



Date:	March 5, 2018
To:	Interested Parties
From:	Ray Tahir, TECS Environmental
Subject:	Results of Legislative Audit of MS4 Permit

In June of 2017, Assembly Representative Al Muratsuchi asked the State’s Joint Legislative Audit Committee to look into MS4 (stormwater) permit costs through the State Auditor’s Office. That request was granted and the audit was conducted shortly thereafter. The audit was completed a few weeks ago and a report was released on March 1, 2018. The audit included a review of three MS4 programs administered by the Central Valley, Los Angeles, and San Francisco Regional Boards. In the conduct of its audit the State Auditor also included the State Water Resources Control Board.

I. Summary

The results of the audit were not favorable to the water boards, especially to the L.A. Regional Board. Among other things, it concluded:

- **The Regional Board did not adequately consider costs in connection with the enhanced and non-enhanced watershed management programs, which is estimated to cost \$20 billion over a twenty-year period.** This is a criticism that cities have made over and over again. It also ties-in with Gardena's litigation. The audit report points out that although the California Water Code requires water boards (State and Regional) to consider economics when imposing a permit requirement, the State Board has provided little guidance on what criteria should be considered when determining the economic impact on of the requirement on a permittee. The audit intimated that had the Regional Board been aware of MS4 Permit costs -- most of which are attributable to the E/WMPs and were not made known until two-and-a-half years after the permit was adopted -- it may not have approved the permit. The audit recommended that the State Board develop guidelines for the Regional Board for determining the cost impact on requirement on a municipal permittee.
- **The Regional and State Board erred in basing pollution control plans (E/WMPs) on inadequate or outdated water quality data.** This was a criticism communicated by Assembly Rep. Muratsuchi to the State Auditor team. It was also an issue raised by Gardena's stormwater consultant during a Regional Board workshop on the revised 303(d) list. The Dominguez Channel toxics TMDL was used as an example. The toxic pollutants placed on the 303(d) TMDL list were based on sampling data from the channel that was a decade old, ignoring the real possibility that water quality has changed and even improved over that time. A more vivid example is the metals TMDL for several segments of the San Gabriel River and Los Angeles River tributaries (Reach 2 of the Rio Hondo and all Reaches of the Arroyo Seco). Despite the fact that the 2010 303(d) list did not identify metals as an impairment for that water body requiring a TMDL, the 2012 MS4 permit lists metals impairments for several segments of the river. This grievous mistake resulted in the unnecessary expenditure of municipal resources.

- **The water boards required unnecessary monitoring.** As an example the audit uses is bacteria, which was based on antiquated test indicators and incorrectly applied ocean monitoring methodologies to freshwater (e.g., Los Angeles River). As a result, municipalities subject to the bacteria TMDL for the Los Angeles River were required to spend resources needlessly.
- **The State Water Board failed to develop guidelines for MS4 Permittees to report MS4-related compliance costs.** The audit noted that jurisdictions used different methods for reporting compliance costs. The State Board responded by claiming that it did have the expertise in municipal finance to develop such guidelines. The auditor responded by recommending that the State Board hire a consultant that knows municipal finance.
- **The audit criticized the Regional Board for not providing adequate oversight of watershed management plans, specifically the EWMP submitted by the Rio Hondo/San Gabriel River EWMP group.** The EWMP group reported that its watershed management plan had overestimated its pollution problem (metals) by a factor of 10. This resulted in an overestimation of the need for green street infiltration controls that added significantly to the cost of compliance. The audit report made clear that the Regional Board should have caught the error during its review of the EWMP plan. Although not specified in the audit report, Regional Board staff, in being overly deferential to the consultant-led E/WMP groups, also failed to inform the Dominguez Channel EWMP group that the City of Lomita is not subject to the Dominguez Channel Harbor/Toxics TMDL. As a consequence, the City of Lomita is required to come up with \$58,456,951 to meet its milestones (compliance targets for the Dominguez Channel EWMP group).
- **The State Water Board erred when it adopted a state-wide policy for controlling trash from MS4s.** This policy is expressed in the L.A. Regional Board's Section 13383 water code order requiring all MS4 Permittees in Los Angeles County. This policy, codified as a basin plan amendment, was not based on any studies showing that cities subject to the trash policy had problems with trash. The audit report also revealed that a number of municipalities in the State did not believe they had a problem with trash as a pollutant. These cities mentioned that spending municipal funds on trash takes away from addressing more serious pollutants.

The Auditor General recommended that the State Board rescind its policy, which would, by extension, invalidate the Regional Board's Section 13383 Order, which is used to compel compliance. It should be noted that Assembly Rep. Muratsuchi's office was responsible for raising this issue to the State Auditor in response to concerns from the City of Gardena. The State Board, in its response to the audit's comments, held steadfast in its belief that the trash policy is necessary and has no intention of changing its stance on it. Let's see what the Auditor General does. Cities should weigh-in on this issue. Letters should be sent to the State Auditor, the legislative audit committee, and the water boards supporting the audit report's findings and recommendations. One of several criticisms cities should make is that the Regional Board was not encouraged by the State Board to conduct a public hearing on the trash policy (a basin plan amendment), which is required under the California Water Code.

II. Water Boards Response

Predictably, the water boards, for the most part, responded defensively to the audit report. The State Board accused the Auditor General's report of being over-generalized and inaccurate. The Auditor dismissed that accusation. Although the water boards agreed with some of the Auditor's recommendations, which they intend to put into practice, several boards complained about the short time-lines for complying with the auditor's recommendations. They include developing criteria for estimating cost impacts on municipalities and reporting costs in the annual compliance reports to the Regional Boards. The audit ignored that concern and recommended that the water boards adhere to the timelines.

The water boards also remained steadfast in their belief that monitoring (taking water quality samples) was not excessive. Again, the Auditor held its ground as well. The State Board, as mentioned, clung to its belief that its state-wide trash plan is justified. The Auditor countered by affirming that the trash policy was overly broad and that local jurisdictions should be given the discretion to channel their resources to more pressing water quality issues.

III. Auditor General's Leverage

The audit report was sent to the Governor's office and the legislature. The Auditor has no enforcement power; only the power to influence. The audit was made at the urging of the joint legislative committee (consisting of 15 State legislators) which was responding to the several complaints it received from several cities and other interested parties. While the Auditor General has no power to legally impose its recommendations on the water boards, the legislators do. They can enact legislation to require the water boards to comply with the legislature's demands. Legislators could, for example, require the water boards to provide up-to-date information on water quality for water bodies in the State such as the Dominguez Channel. And they now have the power to use the unfunded mandate decisions rendered by the State Supreme Court and expanded more recently by the Third Appellate Court. Specifically, the legislature can void an unfunded mandate requirement. The compliance requirements addressed by the audit report are all unfunded mandates because they exceed federal stormwater regulations. This includes excessive monitoring, the trash control requirements and compliance with watershed management plans. In fact, if the legislature voids the watershed management plans the entire MS4 Permit would collapse. It should be kept in mind, however, that the Gardena litigation could accomplish the same end.

IV. Recommendation

The cities and interested persons should consider sending letters to their State legislative reps asking that they support the audit's recommendations. This should not be difficult since 15 state electeds that sit on the Joint Legislative Audit Committee had pushed the Auditor General to conduct the audit of the MS4 Permit and its costs.



State and Regional Water Boards

They Must Do More to Ensure That Local Jurisdictions' Costs to Reduce Storm Water Pollution Are Necessary and Appropriate

Background

To curb harmful effects of pollution from storm water runoff, federal law requires the State to set restrictions on the pollutants that can be discharged into water bodies and requires local jurisdictions—cities, counties, and other public entities—to obtain storm sewer permits. The permits implement pollutant control plans—which the State's nine regional water quality control boards (regional boards) develop—and require local jurisdictions to monitor their storm water discharge to reduce the pollutants to safe levels. The State Water Resources Control Board (State Water Board) and the regional boards regulate storm water pollution. We reviewed the State Water Board's and three regional boards' regulatory activities.

Our Key Recommendations

- The Legislature should direct the State Water Board to assess whether a study of a specific water body is justified, and if so, require the appropriate entity to conduct the study.
- The State Water Board should do the following:
 - » Set and monitor adherence to guidance for local jurisdictions on tracking storm water management costs and for regional boards to develop and document estimates of the overall storm water management costs to local jurisdictions when considering pollutant control plans.
 - » Revise its trash policy to focus it on local jurisdictions that have water bodies that are harmed by trash.

Key Findings

- The regional boards have not adequately considered the overall costs that local jurisdictions would incur to implement pollution control requirements they impose—the city of Los Angeles estimates it will spend \$8.8 million over three years to comply with one requirement and that another pollutant control plan could cost 41 jurisdictions in the Los Angeles region over \$1.4 billion.
 - » For eight of the 20 plans we reviewed, the regional boards either used inappropriate methods for developing estimates or did not document sources they used to develop the estimates.
 - » The regional boards did not consider all of the costs that local jurisdictions had previously incurred from implementing other requirements for 12 of the 20 plans we reviewed.
- The regional boards do not have consistent information on the costs that local jurisdictions incur in complying with storm water requirements.
 - » Although the State Water Board has been aware of inconsistent information, it has not provided guidance to local jurisdictions on how to track or report their costs.
 - » One regional board did not collect cost information from local jurisdictions despite federal requirements directing it to do so.
- The State Water Board and regional boards have established some pollutant control requirements using outdated information or without obtaining sufficient information on the water bodies they are regulating to adequately tailor plans, which has resulted in unnecessary costs for local jurisdictions.
- The State Water Board's statewide policy prohibiting local jurisdictions from discharging trash into water bodies has forced local jurisdictions to direct resources to reduce trash rather than other pollutants of greater concern.