stormwatercosts.com/?page\\_id=13](http://www.stormwatercosts.com/?page_id=13))
- Statewide Stormwater Coalition [www.stormwatercosts.com](http://www.stormwatercosts.com)
- Read the original proposed Phase II MS4 permit here.: [The draft permit](#)

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