

C/CAG

CITY/COUNTY ASSOCIATION OF GOVERNMENTS OF SAN MATEO COUNTY

*Atherton • Belmont • Brisbane • Burlingame • Colma • Daly City • East Palo Alto • Foster City • Half Moon Bay • Hillsborough • Menlo Park
Millbrae • Pacifica • Portola Valley • Redwood City • San Bruno • San Carlos • San Mateo • San Mateo County • South San Francisco • Woodside*

2:30, Thursday, January 21, 2016
San Mateo County Transit District Office¹
1250 San Carlos Avenue, 2nd Floor Auditorium
San Carlos, California

STORMWATER (NPDES) COMMITTEE AGENDA

- | | | |
|--|---------|--------------|
| 1. Public comment on items not on the Agenda (presentations limited to three minutes). | Breault | No materials |
| 2. Stormwater Issues from November and December C/CAG Board meetings: <ul style="list-style-type: none">• November: Receive a copy of executed task order EOA-01, issued to EOA, Inc. in an amount not to exceed \$317,142, for technical support services to the Countywide Water Pollution Program through Calendar Year 2015. (Information)• November: Review and approve Resolution 15-50, affirming C/CAG's commitment to supporting its member agencies in meeting stormwater permitting mandates and requesting State Water Board partnership on addressing pollutants of concern. (ACTION)• December: Review and approve the appointment of Peter Vorametsanti, Interim Public Works Director, to represent the City of Millbrae on the Stormwater Committee (ACTION)• December: Receive a presentation on key provisions of the adopted Municipal Regional Permit and take action or provide staff direction, as appropriate. (ACTION) | Fabry | No materials |
| 3. ACTION – Review and approve August 20 and October 15, 2015 Stormwater Committee meeting minutes | Fabry | Pages 1-9 |
| 4. PRESENTATION - Receive a presentation on key provisions of the adopted Municipal Regional Permit | Fabry | Pages 10-11 |
| 5. ACTION – Review and approve panel recommendation on consultant support services to the Countywide Water Pollution Prevention Program | Fabry | Page 12 |
| 6. INFORMATION – Receive a copy of the water quality petition requesting the State Water Resources Control Board review the San Francisco Bay Regional Water Quality Control Board's reissuance of the Municipal Regional Permit. | Fabry | Pages 13-29 |
| 7. Regional Board Report | Mumley | No Materials |
| 8. Executive Director's Report | Wong | No Materials |
| 9. Member Reports | All | No Materials |

¹ For public transit access use SamTrans Bus lines 390, 391, 292, KX, PX, RX, or take CalTrain to the San Carlos Station and walk two blocks up San Carlos Avenue. Driving directions: From Route 101 take the Holly Street (west) exit. Two blocks past El Camino Real go left on Walnut. The entrance to the parking lot is at the end of the block on the left, immediately before the ramp that goes under the building. Enter the parking lot by driving between the buildings and making a left into the elevated lot. Follow the signs up to the levels for public parking. Persons with disabilities who require auxiliary aids or services in attending and participating in this meeting should contact Mima Guilles at 650 599-1406, five working days prior to the meeting date.

C/CAG AGENDA REPORT

Date: January 21, 2016
To: Stormwater Committee
From: Matthew Fabry, Program Manager
Subject: Review and approve August 20 and October 15, 2015 Stormwater Committee meeting minutes

(For further information or questions contact Matthew Fabry at 650 599-1419)

RECOMMENDATION

Review and approve August 20 and October 15, 2015 Stormwater Committee meeting minutes as drafted.

ATTACHMENTS

1. Draft August 20, 2015 Minutes
2. Draft October 15, 2015 Minutes

STORMWATER COMMITTEE
Regular Meeting
Thursday, August 20, 2015
2:30 p.m.

DRAFT Meeting Minutes

The Stormwater Committee met in the SamTrans Offices, 1250 San Carlos Avenue, San Carlos, CA, 2nd floor auditorium. Attendance at the meeting is shown on the attached roster. In addition to the Committee members, also in attendance were Sandy Wong (C/CAG Executive Director), Matt Fabry (C/CAG Program Coordinator), John Fuller (Daly City), Patrick Ledesma (San Mateo County), Michelle Daher (East Palo Alto), Kathryn Sheehan (CSG Consultants), and Jon Konnan (EOA, Inc.). Chair Breault called the meeting to order at 2:40 p.m.

1. Public comment: None

2. C/CAG staff Matt Fabry provided an update on issues relevant to the Committee from the July and August C/CAG Board meetings. There were no relevant issues from July. In August, based on the results of a Request for Qualifications (RFQ) process, C/CAG approved a resolution that authorizes the C/CAG Chair to execute three-year agreements with 10 firms to provide on-call consultant services to the Countywide Water Pollution Prevention Program, and further authorized the C/CAG Executive Director to negotiate and issue task orders under said contracts in a cumulative amount not to exceed \$2,300,000 for fiscal year 2015-16. Two consultants have provided these services in the past. The RFQ divided the services into seven categories, and the highest rated three consultants were identified for each category, except that five consultants were identified for the Green Infrastructure category. Next steps are for C/CAG staff to develop scopes of work, solicit proposals from the qualified consultants, and issue task orders.

3. ACTION – The draft minutes from the June 18, 2015 Stormwater Committee meeting were approved unanimously. (Motion: Murtuza, Second: Willis).

4. ACTION – C/CAG staff Fabry provided an update on the general categories of compliance activities required under the revised Municipal Regional Permit (MRP) and solicited recommendations from the Committee regarding initial prioritization of the categories with regard to providing C/CAG support during the next five year permit term. Fabry noted that the requirements that will be in the adopted permit are fairly well known at this time. In the past, sufficient funding was available for C/CAG to provide member agencies with all of their desired permit compliance assistance, but that may no longer be the case going forward. Thus, there is need to prioritize types of assistance. C/CAG staff began the process of seeking input on the permit activities for which member agencies desire C/CAG support at the July 21 NPDES Technical Advisory Committee meeting, and the discussion has continued at various subcommittee meetings. In general, member agencies have indicated a desire for C/CAG's support in the following broad categories, in order of MRP provision:

- Provision C.3: New Development and Redevelopment, including Green Infrastructure
- Provision C.7: Public Information and Outreach
- Provision C.8: Water Quality Monitoring
- Provision C.10: Trash Load Reduction

- Provision C.11/C.12: Mercury and PCB Controls

Member agencies also requested C/CAG provide ongoing education and training via regular subcommittee and committee meetings and periodic workshops. There is also a desire for continued support with regard to annual reporting.

C/CAG staff anticipates future support will be limited to annual revenue minus various ongoing administrative and permit support costs. C/CAG staff anticipates approximately \$1.7 million annually to be available for consultant support on MRP requirements. Fabry noted C/CAG has some additional reserve funds (\$600K) available for technical support in the current fiscal year that could carry over to future years. Fabry also noted that he is planning on hiring a staff to assist with management of the stormwater program; this is already budgeted for under administrative and permit support costs.

Fabry referred to tables in the agenda packet that A) summarize the general level of consultant resources that has been put towards seven general compliance assistance categories in recent fiscal years under the current MRP requirements and projected costs under MRP 2, and B) list the categories in order of priority (highest to lowest) based on C/CAG staff's preliminary recommendations. It was noted that the projected mercury/PCBs control costs under MRP 2 are not zero but instead are to be determined, and there already appears to be an annual shortfall and thus the need for prioritization, even without including these unknown mercury/PCBs control costs. Fabry reviewed the rationale for the recommended priorities and solicited feedback from the Committee. The Committee emphasized the importance of assistance with Annual Reporting (Category No. 7 or lowest priority in agenda packet table), and requested moving it up to No. 5. The Committee also agreed that certain aspects of Public Outreach are important to perform at the countywide level and should receive higher priority. Fabry noted that activities related to the potential countywide funding initiative are budgeted separately. The Committee discussed various possibilities for reducing costs in the future. Finally, the Committee asked staff to develop a proposal to more fairly divide up costs among member agencies for C/CAG's assistance with mercury and PCBs controls, since contributions of these pollutants to stormwater runoff discharges is presumed to vary widely among the agencies depending on extent of urbanization and especially old industrial land uses. The committee noted this will require solid justification and will be very challenging.

5. ACTION – C/CAG staff Fabry provided an update on the potential countywide stormwater funding initiative and solicited recommendations from the Committee regarding next steps. Fabry noted that staff efforts on the potential initiative have generally been on hold for the past year. To date, staff has undertaken the following efforts in support of a potential initiative:

- Funding Needs Analysis – completed a final draft, left as a draft to allow revision based on revised Municipal Regional Permit requirements, as needed.
- Funding Options Report – completed a final draft detailing the various options for funding stormwater-related work. Has not been adopted as a final work product yet by the C/CAG Board.
- Opinion Research – final report accepted by the C/CAG Board at the August 2014 meeting. Details results of phone and mail surveys.
- Action Plan – staff prepared a detailed outline of an Action Plan that would serve as the public document detailing how revenue from a successful measure would be utilized.
- Member Agency and Community Engagement – staff met with five member agencies (Brisbane,

Belmont, San Carlos, San Mateo County, and City of San Mateo) and several community groups.

Tasks that remain to be done for an initiative include:

- Finalizing the Funding Needs Analysis – need to verify assumptions made in preparing the document are consistent with permit requirements in the revised Municipal Regional Permit (e.g., add Green Infrastructure planning dollars, adjust mercury/PCBs control costs).
- Finalizing the Action Plan – convert outline into full document for Committee and C/CAG Board review and approval.
- Prepare a rate structure and Fee Report – this task has not yet been started, although preliminary estimates of revenue that would be generated from a successful initiative were based on the rate structure established by the Contra Costa County Clean Water Program in its 2012 initiative and would likely be the starting point for discussion on a San Mateo County rate structure.
- Potentially perform additional opinion research to gauge public support if enough time passes between an actual initiative and the previous polling, or to test new messages or focus areas, such as a Green Infrastructure / sustainability initiative vs. a clean water initiative.

Once all these tasks are completed and if the C/CAG Board approved moving forward with an initiative, it is approximately five months from Board decision to a tabulated election result. Fabry noted other factors that might impact the initiative such as other initiatives and Proposition 218 reform. Fabry noted staff is proposing two options for Committee review/discussion on moving forward with a potential initiative:

- Option 1: continue moving forward to complete tasks detailed above. Initiate a concerted outreach and education effort to inform city councils, community groups, and the public on the need for stormwater funding. With the amount of work still remaining, it is unlikely an initiative could be put before property owners before summer of 2016. Given the significant political focus in 2016 on primary and general elections, it may be prudent to plan for a balloting process no sooner than spring of 2017.
- Option 2: put any further efforts regarding an initiative on hold. Potentially revisit the need for an initiative once member agencies have had time to better quantify and understand the cost implications of the revised Municipal Regional Permit, or possibly when Green Infrastructure plans are completed (likely Year 4 of the new permit term) and can serve as the basis for an initiative (i.e., funding would be used to implement Green Infrastructure plans). The implication of this option is C/CAG and member agencies will be limited to existing revenue sources for much, if not all, of the next five-year permit term.

The Committee discussed an approach that would be a hybrid of Options 1 and 2, which would continue outreach, engagement, and messaging but put other aspects of the initiative on hold. Overall, the timeframe should remain within the MRP 2 permit term so that we are not in the same place when we reach the MRP 3 permit term.

6. Regional Board Report: NONE

7. Executive Director's Report: C/CAG Executive Director Sandy Wong announced that the C/CAG Board has formed an ad hoc committee to address the potential formation of a new countywide water management agency, an effort led by Supervisor Pine. The ad hoc committee developed a response to

the San Mateo County Grand Jury Report released June 4 entitled “Flooding Ahead: Planning for Sea Level Rise.” The response was approved by the C/CAG Board last week and is available in the associated agenda package. The ad hoc committee will meet again in September and will invite Supervisor Pine.

8. Member Reports: NONE

Chair Breault adjourned the meeting at 3:30 p.m.

DRAFT

STORMWATER COMMITTEE
Regular Meeting
Thursday, October 15, 2015
1:15 p.m.

DRAFT Meeting Minutes

The Stormwater Committee met in the SamTrans Offices, 1250 San Carlos Avenue, San Carlos, CA, 2nd floor auditorium. Attendance at the meeting is shown on the attached roster. In addition to the Committee members, also in attendance were Sandy Wong (C/CAG Executive Director), Matt Fabry (C/CAG Program Manager), Gary De Jesus and Ralph Braboy (City of San Mateo), Supervisor Dave Pine, Michael Barber, Hilary Papendick, and TJ Carter (San Mateo County), John Fuller and Cynthia Royer (Daly City), Michelle Daher (East Palo Alto), Hardeep Takhar and Wilfung Martono (Caltrans), and Jon Konnan (EOA, Inc. Chair Breault called the meeting to order at 1:23 p.m. without a quorum.

1. Public comment: None

2. C/CAG staff Matt Fabry provided an update on issues relevant to the Committee from the September and October C/CAG Board meetings. In September, Fabry gave a presentation on FY 2014-15 Countywide Water Pollution Prevention Program accomplishments and information on the draft Municipal Regional Permit. In October, the Board approved the framework for the formation of a new C/CAG committee to facilitate the discussion on countywide approaches to water related issues, such as stormwater runoff pollution control, flood control, and sea level rise. The new committee will include seats for elected officials and city/county managers, and a seat for BAWSCA.

3. ACTION – Approval of the draft minutes from the August 20, 2015 Stormwater Committee meeting was deferred due to the lack of a quorum.

4. ACTION – C/CAG staff Fabry provided options for C/CAG to support development of a countywide Stormwater Resource Plan to enable member agencies to seek Proposition 1 stormwater grant funding. Fabry noted that Senate Bill 985 requires public agencies seeking voter-approved bond funds for stormwater and dry weather runoff capture projects to develop Stormwater Resource Plans. These Plans are intended to identify and prioritize, on a watershed basis, stormwater and dry weather runoff capture projects “in a quantitative manner, using a metrics-based and integrated evaluation and analysis of multiple benefits to maximize water supply, water quality, flood management, environmental, and other community benefits within the watershed.” Although focused on managing stormwater as a resource and benefitting water supply and drought concerns, Stormwater Resource Plans are expected to contain similar components as the Green Infrastructure Plans that will be required under the revised Municipal Regional Permit. Fabry noted that C/CAG staff believes a countywide Stormwater Resource Plan can be developed in a way to directly support subsequent development of Green Infrastructure Plans by individual agencies. A solicitation is anticipated in early 2016 for Round 1 of \$200 million of Proposition 1 funding. State Board staff anticipates making approximately \$80 million available in Round 1, including up to \$20 million for developing Stormwater Resource Plans. Agencies applying for Round 1 funds to develop Stormwater Resource Plans will have to wait until Round 2 for an opportunity to seek implementation funding. Round 2 is not likely until 2018, at the earliest. Fifty-percent non-state matching funds are required for the stormwater grant program.

Fabry noted that C/CAG staff is evaluating options to support its member agencies in being eligible to compete for the funding and discussed the four options that are detailed in the agenda package for Stormwater Committee consideration. C/CAG staff recommends Option 1, which is that C/CAG solicits consultant support now to develop a countywide Stormwater Resource Plan to enable member agencies to pursue implementation funds under Round 1 of the stormwater grant program. Fabry noted that the short timeline would be challenging and local agencies in San Mateo County would need to step up with projects to make the effort worthwhile. In response to a question from committee member Walter, Fabry noted that agencies from other Bay Area counties appear to be moving in the direction of applying for planning funds (Option 2). Committee member Oskoui noted that he favors Option 1, and that Belmont has a couple of projects almost ready to go (one is a joint project with San Mateo County). A vote was not taken due to the lack of quorum but committee members generally favored proceeding with Option 1.

5. PRESENTATION – C/CAG staff Fabry noted that Caltrans is subject to a statewide stormwater permit that includes requirements for Caltrans to reduce trash loading from its storm drainage system statewide. Caltrans is conducting on-land visual assessments (including locations within San Mateo County) and developing trash load reduction control methodologies. There are opportunities to develop cooperative agreements to address trash with local agencies for locations such as El Camino Real. Hardeep Takhar (Caltrans) provided an overview of Caltrans' Trash Load Reduction Plan for the San Francisco Bay Region. He is Caltrans' point person and has been reaching out to countywide programs and the Bay Area Stormwater Management Agencies Association (BASMAA) Trash Committee to discuss cooperation. Takhar noted that Caltrans would like to get cooperative agreements with local agencies in place as soon as possible (e.g., by June 2016). He will send a link to Caltrans' assessment data and standard details for trash control devices to Fabry for distribution to the committee. It was noted that local agencies should review the Caltrans' assessment data and resolve any conflicts with local agency data.

6. PRESENTATION – Jon Konnan (EOA, Inc.) provided a presentation on the Countywide Water Pollution Prevention Program's recent PCBs and Mercury Source Area Identification Study, which was conducted in accordance with requirements in the Municipal Regional Permit. Konnan noted that the purpose of the study was to further understand distribution of PCBs and mercury within prioritized land use areas where elevated pollutant concentrations were more likely to be found, with the overall goal of finding areas where controls would be most cost-effective. One hundred sediment samples were collected from municipal storm drain systems within nine agencies that comprise over 90% of the old industrial land use areas that drain to San Francisco Bay. The sampling design specifically targeted sample station locations within the old industrial landscape that are influenced by parcels that were classified and prioritized by a land use analysis as having relatively higher potential to be sources of PCBs. However, a strong correlation between the land use analysis and sampling results was lacking, and only five of the 100 samples exhibited concentrations in excess of the benchmark established by BASMAA as a threshold for potential further investigation. The study results suggest that identifying additional source areas and properties in San Mateo County may be becoming increasingly difficult. In addition, remaining PCBs sources may be less elevated and more diffuse and therefore more challenging to control. Committee members recommended defining what level of future source identification effort is good enough for our purposes so that a definite endpoint for this type of study is reached sooner rather than later.

7. PRESENTATION – After an introduction by San Mateo County Supervisor Pine, Hilary Papendick (San Mateo County Office of Sustainability) provided a presentation on the Countywide Sea Level Rise Vulnerability Assessment, including an update on the current status of the study and a discussion of

opportunities for local agency participation. The assessment will identify key assets at risk from multiple scenarios of sea level rise and storm events and options to mitigate. Papendick noted that there is a lot of variability in the sea level rise estimates that form a basis for the scenarios and that the study is casting a wide net in developing the scenarios. Committee members asked whether the project's Policy Advisory Committee has approved the scenarios and recommended getting this approval to avoid making the process overly iterative.

8. UPDATE – C/CAG staff Fabry provided an update on the Municipal Regional Permit reissuance. A revised Tentative Order for the permit is anticipated to be released tomorrow or early next week. An adoption hearing is scheduled for November 18 and could continue into November 19. The remaining issue of greatest concern is that PCBs load reduction requirements remain couched as Numeric Effluent Levels rather than Numeric Action Levels. Fabry is working on obtaining a resolution from the C/CAG Board that speaks to this issue in the hope that more moderate members of the Regional Water Board might be swayed by San Mateo County elected officials. Fabry handed out a draft resolution for the committee's review.

9. Regional Board Report: NONE

10. Executive Director's Report: C/CAG Executive Director Sandy Wong provided updates on several items related to transportation programs.

11. Member Reports: NONE

Chair Breault adjourned the meeting at 3:10 p.m.

2015 Stormwater Committee Roster			Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Agency	Representative	Position												
Atherton	Gordon Siebert	Public Works Director								X				
Belmont	Afshin Oskoui	Public Works Director		X		X				X		X		
Brisbane	Randy Breault	Public Works Director/City Engineer				X		X		X		X		
Burlingame	Syed Murtuza	Public Works Director		X		X		X		X				
Colma	Brad Donohue	Director of Public Works and Planning		X		X				X		X		
Daly City	Patrick Sweetland	Director of Water & Wastewater		O		X		X		O		O		
East Palo Alto	Kamal Fallaha	City Engineer						O		O		O		
Foster City	Jeff Moneda	Public Works Director				X				X				
Half Moon Bay	Mo Sharma	City Engineer				X		X		X				
Hillsborough	Paul Willis	Public Works Director		X		X		X		X		X		
Menlo Park	Vacant	Public Works Director												
Millbrae	Charles Taylor	Public Works Director		X				X						
Pacifica	Van Ocampo	Public Works Director/City Engineer												
Portola Valley	Howard Young	Public Works Director		X						X				
Redwood City	Saber Sarwary	Supervising Civil Engineer		X		X				X		X		
San Bruno	Jimmy Tan	City Engineer		X				X		X		X		
San Carlos	Jay Walter	Public Works Director		X				X		X		X		
San Mateo	Brad Underwood	Public Works Director		X		X		X		X		O		
South San Francisco	Brian McMinn	Public Works Director		X		X		X		X		X		
Woodside	Paul Nagengast	Deputy Town Manager/Town Engineer						X						
San Mateo County	Jim Porter	Public Works Director		X		X		X		X				
Regional Water Quality Control Board	Tom Mumley	Assistant Executive Officer		O										

"X" - Committee Member Attended

"O" - Other Jurisdictional Representative Attended

C/CAG AGENDA REPORT

Date: January 21, 2016
To: Stormwater Committee
From: Matthew Fabry, Program Manager
Subject: Receive a presentation on key provisions of the adopted Municipal Regional Permit

(For further information or questions, contact Matthew Fabry at 650-599-1419)

RECOMMENDATION

Receive a presentation on key provisions of the adopted Municipal Regional Permit.

FISCAL IMPACT

None

SOURCE OF FUNDS

NA

BACKGROUND

The San Francisco Bay Regional Water Quality Control Board (Water Board) adopted a revised Municipal Regional Stormwater Permit on November 19, 2015. This was after approximately seven hours of public testimony the day prior and a full day of Water Board deliberations and engagement with its staff on the 19th. The revised permit regulates the stormwater discharges from C/CAG's member agencies, as well as all of the municipalities in Santa Clara, Alameda, and Contra Costa Counties, and the cities of Vallejo, Fairfield, and Suisun City.

Key provisions in the revised permit include requirements to reduce trash, mercury, and PCBs (polychlorinated biphenyls) discharging from storm drains and for each municipality to develop a Green Infrastructure Plan. Staff will provide an oral presentation summarizing the revised permit, with a focus on these key provisions. A summary of these issues is included below.

Trash

The trash reductions are continued from the previous permit term in which permittees were required to achieve a 40% reduction in trash loading from storm drain systems by July 1, 2014. Under the revised permit, permittees will need to improve on those gains by achieving 70% and 80% reductions by July 1, 2017 and July 1, 2019, respectively. Trash load reduction is generally achieved either by installing trash capture devices within municipal storm drain systems (which

require ongoing maintenance to prevent clogging and flooding), or other control measures, such as street sweeping, on-land cleanups, enhanced solid waste management programs, public education, and source control, such as bans on litter-prone items such as plastic bags and foam foodware. As is typical with pollutant control programs, achieving greater load reductions over time becomes more challenging and costly, as “low-hanging fruit” are quickly exhausted.

Mercury & PCBs

For mercury and PCBs (both of which accumulate in fish tissues in San Francisco Bay at levels unsafe for human consumption), permittees are required to reduce loads in urban runoff by 48 and 3,000 grams, respectively, during the five-year term of the permit. PCBs are considered the primary driver under the permit, with mercury reductions expected as a result of implementing certain PCB control measures. PCBs, which were banned in 1979, were manufactured and used in various places throughout the Bay Area, with historical releases resulting in some degree of polluted “hot spots” in older industrial areas, but low concentrations found throughout urbanized areas. For PCBs, the primary means of achieving the load reductions during the permit term are referral of contaminated source properties for cleanup, controlling releases of PCBs during building demolition activities, and treatment via green infrastructure implementation.

PCBs were used extensively in many products during the years in which it was manufactured, including as a non-conductive lubricant in electronic equipment and as a plasticizer for caulks and sealants. Certain properties at which PCBs were either manufactured or spilled/released may remain ongoing sources of PCBs to the storm drain system. Permittees are required to look for such properties and refer them for cleanup to appropriate state or federal agencies.

Buildings constructed during between the 1950s through 1970s when PCBs were in widespread use have been found to contain significant levels of PCBs in caulking around windows and doors and in concrete joints and in sealants in floor systems. Demolishing these buildings without proper controls can result in PCBs being released to the environment and potentially discharging from storm drain systems. As such, the permit requires permittees to develop a program to manage PCBs in building materials so these releases are avoided (something similar to how lead paint and asbestos are abated prior to building demolition).

Green infrastructure, which captures, treats, and infiltrates stormwater via specially designed landscape systems, is effective at removing mercury and PCBs because it captures sediment and other fine-grained materials, to which mercury and PCBs strongly adhere. Green infrastructure will occur over time as properties are developed or redeveloped in accordance with stormwater permit mandates that went into effect in 2005 and require new and redevelopment projects of any significant size to incorporate onsite stormwater treatment. Green infrastructure can also be implemented on public properties, such as through green streets and parking lots. The permit mandates permittees develop Green Infrastructure Plans over the course of the permit term that, when implemented over the coming decades, will achieve significant reduction in PCBs loading to the Bay by the year 2040.

C/CAG AGENDA REPORT

Date: January 21, 2016
To: Stormwater Committee
From: Matthew Fabry, Program Manager
Subject: Review and approve panel recommendation on consultant support services to the Countywide Water Pollution Prevention Program

(For further information or questions, contact Matthew Fabry at 650-599-1419)

RECOMMENDATION

Review and approve panel recommendation on consultant support services to the Countywide Water Pollution Prevention Program

FISCAL IMPACT

TBD

SOURCE OF FUNDS

NPDES & Measure M Funds

BACKGROUND

In August 2015, the C/CAG Board approved 10 on-call contracts with firms qualified to provide support to the Countywide Water Pollution Prevention Program in various categories of expertise. In November, C/CAG staff issued a Request for Proposals to the 10 firms for numerous support tasks associated with the reissued Municipal Regional Permit. Nine of the 10 firms submitted proposals. Staff convened a review panel including Committee members Porter and Askoui and conducted interviews during the first week of January. Based on review of the proposals and results of the oral interviews, staff is requesting the Committee review and approve the panel's recommendation regarding the firms to which task orders should be issued. The final recommendation was not ready at the time of the agenda preparation, so staff will present the recommendation at the Committee meeting.

C/CAG AGENDA REPORT

Date: January 21, 2016

To: Stormwater Committee

From: Matthew Fabry, Program Manager

Subject: Receive a copy of the water quality petition requesting the State Water Resources Control Board review the San Francisco Bay Regional Water Quality Control Board's reissuance of the Municipal Regional Permit.

(For further information or questions, contact Matthew Fabry at 650-599-1419)

RECOMMENDATION

Receive a copy of the water quality petition requesting the State Water Resources Control Board review the San Francisco Bay Regional Water Quality Control Board's reissuance of the Municipal Regional Permit.

FISCAL IMPACT

None at this time.

SOURCE OF FUNDS

NA

BACKGROUND

At the December 8, 2015 C/CAG Board meeting, staff provided a presentation summarizing the major new permit provisions of the reissued Municipal Regional Permit. Staff indicated the Regional Water Quality Control Board had not made any of the important changes requested by permittees and informed the Board that some of the other Countywide Programs were planning to file a petition for the State Water Board to review the Regional Board's action regarding the reissued permit. The C/CAG Board directed staff to explore opportunities for signing on with another Countywide Stormwater Program's petition and to sign on if an appropriate opportunity existed. Staff determined the most feasible option in the short turnaround time before a petition had to be filed (December 19, 2015) was for C/CAG's Countywide Water Pollution Prevention Program to sign on as a co-petitioner with the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) on behalf of C/CAG's member agencies. The SCVURPPP petition addresses procedural concerns with the reissuance process as well as the technical issue of whether Numeric Effluent Limitations for mercury and polychlorinated biphenyls (PCBs) reductions are appropriate instead of Numeric Action Levels. Pursuant to the C/CAG Board direction and in consultation with legal counsel, staff authorized SCVURPPP's legal counsel to

add the Countywide Water Pollution Prevention Program as a co-petitioner. The petition was filed on December 16, 2015. The petition, without attachments, is included as Attachment 1.

C/CAG staff understands petitions were also filed by the San Francisco Baykeeper, the City of San Jose, and permittees in Alameda County.

ATTACHMENTS

1. Water quality petition requesting the State Water Resources Control Board review of the San Francisco Bay Regional Water Quality Control Board's reissuance of the Municipal Regional Permit.

December 16, 2015

Writer's Direct Contact
+1 (415) 268.6294
RFalk@mofocom

By UPS Two-Day Delivery and by Email to waterqualitypetitions@waterboards.ca.gov

State Water Resources Control Board
Office of Chief Counsel
Attn. Adrianna M. Cowl
1001 "I" Street, 22nd Floor
Sacramento, CA 95814

Re: **Water Quality Petition requesting State Water Resources Control Board's Review of Region 2's Re-Issuance of Municipal Regional (Stormwater) Permit (NPDES No. CAS612008)**

To Whom It May Concern:

Please accept this Petition for Review of the California Regional Water Quality Control Board, San Francisco Bay Region's (Region 2's) November 19, 2015 action in adopting NPDES Permit No. CAS612008, better known as Region 2's reissuance of the San Francisco Bay Municipal Regional Permit for stormwater discharges (MRP 2.0).

MRP 2.0 includes as co-permittees 76 San Francisco Bay area municipalities that collectively serve over 5.5 million Californians. To better coordinate their efforts, 15 of those co-permittees located in the Santa Clara Valley previously entered into an agreement to form the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP).¹ Likewise, to provide coordination and assistance with respect to compliance with their NPDES stormwater permit, another 21 co-permittees previously formed the San Mateo Countywide Water Pollution Prevention Program (SMCWPPP), which is administered under the City/County Association of Governments of San Mateo County (C/CAG), a joint powers agency.²

¹ The 15 municipal co-permittee agencies comprising SCVURPPP are: the cities of Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, and Sunnyvale; the County of Santa Clara; and the Santa Clara Valley Water District.

² The 21 municipal co-permittee agencies comprising SMCWPPP are: the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside; the cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco; and the County of San Mateo.

State Water Resources Control Board
December 16, 2015
Page Two

This Petition is submitted by SCVURPPP and SMCWPPP on both of their behalves for the benefit of their respective members.³

All information the State Water Resources Control Board (State Board) requires for a water quality petition of this nature is presented below.

1. Name, address, telephone number and e-mail address (if available) of the petitioner:

Names of Petitioners: the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) and the San Mateo Countywide Water Pollution Prevention Program (SMCWPPP).

Mailing Addresses:

For SCVURPPP:⁴ c/o Robert Falk, SCVURPPP Legal Counsel, Morrison & Foerster LLP, 425 Market Street, 32nd Floor, San Francisco, CA 94105

For SMCWPPP: c/o Matthew Fabry, PE, Manager, San Mateo Countywide Water Pollution Prevention Program, City/County Association of Governments of San Mateo County, 555 County Center, 5th Floor, Redwood City, CA 94063

Telephones:

For SCVURPPP: 415-268-6294

For SMCWPPP: 650-599-1419

Email Addresses:

For SCVURPPP: RFalk@mofa.com

For SMCWPPP: MFabry@smcgov.org

³ SCVURPPP and SMCWPPP are collectively referred to herein as the "Petitioners." Co-permittees that are members of SCVURPPP or SMCWPPP reserve their rights to file petitions concerning MRP 2.0 on their own behalves. The City of San Jose, California will be filing such a petition, incorporating aspects of this Petition to the extent it determines it efficient to do so.

⁴ Although SCVURPPP requests all communications concerning this Petition be directed to its legal counsel, whose contact information is shown above, its direct mailing address is: Santa Clara Valley Urban Runoff Pollution Prevention Program, 1021 S. Wolfe Rd., Suite 185, Sunnyvale, CA 94086. Its direct telephone number is 408-720-8811.

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- 2. The action or inaction of the Regional Water Board being petitioned, including a copy of the action being challenged or any refusal to act, if available.** If a copy of the regional board action is not available, the petitioner must explain why it is not included.

Action Being Challenged: Adoption of MRP 2.0, NPDES Permit No. CAS612008, by Region 2 on November 19, 2015.

The version of MRP 2.0, including its Fact Sheet and other attachments, that was last publicly noticed for adoption by Region 2 and an associated Errata sheet that was released to the public several days in advance of the November 18-19, 2015 adoption hearing, are available for download at:

http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/mrpwrittencomments/November/Revised_Tentative_Order_11-10-15_Attachments_A_G.pdf and

http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/mrpwrittencomments/November/Errata_and_Clarifications.pdf).⁵

The following additional documents, which modified the above and were adopted as part of MRP 2.0, present issues raised for review herein include: **(1)** a “Staff Supplemental” first made available to the public at the hearing location just prior to the beginning of Region 2’s meeting on November 18, 2015 (provided as Attachment 1 hereto), and **(2)** a “Chair’s Supplemental” which the Chair of Region 2’s Board first revealed and made available to those present at the adoption hearing only after the agenda item in question commenced on November 18, 2015 (provided as Attachment 2 hereto).⁶

Because its effect was, for the first time on the record, to officially characterize the nature of the “numeric performance criteria” for mercury and PCBs load reductions set forth in MRP 2.0 and its Fact Sheet as “numeric effluent limitations (NELs) rather than numeric action levels (NALs), we also include the Region 2 staff’s Response to Comments document concerning these permit provisions (available for download at

⁵ Hard or electronic copy of these documents are not being provided at this time due to the lengthy number of pages/size of the data files involved, but they can be provided under separate cover and/or .pdf upon further request.

⁶ To avoid overwhelming a firewall due to the large number of pages/amount of data involved, all Attachments referenced herein are being provided only with the hard copy of this Petition being sent via UPS delivery. Electronic (.pdf) copies of any of them can also be provided under separate cover upon further request.

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http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/mrpsresponsetocomments/C11-12_Response_to_Comments.pdf).⁷

Collectively, all of the above documents are further referred to herein as “Final MRP 2.0 Order.”⁸

3. The date the Regional Water Board acted, refused to act, or was requested to act:

Hearing conducted on November 18-19, 2015; vote taken on November 19th.

4. A statement of the reasons the action or inaction was inappropriate or improper:

- A. Adoption of Final MRP 2.0 Order emerged from a serially flawed and biased public participation and hearing process that did not comply with the requirements of law.
- B. Region 2’s inclusion of NELs as opposed to NALs for mercury and PCBs load reductions in Final MRP 2.0 Order was the result of the flawed public participation process and inaccurate statements by Region 2 staff and counsel concerning the State Board’s position on the issue. Beyond this, the NELs in question were otherwise not adequately justified on the record and their adoption therefore reflects an abuse of discretion.

5. How the petitioner is aggrieved:

Petitioners and their member agencies (and other MRP 2.0 co-permittees and interested persons) were deprived of the full public participation (e.g., notice, comment, and open meeting observation) rights to which they are entitled by applicable federal and state law. Requirements and, in other cases, official interpretations of requirements, are included in Final MRP 2.0 Order that would not be included if the public participation process resulting in its adoption was not so flawed. Petitioners and other co-permittees were also deprived of a vote on MRP 2.0’s most controversial provisions by a full, fairly

⁷ This document can also be provided in hard copy or .pdf under separate cover upon further request.

⁸ On December 10, 2015, Region 2 posted an announcement making the adopted version of MRP 2.0, as incorporating the errata and language reflecting the Staff Supplemental and Chair’s Supplemental, available at the following link: http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/R2-2015-0049.pdf. This lengthy document will also be provided in hard copy and/or .pdf upon further request. (Other archived documents associated with the development and adoption of MRP 2.0 are also available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/mrp_sw_reissuance.shtml. If necessary, hard or .pdf copies of any of these can be provided on request.)

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constituted, and representative Regional Board. Had flawed public participation and inaccurate Region 2 staff and counsel representations made at the adoption hearing not occurred, the numeric performance criteria for mercury and PCBs load reductions would not have been characterized or be legally enforceable as NELs. Petitioners' member agencies would then have been able to ensure compliance with MRP 2.0 through implementing required initial and follow-up actions on a timely basis, and not be subject to third party lawsuits if mercury and PCBs loading reductions fall short of their non-transparently calculated and speculative marks.

6. The action the petitioner requests the State Water Board to take:

The State Board should conduct further public hearings on MRP 2.0 to provide the proper and fair process and absence of bias to which the Petitioners, other co-permittees, and all members of the public are entitled. As part of this process, and as it did in the construction and industrial general stormwater permits it has adopted, the State Board should convert the numeric performance criteria for mercury and PCBs set forth in Provisions C.11 and C.12 of MRP 2.0 from NELs into NALs with an accompanying set of appropriate exceedance response action requirements (ERAs) if these benchmarks are not met in the first instance.⁹

7. A statement of points and authorities for any legal issues raised in the petition, including citations to documents or the hearing transcript of the regional board hearing if it is available.

A. Adoption of Final MRP 2.0 Order emerged from a serially flawed and biased public participation and hearing process that did not comply with the requirements of law.

Federal and state law entitles regulated entities and other members of the public to certain fundamental public participation rights in regulatory permitting proceedings, including in the NPDES context: adequate notice, a meaningful opportunity to comment based on what has been properly noticed, and a full, fair, and transparent hearing. 33 U.S.C. §§ 1342(a)(1) and 1251(e); 40 C.F.R. § 124.10; Cal. Gov. Code §§ 11120 *et seq.*, 11400 *et seq.*, 11500 *et seq.* and 23 Cal. Code Regs. § 647 *et seq.* Those rights were materially abridged in these Region 2 proceedings, including as follows:

- i. Two members of the Region 2 Board that were not required to recuse themselves from the MRP 2.0 proceedings due to their prior or current employment by two of the

⁹ Indeed, there is even more reason for the State Board to utilize NALs here. Unlike in this Clean Water Act section 402(p)(3) MS4 permit, NPDES stormwater permits for construction and industrial activities *must* address the less flexible requirements of Clean Water Act section 301(b)(1)(C).

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76 municipal co-permittees, nevertheless recused themselves due, at least in part, to erroneous direction one of the individuals received from the Board's legal counsel.¹⁰ Given their municipal experience, these two additional Board members could have brought important diverse perspectives and practical insights into the Region 2 Board's deliberations on MRP 2.0's requirements and influenced the final vote. Their exclusion from the process, when not required by law and as tainted by Board counsel's prior erroneous advice that recusal was legally required, flies in the very face of the rationale for their appointments by the Governor. It in and of itself gives rise to the specter of biased decisions being made thereafter by a less diverse and less representative Regional Board. Indeed, the outcome of several key contested issues relative to MRP 2.0 might have been materially different had these two duly appointed and unconflicted Region 2 Board members participated in the proceedings.

- ii. Due to one of the recusals, the Region 2 Board lost a quorum for the June 10, 2015 public hearing on all aspects of the draft permit other than its trash management requirements.¹¹ Instead, the proceeding continued immediately and was conducted by a subcommittee of the Board that was constituted at the spur of the moment. As such, there was no advance notice to the public that this less representative procedural device might be invoked, and there was no meaningful opportunity to object to it or the potential bias it might create with respect to the remainder of the permitting process.¹²
- iii. Following the June 10, 2015 hearing, two members of this subcommittee apparently exchanged emails with each other concerning the testimony they heard and the report and recommendations they intended to provide to the Region 2 Board and staff with regard to it.¹³ The content of these emails and any related communications between these two subcommittee members and other members of the Region 2 Board have never been disclosed to the public. The third member of the subcommittee, who may have brought a different perspective on the same testimony to the table, did not participate in these communications or otherwise have input into the subcommittee's report and recommendations; nor was she present when the subcommittee's report and recommendations were more officially presented to the Region 2 Board at a

¹⁰ Reporter's Transcript of Proceedings June 10, 2015, Item 8 (RT-June, Attachment 3 hereto) at 6:3-8, 7:9-11; Reporter's Transcript of Proceedings July 8, 2015, Item 6 (RT-July, Attachment 4 hereto) at 6:2-7:14; Email exchange between Region 2 counsel Yuri Won and Robert Falk and Gary Grimm July 6-7, 2015 (*See* Attachment 5 hereto), discussing Cal. Gov. Code § 82030(b)(2) and <http://ag.ca.gov/publications.coi.pdf> at p.14.

¹¹ RT-June at 7:7-8:1.

¹² *Id.*

¹³ RT-July at 18:8-19:3.

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hearing on July 7, 2015.¹⁴ Despite Board counsel's post-hoc attempt to sanitize the record on what clearly were articulated as the subcommittee's recommendations to the remainder of the Region 2 Board and to Region 2 staff present at the July 7th hearing, the combined effect of this subcommittee effort, the recusals, and the absence of transparency and additional Board member participation at this critical stage of the public participation and hearing process deprived Petitioners and the public of their full rights and cast a dark shadow over the propriety and legitimacy of the permit adoption process's ultimate outcome.

- iv. At the November 18, 2015 permit hearing, members of the public were, *for the very first time*, given notice of and access to copies of the Staff Supplemental and the Chair's Supplemental, both of which modify or effectively modify the terms of the Final MRP 2.0 Order and its compliance requirements.¹⁵ Although the Region 2 staff and counsel took pains at the hearing to try and characterize these Supplementals as mere "clarifications" and "outgrowths," the transcript of the proceedings makes clear that the members of the Region 2 Board understood that the Supplementals represented more, and even the staff appeared to concede at one point that one aspect of the Chair's Supplemental contained new requirements.¹⁶ Moreover, even if these Supplementals really only contained clarifications, at the very minimum, the public should have received notice of them at least 10 days prior to the hearing in order to have a real and meaningful opportunity to review and prepare testimony on their implications.¹⁷
- v. Even more significantly, Region 2 staff did not provide requisite notice to the public that "numeric performance criteria" for mercury and PCBs loading reductions contained in MRP 2.0 were intended as NELs rather than as NALs until they released their Response to Comments document on October 19, 2015 in conjunction with the announcement of permit adoption hearing.¹⁸ Indeed, the ambiguous nature of the

¹⁴ *Id.*

¹⁵ See Attachments 1 and 2 and Reporter's Transcript of Proceedings, November 18, 2015, Item 7 (RT-Nov18, Attachment 6 hereto) at 17:18-21, 51:9-54:20.

¹⁶ Reporter's Transcript of Proceedings, November 19, 2015, Item 7 (RT-Nov19, Attachment 7 hereto) at 115:18-126:14.

¹⁷ See Cal. Gov. Code § 11125.

¹⁸ Response to Comments, available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/mrpresponsetoc/omments/C11-12_Response_to_Comments.pdf, p. 4-10. As it appeared nowhere in the May 2016 Tentative Order, Fact Sheet, or associated public comment/hearing announcement, Region 2 staff's attempted explanation about having provided prior notice in various meetings and other informal communications of their *intent* to

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term “numeric performance criteria” in the permit and its fact sheet resulted in extensive testimony at the June 10, 2015 hearing on the non-trash-related aspects of the draft permit and generated an associated formal request for clarification in terms of the NEL vs. NAL distinction in written comments which followed on July 9, 2015.¹⁹ Hence, as a practical matter, the Response to Comments document’s first time insistence that the numeric performance criteria were NELs and not something else effected a material change in the nature of the permit’s requirements and the associated potential third party liability consequences to the co-permittees in the event they are unable to fully comply with them. As such, it should have commanded a revision of the draft permit/Fact Sheet and a re-opening of the written public comment period.

- vi. The final deliberations of the Regional Board members at the adoption hearing on November 19, 2015 concerning their resolution of key contested issues (including concerning the imposition of NELs rather than NALs for mercury and PCBs) occurred in a lengthy, 1 hour and 45 minute closed session that was also insufficiently noticed and which was otherwise unauthorized even in the context of an adjudicative proceeding of this nature.²⁰ This precluded direct observation by, and

have performance criteria serve as “enforceable limits” or a “metrics approach” is irrelevant and did not exclude the possibility of them being NALs in this regard in any event. RT-Nov19 at 128:6-129:22.

¹⁹ See e.g.,

http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/agencies/SCVU_RPPP_Legal.pdf)

²⁰ Region 2’s October 19, 2015 Public Notice of Adoption Hearing, available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/mrppublicnotice/MRP_Public_Notice.pdf provided no mention of a potential closed session whatsoever. The Agenda for the November 18-19, 2015 Region 2 Board Meeting, available at http://www.waterboards.ca.gov/sanfranciscobay/board_info/agendas/2015/November/11_18_15_agenda.pdf, does not provide notice of a closed session in conjunction with its specified item on MRP 2.0 (Item 7). Instead, Agenda Item 11 just contains a boilerplate omnibus reference to a closed session for “Deliberation,” the authority referenced for which is Government Code section 11126(c)(3). There is also a further explanatory note contained in a boilerplate attachment to the Agenda that explains that the Board may adjourn to a closed session at any time during the regular session to, among other things, deliberate, based on the authority provided by “Government Code section 11126(a), (d) and (q).” Putting aside for a moment the question of whether any of these statutory references provide authorization for a closed session in these circumstances, what they clearly do not do is override Government Code section 11125(b)’s independent requirement to provide clear advanced notice to the public of “an item” to be discussed in closed session.

Moreover, in terms of providing authorization for a closed session on the MRP 2.0 adoption item, these references are either inapposite or non-existent. Even Government Code 11126(c)(3) extends only to deliberations on proceedings conducted pursuant to Government Code section 11500 or similar provisions of law. But Section 11500 *et seq.* concerns only proceedings conducted by administrative law judges and, to the extent Government Code section 11400 *et seq.* is considered similar, its general rule is that even an adjudicative hearing “shall be open to public observation” and may only be closed for certain limited purposes, none of

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full accountability to, members of the public, as both the spirit and the letter of the Bagley-Keene Act demand.²¹

- B. Region 2's inclusion of NELs as opposed to NALs for mercury and PCBs load reductions in Final MRP 2.0 Order was the result of the flawed public participation process and inaccurate statements by Region 2 staff and counsel concerning the State Board's position on the issue. Beyond this, the NELs in question were otherwise not adequately justified on the record and their adoption therefore reflects an abuse of discretion.
- i. The above-described flaws in the public participation process leading up to the adoption of Final MRP 2.0 Order assume even greater importance in light of confusing, inaccurate, and sometimes misleading statements Region 2 staff and counsel made to the members of the Region 2 Board following the conclusion of public testimony at the permit adoption hearing.²²

After having confirmed that the requirements in MRP 2.0 were best management practices (BMP) and other required actions-based measures, consistent with their TMDL implementation plans, and that good faith compliance with them would create

which presented themselves here. *See* Cal. Gov. Code §§ 11425.10(a)(3) and 11425.20(a)(1)-(3). Government Code section 11126(e), which was *not* referenced on the Agenda, also does not apply here since there is no significant exposure to litigation against Region 2 and, in any event, Region 2's counsel did not timely prepare and submit the requisite memorandum detailing the specific reasons and legal authority for closing the session on this basis. *See* Cal. Gov. Code 11126(e)(1), (e)(2), and (e)(2)(B) and (C)(ii).

Finally, even if the above were not the case, the transcript of the open hearing reveals that the closed session's purpose was not deliberating evidence but rather, ultimately without apparent success, for the Board members to try and craft new permit language to resolve the NEL v. NAL issue in a manner addressing the co-permittees concerns. RT-Nov19 at 158:18-159:13. (Indeed, as has been observed relative to general permits issued in California, the line between adjudicative and quasi-legislative action and associated procedural rules governing the board members blurs in a proceeding to develop a single set of requirements governing a large number of co-permittees, like the 76 present here such that erring on the side of transparency concerning the Region 2 Board members' decision-making is in order relative to this closed session issue.)

²¹ *See* Cal. Gov. Code § 11120 ("It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed The people insist on remaining informed so that they may retain control over the instruments they have created.")

²² Indeed, as described in more specific detail below, Regional Board counsel contributed to the flawed process and its biased outcome in a manner contrary to law by concurrently serving as an advocate for the staff's favored position on NELs and as a supposedly neutral advisor to the Board members at the permit adoption hearing. *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81; *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810. *Cf. Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal. 4th 731. (While it is not precedent, *see also* Los Angeles Superior Court's decision in *County of Los Angeles, et al. v. State Water Resources Control Bd.*, No. BC122724 (2010).)

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a safe harbor for the co-permittees, staff and counsel then left the Board members in a state of confusion by respectively saying that the mercury and PCBs requirements in the permit were not-fully action-based and ultimately acknowledging that failing to meet the numeric criteria would render the co-permittees subject to enforcement and third party lawsuits even if they implemented all required actions.²³

Then, contrary to the State Board's own conclusions and use of them, just before the improper closed session at the adoption hearing, Region 2 staff and counsel also told the Region 2 Board members that NALs would not be effective regulatory mechanisms and suggested that the State Board would see anything other than NELs as insufficiently rigorous.²⁴

Rather than engaging in this distorted advocacy, the Region 2 staff (and counsel to the Region 2 Board in particular), should have presented the Board members with a more objective delineation of the State Board's position on the issue of NALs v. NELs; informed them that the State Board has not precluded the use of NALs as an "ambitious, rigorous, and transparent" alternative to NELs to date; and left the decision on whether to use NELs or NALs in the Region 2 Board members' hands in a far less tainted manner. Indeed, the staff's characterization of NALs as toothless "kick the can" regulatory tools that are meaningless and cannot be enforced conflicts with: (1) the State Board's own use of them,²⁵ (2) the State Board's Expert Panel's express recommendations concerning the use of NALs in *municipal* stormwater permits,²⁶ and (3) the guidance the State Board recently provided on this issue in WQO-2015-0075.

²³ Cf. RT-Nov19 at 12:18-17:12 and 155:9-18 with 145:12-147:5, 151:5-11, and 157:11-158:16.

²⁴ RT-Nov19 at 165:16-166:21, 168:19-169:12, and 172:19-173:11.

²⁵ Storm Water General Permit Order No. 2009-0009-DWQ and Storm Water General Permit Order No. 2014-0057-DWQ.

²⁶ State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Discharges from Municipal, Industrial and Construction Activities (June 19, 2006) at p. 8 ("It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. . . . For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit basically is not possible.) After the conclusion of the public testimony portion of the adoption hearing, Region 2 staff asserted that SCVURPPP's characterization of the Expert Panel's conclusions were amounted to gross misrepresentation. RT-Nov19 at 131:12-20. Although there is no evidence to support it in the record and it is sheer speculation at best, they then went on to assert that the Expert Panel's report was outdated and that these experts "were not *thinking* in the context of Effluent Limits . . . which are an enforceable numeric . . . performance measure that will be enforced." RT-Nov19 at 133:1-9 (emphasis supplied.)

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Indeed, in the latter, although the State Board acknowledged that the Los Angeles Regional Board's use of NELs to implement 33 TMDLs in its area was not error given the number and nature of TMDLs involved, it then went on to specifically state: "We emphasize, however, that we are not taking the position that [NELs] are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit We also decline to urge the regional water boards to use [NELs] in all MS4 permits."²⁷

And with regard to the Region 2 staff's repeated assurances to its Board that the co-permittees concerns with NELs could be sidelined and dealt with later through the exercise of their enforcement discretion, they and counsel should have informed their Board members that the State Board had expressed a different policy preference earlier this year when it stated in WQO-2015-0075: "from a policy perspective, we find that MS4 Permittees that are developing and implementing [alternative compliance measures] should be allowed to come into compliance with . . . interim and final TMDLs through provisions built directly into their permit rather than through enforcement orders" – i.e., enforcement orders that could arise from non-compliance with NELs per se.²⁸

- ii. Beyond these significant process issues, the substantive justification offered by Region 2 staff for treating the numeric performance criteria for PCBs and mercury load reductions as NELs also falls short. First, while they are undoubtedly designed to further implement Region 2's mercury and PCBs TMDLs and represent an increment towards getting to the waste load allocations assigned to stormwater therein, there is nothing concrete in the record revealing how the numeric values of the NELs were actually calculated.²⁹ Instead, Region 2's staff state why they think the load reduction numbers they have identified as NELs for PCBs are feasible to achieve based on the Bay Area's recent performance in terms of new and redevelopment and building demolition and construction.³⁰ But the Region 2 staff's economic forecast (which often proves wrong even when done by actual economists) has no basis in the record and requires no deference given their lack of expertise in the discipline in question. Moreover, a plethora of testimony at the adoption hearing demonstrated that even if the staff's prediction concerning the pace of development

²⁷ WQO-2015-0075 at p. 58-59.

²⁸ *Id.* at 31.

²⁹ Region 2 counsel's last minute effort to try and create a record for their being an adequate substantive basis for the NELs through eliciting a wholly conclusory statement by a staff member is meaningless and improper advocacy, particularly without the "adequate information" to which she summarily refers actually having been delineated in the record and subject to prior public review and comment. *See* RT-Nov19 at 174:21-175:5.

³⁰ RT-Nov18 at 26:6-9.

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and construction ends up being on target, there is still likely to be a significant shortfall in all, or at least many, co-permittees meeting the NELs.³¹

At one point, staff testified at the adoption hearing that the PCB numbers were “based on an updated assessment of controls to reduce PCBs to the maximum extent practicable” and then indicate that their calculation “started with a numerical formula.”³² But, importantly, this formula and these calculations are nowhere to be found in the record, and later in their testimony, the same staff member even indicates that they abandoned the formula-based calculation effort.³³ Their testimony then goes on to explain that they turned to “a number of sources of information” to come up with the 3 kilogram PCBs load reduction requirement, but once again, these sources were not delineated in the permit’s Fact Sheet or elsewhere in the record.³⁴

Indeed, the Region 2 staff member’s further testimony on the issue indicates that the PCBs load reduction numbers in controversy are no more than speculative “guesstimate estimates” that represent the idea of “[h]ere is the number, we think it’s attainable.”³⁵ Ultimately, the staff even expressly conceded that “we know that there’s uncertainty with the basis of our numbers,” while trying to reassure the Region 2 Board members that they could deal with the uncertainty through their future exercise of enforcement discretion.³⁶ (Region 2’s counsel then further conceded to one of the Board members that the numbers were uncertain and that the co-permittees would be in non-compliance if they did not meet them despite their good faith efforts to implement all required actions.³⁷)

- iii. Finally, in the course of the adoption hearing, Region 2 staff revealed that, when all was said and done, their position on NELs was really based on their preference to avoid having to specify additional required actions and then expending the additional effort necessary to oversee and enforce on them if bad actors emerge among the co-

³¹ See e.g., RT-Nov18 at 138:8-142:18 and 158:7-159:22. See also RT-Nov18 at 67:19-68:11; 95:12-16; 104:13-105:8; 112:19-113:11; 117:1-11; 128:24-130:3; 136:1-11; 201:19-205:8; 231:-232:22; 241:1-23; 244:17-245: 15; 248:25-249:4; and 259:9-24.

³² RT-Nov19 at 133:12-22.

³³ *Id.* at 135:22-24.

³⁴ *Id.* at 136:14-16.

³⁵ *Id.* at 137:18-19 and 145:5-6. Relative to some communities that are not likely sources of PCBs, the Region 2 staff’s testimony even went further to characterize the requirements as they might default down to them as “unrealistic.” RT-Nov19 at 152:2-6. See also *id.* at 167:4-18.

³⁶ *Id.* at 148:3-20.

³⁷ *Id.* at 150:18-151:11.

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permittees and refused to meet their implementation obligations.³⁸ Instead, they ultimately admitted that their insistence on NELs reflects their preference to employ a psychology of “coercion.”³⁹ Not only is this an inappropriate basis for calculating the numbers used for the NELs, while they voted to include them based on the mistaken understanding that the State Board would disapprove the permit if it contained NALs instead, the need for undertaking a coercive, rather than cooperative state-local partnership approach vis-à-vis the co-permittees, was not a view that was shared by the members of the Region 2 Board.⁴⁰

8. A statement that copies of the petition have been sent to the Regional Water Board and to the discharger, if different from the petitioner.

Copies of this Petition have been provided to Region 2, the member agencies of SCVURPPP and SMCWPPP, and, through their respective municipal stormwater programs, all other co-permittees to MRP 2.0.

9. A statement that the issues raised in the petition were presented to the regional board before the regional board acted, or an explanation of why the petitioner could not raise those objections before the regional board.

Both SCVURPPP and SMCWPPP actively participated in the public comment and hearing process on MRP 2.0.⁴¹ As demonstrated through the above citations to the record and in Attachments 3-7, all issues raised in this Petition were previously presented to Region 2 prior to its final action in adopting MRP 2.0 on November 19, 2015.⁴²

In closing, Petitioners wish to note that the vast majority of MRP 2.0 was not the subject of significant dispute and is a tribute to an otherwise high level of cooperation between it and its fellow municipal stormwater programs in the San Francisco Bay Area and the Region 2 staff. SCVURPPP and SMCWPPP raise the issues in this Petition to ensure an improved, more

³⁸ See RT-Nov19 at 135:12-17 and 144:24-145:6.

³⁹ RT-Nov 19 at 170:3-172:14.

⁴⁰ RT-Nov19 at 158:18-160:1, 165:6-15, 166:22-168:5, 179:24-182:2, 185:18-187:6, 190:25-192:13, and 194:14-195:6.

⁴¹ See e.g.,

http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/agencies/SMCWPPP.pdf,

http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/agencies/SCVURPPP.pdf, and

http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/agencies/SCVURPPP_Legal.pdf.

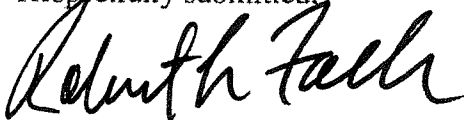
⁴² As to the process issues, see also RT-Nov18 at 252:13-254:14.

State Water Resources Control Board
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Page Fourteen

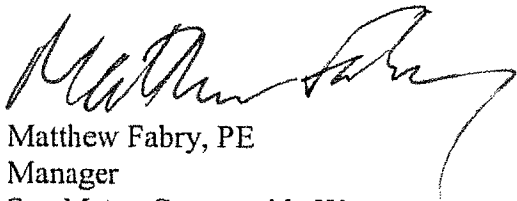
transparent, and publicly legitimate permit will be put in place that avoids the prospect of resource consuming litigation and allows for a high level of cooperation and creative approaches to continue to make meaningful and substantial progress on the highest priority water quality issues in the Bay Area.

Thank you for your consideration.

Respectfully submitted,



Robert L. Falk
Program Legal Counsel
Santa Clara Valley Urban Runoff
Pollution Prevention Program



Matthew Fabry, PE
Manager
San Mateo Countywide Water
Pollution Prevention Program

Attachments

cc: Bruce Wolfe, Executive Officer, Region 2
SCVURPPP Co-Permittees
SMCWPPP Co-Permittees
Alameda, Contra Costa, Vallejo and Fairfield Municipal Stormwater Program Managers

PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

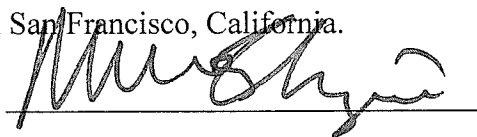
I further declare that on December 16, 2015, I served a copy of the following on the addressees listed below via UPS Two Day delivery by placing a true copies thereof enclosed in sealed envelopes with charges thereon fully prepaid for collection and provision to UPS at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices. I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence and packages for delivery by UPS, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described below will be provided to UPS on the same date that it (they) is (are) placed at Morrison & Foerster LLP for collection and delivery to UPS:

**Water Quality Petition Requesting State Water Resources Control Board's
Review of Region 2's Re-Issuance of Municipal Regional (Stormwater)
Permit, NPDES No. CAS612008 (including Attachments 1-7)**

State Water Resources Control Board
Office of Chief Counsel
Attn. Adrianna M. Crowl
1001 "I" Street, 22nd Floor
Sacramento, CA 95814

Bruce Wolfe, P.E.
Executive Officer
Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Executed this 16th day of December 2015, in San Francisco, California.



Margaret McIlhargie

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