RECENT DEVELOPMENTS IN WATER QUALITY LAW IN CALIFORNIA AND THEIR FISCAL AND OPERATIONAL IMPACT ON MUNICIPALITIES

By:  J.G. Andre Monette
BEST BEST & KRIEGER LLP
# Table of Contents

Recent Developments in Water Quality Law in California and Their Fiscal and Operational Impact on Municipalities

I. **Overview of California Water Quality Law and Development of Municipal NPDES Permits** ................................................................. 1  
   A. **History of the Storm Water Permitting Program** .......................... 1  
   B. **Basic Requirements and Structure** .................................................. 3  
   C. **Regulation by the State and Regional Boards** ............................... 5  

II. **Critical Issues** ................................................................................ 6  
   A. **Low Impact Development** .............................................................. 6  
   B. **numeric Effluent Limits** ................................................................. 7  
   C. **TMDLs** ....................................................................................... 8  
   D. **Funding** ..................................................................................... 9  
      1. **State Restrictions on Local Funding** .......................................... 10  
      2. **Unfunded State Mandates Litigation** ......................................... 11  

**Conclusion** ..................................................................................... 12
Recent Developments in Water Quality Law in California and their Fiscal and Operational Impact on Municipalities

Regulation of Municipal Separate Storm Water Systems (“MS4s”) under the Clean Water Act presents a unique situation in the world of environmental regulation. When Congress, or the State of California regulates discharges from an MS4, not only does it force a local or state government to use its own resources and personnel to implement a comprehensive regulatory scheme, it also places the cost of compliance directly on local entities in a manner that other federal environmental regulations do not. For that reason, the manner in which storm water discharges are regulated is of special concern to cities and counties in California.

I. Overview of California Water Quality Law and Development of Municipal NPDES Permits

Congress passed the Clean Water Act’s on October 22, 1972. The Act divides its regulatory universe into "point sources" and "non-point sources," and at its core, makes it illegal to discharge any pollutant into the waters of the United States without a properly issued permit.\(^1\) At its best, the Clean Water Act is an example of cooperative federalism at work.\(^2\) The act establishes a set of goals for clean water and to a large extent allows the states to decide how to achieve those goals.\(^3\) Nevertheless, many view the Act is an unfunded mandate that coerces local governments to comply with an ineffective command and control regulatory scheme.\(^4\)

A. History of the Storm Water Permitting Program

Under the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) program, every person discharging a pollutant from a point source to the waters of the United States must apply for and obtain a permit for the discharge.\(^5\) The NPDES permitting process requires the discharger to submit information about its facility and discharges to the EPA or other state permitting authority.\(^6\) The permitting authority will review the information and then propose permit terms, including effluent limits and other requirements with which the

---

1 33 U.S.C. §§ 1301, 1342, 1351.


3 See e.g. 33 U.S.C. §§ 1329, 1342(p).


5 33 U.S.C. §§ 1311, 1341(a).

discharger must comply. The program did not originally apply to MS4 discharges. Congress amended the Clean Water Act in 1987 to require NPDES permits for the following types of discharges:

1) Storm water discharges that the EPA had already permitted;
2) Storm water discharges associated with industrial activity;
3) Storm water discharges from MS4s serving populations of 100,000 or more; and
4) Storm water discharges that the EPA determines are a significant contributor of pollutants, or contribute to a violation of a water quality standard.

The amendments held discharges from industrial activity to the same standard as any other point source discharges, but established a new standard for municipal discharges. The new standard required MS4s operators “to effectively prohibit” non-storm water discharges from entering their system, and to reduce the discharge of pollutants from the MS4 system to the “maximum extent practicable” (“MEP”). Congress did not define MEP what meant, other than to provide examples including “management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”

When enacting the 1987 amendments, Congress was met with stiff opposition from municipalities who feared that the regulations could be interpreted as requiring everyone with a device to collect storm water – including homeowners – to have an EPA issued permit. An example of this general sentiment is Sen. Mack Mattingly’s statement on the Senate Floor:

Most sensible persons would say that if runoff is not impairing a water quality designation or significantly contributing to water pollution, then we should not

---

7 Id.
12 33 U.S.C. § 1342(p)(3)(A) (stating that storm water discharges associated with industrial activity must meet all applicable provisions of CWA §§ 402(p) and 301).
15 Id.
16 Id., at 35.
waste time and scarce financial resources requiring these sources to be permitted along with those sources which do contain significant levels of pollutants. To do so would seriously threaten our efforts to attain and maintain water quality standards because the regulators would be literally swamped under a mountain of paperwork.  

As a result, Congress was forced to find a compromise that would prevent the EPA from regulating zoning decisions across the country. In the end, Congress was so intent on passing the legislation that it passed the amendments over two Presidential vetoes and President Reagan’s warning that the amendments would permit the EPA to intrude into farmers’ decision about how to manage their land, and become a major force in local zoning decisions.

B. Basic Requirements and Structure

The 1987 Clean Water Act amendments did not provide a statutory definition of MS4. EPA initially had difficulty deciding what exactly constitutes such a system. The agency settled on an extremely broad definition that includes not only city owned systems, but those operated by, among others, universities, hospitals, and military bases. The regulations divide these MS4s into three categories: large, medium, and regulated small, and treat large and medium MS4s differently than the small MS4s.

---


19 Id., at 37-38 (1987) (the 1987 amendments were initially passed and vetoed, revised, passed and vetoed, and passed over the second veto 406 to 26 in the House of Representatives, and 86 to 14 in the Senate).


22 40 CFR § 122.26(b)(8) defines an MS4 as:

- a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

  - (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law)...including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges into waters of the United States.

  - (ii) Designed or used for collecting or conveying storm water;

  - (iii) Which is not a combined sewer; and

  - (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

23 See 33 U.S.C. § 1342(p); 40 CFR § 122.26; and 40 CFR § 122.34. A large MS4 is any MS4 located in an incorporated place or county with a population of 250,000 or more. A medium MS4 is any MS4 located in an
EPA regulations give large and medium MS4 operators the option of submitting an individual permit application or a joint application for interconnected systems.24 The resulting permits prescribe a particular set of requirements for the permittee or group of co-permittees tailored to their discharges. In contrast, small MS4s are subject to a different set of regulations,25 and have the option of submitting a permit application in the same manner as large or medium MS4 operators,26 or participating in a general permit.27 General permits prescribe one set of requirements for all permit holders.28 In order to apply for a general permit, an MS4 operator must file a Notice of Intent (NOI) with the permitting authority.29 A regulated small MS4 operator complies with a general permit by submitting an NOI to the NPDES permitting authority that describes its proposed storm water management plan, including best management practices (BMPs) and measurable goals.30

Although there is no one set of substantive requirements for MS4 permits, at a minimum, MS4 operators generally must implement a number of common schemes.31 Among other things, EPA regulations require MS4 operators to:

24 40 C.F.R. § 122.26(a)(3)(iv). In some cases however, the EPA may require one system-wide MS4 permit covering all discharges from storm sewers within the system, or distinct permits for different categories of discharges within an MS4. 40 C.F.R. § 122.26(a)(3)(ii). Categories of discharges may include all discharge points owned or operated by the same municipality, all discharge points located within the same jurisdiction, all discharge points within a system that discharge to the same watershed, discharge points within a system that are similar in nature, or individual discharge points within the system. Id.

The EPA may likewise issue a permit covering all or a portion of all MS4 sewers in adjacent or interconnected large or medium MS4 systems. 40 C.F.R. § 122.26(a)(3)(iv). Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system. 40 C.F.R. § 122.26(a)(3)(v).

25 See 40 C.F.R. §§ 122.32-122.36.

26 40 C.F.R. § 122.34(a).

27 40 C.F.R. § 122.34(a).

28 EPA OFFICE OF WATER, STORM WATER PHASE II FINAL RULE FACT SHEET; PERMITTING AND REPORTING: THE PROCESS AND REQUIREMENTS 1 (2005).

29 Id.

30 EPA, STORM WATER PHASE II COMPLIANCE ASSISTANCE GUIDE 4-12 (2000).

• Develop and enforce a program to detect and eliminate illicit discharges the system.\textsuperscript{32}

• Via ordinance, or other regulatory mechanism, effectively prohibit non-storm water discharges into the system.\textsuperscript{33}

• Implement a plan to detect non-storm water discharges, including illegal dumping, to the system.\textsuperscript{34}

• Implement a public education program\textsuperscript{35}

• Control discharges from the MS4 to the MEP.\textsuperscript{36}

C. Regulation by the State and Regional Boards

The Clean Water Act requires the EPA to issue NPDES permits to MS4 dischargers, but allows the EPA to delegate that authority to the states. In California, the State Water Resources Control Board ("State Board"), and the individual Regional Water Quality Control Boards ("Regional Board") have accepted that responsibility. As a result, virtually all NPDES permits in the state are issued by either the State Board or the individual Regional Boards. The permit requirements are still subject to the same federal regulations, however, because the state of California has broader authority to regulate discharges than the EPA would under the Clean Water Act, requirements in NPDES permits issued by the State and Regional Boards frequently exceed the requirements of federal law.

In California, the Porter-Cologne Water Quality Control Act enacted in 1969, gives the state and Regional Boards this authority. The Act’s stated goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible."\textsuperscript{37} Together the State Board and the Regional Boards comprise “the principal state agencies with primary responsibility for the coordination and control of water quality” and are responsible for issuing “waste discharge requirements,” the state equivalent of the NPDES permits.\textsuperscript{38}

\textsuperscript{32}40 C.F.R. § 122.34(b)(3)(i).

\textsuperscript{33}40 C.F.R. § 122.34(b)(3)(ii)(B).

\textsuperscript{34}40 C.F.R. § 122.34(b)(3)(ii)(C).

\textsuperscript{35}40 C.F.R. § 122.34(b)(1).

\textsuperscript{36}40 C.F.R. § 122.34(b).

\textsuperscript{37}Cal. Water Code § 13000.

\textsuperscript{38}Cal. Water Code §§ 13001; 13374.
Although the state has the authority to issue NPDES permits, it is also restricted by other provisions in Porter Cologne. For instance, under the California Supreme Court's holding in City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613, a Regional Board must consider the factors set forth in Water Code sections 13000 and 13241 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law."\(^{39}\) According to the Supreme Court in Burbank, "Section 13263 directs Regional Boards, when issuing waste discharger requirements, to take into account various factors including those set forth in Section 13241."

In Burbank, the California Supreme Court held that to the extent the NPDES Permit provisions in that case were not compelled by federal law, that the Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that the Water Boards must analyze the "dischargers cost of compliance."\(^{40}\) The Court specifically interpreted the need to consider "economics" as requiring the consideration of the "cost of compliance" on the cities involved in that case.\(^{41}\) And according to the California Supreme Court, the goal of the Porter-Cologne Act is to "attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible."\(^{42}\)

II. Critical Issues

Because MS4s are operated by municipal entities, the cost of implementing pollution prevention programs falls directly on the municipality and by extension, the local tax and ratepayers.\(^{43}\) No surprisingly, interest and enthusiasm for the MS4 program has largely depended on the extent to which a local economy reaps the benefits of compliance. The following issues have been at the forefront of MS4 permit development over the past five years. They are among the most contentious aspects of the MS4 permit program in California.

A. Low Impact Development

Traditionally, storm water management systems have been designed as flood control systems. This has limited their ability to perform other functions. For example, designing major floodways for the 100 year event has the potential to degrade natural stream systems, or cause downstream water quality problems by rapidly transporting pollutants through the urban area and into the receiving waters. Low Impact Development ("LID") is an approach to storm water


\(^{40}\) Id., at 618.

\(^{41}\) Id., at 625 ["The plain language of Sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a Regional Board consider the costs of compliance when setting effluent limitations in a waste water discharge permit."]

\(^{42}\) Id. at 618, citing Water Code § 13000.

management that is designed to manage rainfall at the source using design techniques that infiltrate, filter, store, evaporate, and detain runoff. Instead of conveying and managing/treating storm water in large facilities located at the bottom of drainage areas, LID addresses storm water at the lot level.

LID has several advantages over conventional storm water management approaches. It is not always possible to treat storm water to high levels with conventional storm water management technology. By managing runoff close to its source through site design, in some circumstances LID can provide a more effective means of preventing pollutants from entering local water bodies. The LID requirements in many of the most recent MS4 permits are not specifically required by the Clean Water Act. As such, to the extent they are included in MS4 permits in California, it is under the auspices of state law. In the end, however, the State and Regional Boards have the discretion to require LID BMPs in MS4 permits. It is a policy determination to be made on the basis of the evidence before the Board, and what it deems is necessary to meet the MEP standard.

B. Numeric Effluent Limits

MS4 permits have traditionally taken a BMP based approach to compliance with the MEP standard. Under this approach, a municipality will implement a series of best management practices ("BMPs") to ensure that pollutants are effectively prohibited from the entering the municipal storm drain system, and a numeric standard is not applied to discharges from the MS4. As of 2010, it is the EPA’s official position that implementation of a storm water management program that contains best management practices constitutes compliance with the MEP standard. It is likewise the stated policy of the State Board to use an iterative BMP process to meet the MEP standard. This approach was approved by the Ninth Circuit Court of Appeals in Defenders of Wildlife v. Brown (9th Cir. 1999) 191 F.3d 1159. In that case, the Ninth

44 EPA, STORM WATER PHASE II COMPLIANCE ASSISTANCE GUIDE 4-12 (2000).

45 This policy is reflected in numerous State Board orders and other legal documentation from the State Board. See, e.g., State Board Order No. 91-04, p. 14 ["There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges," p. 14]; State Board Order No. 96-13, p. 6 ["federal laws does not require the [San Francisco Reg. Bd] to dictate the specific controls."]; State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limitations."]; State Board Order No. 2001-11, p. 3 ["In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations. "] ; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate."] ; State Board Order No. 2006-12, p. 17 ["Federal regulations do not require numeric effluent limitations for discharges of stormwater"]; Stormwater Quality Panel Recommendations to The California State Water Resources Control Board - The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm water Associated with Municipal, Industrial and Construction Activities, June 19,2006, p.8 ["It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers."]; and an April 18,2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["Most NPDES Permits are largely comprised of numeric limitations for pollutants . ... Storm water permits, on the other hand, usually require dischargers to implement BMPs."]
Circuit held that the EPA has the authority to issue NPDES permits without specific numeric effluent limits that are based on BMP based controls.

Despite the formal position taken by EPA headquarters, EPA Region 9, the regional office charged with overseeing regulation in California, has distanced itself from the 2002 Guidance. Recently EPA has pushed Regional Boards in California to incorporate TMDLs into MS4 permits as strict numeric targets. The basis for this push being what EPA Region 9 feels is the outdated nature of the 2002 Guidance. As with LID BMPs, a Regional Board’s authority to impose NELs in an MS4 permit is largely discretionary. If the requirement is based on substantial evidence in the record, it will be upheld.46

C.  TMDLs

In addition to the NPDES program, the substantive requirements of the Clean Water Act are based on the state-developed water quality standards (“WQS”).47 The CWA requires states to adopt WQS for the navigable waters within their boundaries, and submit them to the EPA for approval.48 The WQS may take into account a particular water body’s primary use,49 but at base, the Act requires states to do three things:50

1) Identify waters that remain polluted for their assigned use after the implementation of technology based standards;51

2) Prioritize the waters based on the severity of their pollution;52 and

3) Establish total maximum daily loads (“TMDLs”) of pollutants that would bring these waters up to grade.53

States must submit their lists of polluted waters and proposed TMDLs to the EPA for approval.54 If the EPA does not approve, it may promulgate them itself, and importantly, EPA retains the ultimate say in revising WQS standards if it does not think they meet the overall

46 See Cal. Code Civ Pro 1094.5.


48 33 U.S.C. § 1313(a)

49 Id.

50 33 U.S.C. § 1313(d).

51 Id.

52 Id.

53 Id.

54 Id.
requirements of the Act. The final TMDLs are made up of three components: a Load Allocation (“LA”) for background sources of the pollutant at issue; a Waste Load Allocation (“WLA”) for the maximum discharges of the pollutant at issue to be allowed from point sources such as municipal storm sewer systems; and a margin of safety (“MOS”) to protect the watershed from excessive discharges. Expressed numerically:

\[ \text{LA + WLA + MOS} = \text{TMDL}. \]

Consequently, if the TMDL is set at a specific level, the other variables must increase or decrease in a manner that corresponds to the overall maximum daily load of the pollutant at issue. For example, if the TMDL for a given pollutant is set at 10, the WLA, LA and MOS must add up to 10. If there are high background levels of the pollutant then the LA should be high, but in order to have a high LA, the WLA and MOS must be low. This would be problematic if the background pollutant was also making its way into (and out of) municipal storm drain systems in the watershed because they would be assigned a low WLA. Cities operating these systems would be much more likely to violate the TMDL.

Nonetheless, TMDLs are not self executing, and must be incorporated into an NPDES permit before they can be enforced. Pursuant to EPA guidance, the WLAs within a TMDL are not required to be strictly incorporated into MS4 permits. The guidance memo issued on November 22, 2002 and entitled "Establishing Total Maximum Daily Load Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs," explained that for NPDES Permits regulating municipal storm water discharges, any water quality based effluent limit for such discharges, should be "in the form of BMPs and that numeric limits will be used only in rare instances." The EPA recommended that "for NPDES-regulated municipal . . . dischargers effluent limits should be expressed as best management practices (BMPs), rather than as numeric effluent limits." As stated above, EPA Region 9 has distanced itself from this guidance and is actively encouraging the Regional Boards to incorporate TMDLs into municipal storm water permits as strict numeric effluent limits.

D. Funding

In City of Rancho Cucamonga v. Regional Water Quality Control Board – Santa Ana Region, the City of Rancho Cucamonga challenged its MS4 permit. The city alleged that the permit’s implementation costs were excessive and unreasonable, and that the Regional Board did not consider these impacts when issuing the permit. The city based its argument on the California Supreme Court’s holding in City of Burbank v. State Water Resources Control Board 35 Cal. 4th 613, 618 (2005) requiring the Regional Boards to consider the economic implications of permit requirements that exceed federal requirements. The court rejected Rancho

57 Id., at 1385-86.
58 Id., at 1386 (citing City of Burbank v. State Water Resources Control Board, 35 Cal. 4th 613, 618 (2005)).
Cucamonga’s claim, holding that the city did not prove that the MS4 permit exceeded federal requirements, and that the city further bore the burden of showing economic infeasibility, which it did not do.\textsuperscript{59}

What is notable about Rancho Cucamonga is that the cost of compliance with the MS4 permitting scheme is an issue for almost every community. The MS4 permitting process is unique in the environmental arena because it places the cost of compliance directly on communities where it comes directly out of a municipality’s bottom line. With MS4s, this added cost has spawned litigation as municipalities seek to find ways to pay for the program.

1. State Restrictions on Local Funding

California’s Proposition 13\textsuperscript{60} limits cities’ ability to tax in two ways. Cities cannot levy special taxes without two-thirds voter approval,\textsuperscript{61} and cannot levy ad valorem taxes on real and personal property at all.\textsuperscript{62} Instead, Proposition 13 provides for a countywide property tax of one percent of assessed property value apportioned by the Legislature to jurisdictions within the county. In addition, California’s Proposition 218\textsuperscript{63} substantive limitations on the imposition of all local government taxes (both general and special), benefit assessments on real property, and property-related fees and charges. Under Proposition 218, the only permissible taxes “upon any parcel of property or upon any person as an incident of property ownership” are those provided for under Proposition 13 and property taxes approved by two-thirds of voters. While property related fees are still permitted, they will be considered taxes unless they meet specific requirements.\textsuperscript{64}

These restrictions on funding have posed significant obstacles for cities trying to fund their storm water programs. In Howard Jarvis Taxpayers Ass’n v. City of Salinas (2002) 98 Cal. App. 4th 1351 a public interest group challenged a storm water drainage fee imposed on owners and occupants of developed lots in the city of Salinas to pay for the cost of the storm drain system. The court held that the storm water management fee was not exempt from Proposition 218’s voter approval requirements. The City had argued that the storm drainage fee was for water and sewer services and, thus, was within the Proposition 218 exemption for fees "for sewer, water and refuse collection services." "Sewer" is an undefined term in Article XIII D and is also not defined by the Proposition 218 Omnibus Implementation Act.\textsuperscript{65} The court held that

\begin{itemize}
\item \textsuperscript{59} \textit{Id.}, at 1388.
\item \textsuperscript{60} Cal. Const. Art. XIIA, §§ 1 - 4
\item \textsuperscript{61} Cal. Const. Art. XIIA, § 4
\item \textsuperscript{62} Cal. Const. Art. XIIA, § 1
\item \textsuperscript{63} Cal. Const. Art. XIIC and Cal. Const. Art. XIIID
\item \textsuperscript{64} Cal. Const. Art. XIIID, § 6(b)
\item \textsuperscript{65} Cal. Gov Code §§ 53750 et seq.
\end{itemize}
the term “sewer” is ambiguous in Proposition 218 and that it must be construed to meet the intent of Proposition 218, to curb the rise of fees without voter approval.

In the wake of the Salinas decision, cities have had three options for funding their storm water programs: cover the cost of the program with money from the general fund; charge development related fees for those aspects of the program related to property development; or attempt to pass a special tax with two-thirds voter approval. Cities are increasingly viewing none of these options as a viable or sustainable means of funding their storm water programs. As demonstrated by the Rancho Cucamonga case and others, this funding issue has both directly and indirectly led to litigation.

2. Unfunded State Mandates Litigation

This litigation has focused on cost recovery for state mandated programs under Article XIII B of the California Constitution. Article XIII B, Section 6 of the California Constitution prohibits the Legislature or any State agency from shifting the financial responsibility of carrying out governmental functions to local governmental entities. Article XIII B, Section 6 provides, in relevant part, as follows:

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 such local governments for the cost of such program or increased level of service . . .

This reimbursement requirement provides permanent protection for taxpayers from excessive taxation and requires discipline in tax spending at both state and local levels.66 Enacted as a part of Proposition 4 in 1979, it "was intended to preclude the state/rom shifting financial responsibility to local entities that were ill equipped to handle the task."67 Recent state mandates cases challenging permits in Los Angeles and San Diego have resulted in wins for municipalities. On March 26, 2010, the California Commission on State Mandates held that large portions of the San Diego County Large Municipal Storm Water Permit exceeded the requirements of federal law and constituted unfunded state mandates. This is an important decision that has potential application to storm water permits throughout California. According to the Commission’s decision, the following portions San Diego permit are unfunded state mandates:

1. Street Sweeping
2. Street Sweeping Reporting
3. Conveyance System Cleaning
4. Conveyance System Cleaning Reporting

67 Id.
5. Public Education Requirements with Specific Target Communities and Specified Topics
7. Regional Urban Runoff Management Program
8. Program Effectiveness Assessment
9. Long-term Effectiveness Assessment
10. Permittee Collaboration

The decision has implications for municipal storm water permits statewide. If the Legislature does not appropriate funding for the programs, the County and cities subject to the permit are not required to implement them. While the State Board still has the opportunity to appeal the San Diego case, in an area where wins for municipalities are infrequent at best, both the LA and San Diego cases represent watershed moments. Both cases may set the standard for challenges throughout the state.

Conclusion

Regulation of MS4 discharges under the Clean Water Act’s NPDES program has been a twenty year process. The end result is undoubtedly cleaner water, however the requirements of the program are reaching a point where cities and other local government entities are conducting a cost benefit analysis and questioning whether additional, more stringent controls are necessary. The next decade of regulation in this area is likely to be driven by the ongoing cost benefit analysis that cities are going to do when allocating scarce resources.