

**RESPONSE TO COMMENTS  
FOR  
TENTATIVE ORDER NO. R5-2007-XXXX  
NPDES NO. CAS083470  
CITY OF STOCKTON AND COUNTY OF SAN JOAQUIN  
MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT**

On 24 September 2007 the Central Valley Regional Water Quality Control Board (Regional Water Board) staff circulated the Tentative order for the City of Stockton (hereafter City) and County of San Joaquin (hereafter County) Municipal Separate Storm Sewer System Permit System (MS4) NPDES permit (hereafter Tentative Order) for public review and comment. Interested parties were requested to submit comments on the Tentative Order no later than 24 October 2007. Comments were received from the following party:

- City of Stockton

This memorandum provides responses to these comments and, where appropriate, identifies and explains revisions that were made to the Tentative Order in response to these comments. Responses are provided below.

**City of Stockton Comments and Regional Water Board Responses**

**Comment:** Finding 20 does not comply with *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515, and reads like a legal brief rather than bridging the gap between evidence and conclusions. (This contention appears in the introduction and under several of the City's seven specific contentions.)

**Response:** *Topanga* does not prohibit a public agency from adopting findings in addition to those required to bridge the gap between the evidence and the conclusions. In the case of Regional Water Board permitting, this would require findings to support permit requirements. Even assuming the correctness of the commenter's implied conclusion that Finding 20 is superfluous, nothing in *Topanga* precludes the Regional Water Board from making more findings than what the law requires.

**Comment:** 1) The City objects to Finding 20 because the Regional Water Board does not have jurisdiction to resolve subvention claims, questions the purpose and intent of the finding and disputes that the MS4 permit is a federal mandate; and 6) The City contends that whether it voluntary sought permit coverage is a question of fact for the Commission on State Mandates.

**Response:** The Regional Water Board does not dispute that the Commission on State Mandates has the authority to resolve subvention claims. However, the Regional Water Board is the state agency charged with administering and interpreting the Clean Water Act and Porter-Cologne Water Quality Control Act. The Regional Water Board is in a unique position to make findings and conclusions about what those laws require of municipalities

that operate municipal separate storm sewer systems, and how those requirements compare to similarly situated dischargers. The purpose of these findings is simply to bridge the gap between the evidence and the Regional Water Board's conclusion that subvention is not required and to provide the legal basis for permit requirements.

The City is incorrect that the subvention issue was unsuccessfully litigated in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898. In that case, the trial court found, solely as a matter of law, that the Government Code section 17516 exemption was unconstitutional. The court did not consider the specifics of the permit, the Porter-Cologne Water Quality Control Act, or the Clean Water Act. The judge's conclusion was based on a determination that Government Code section 17516 precluded the Commission from considering the Regional Water Boards' actions under the Porter-Cologne Act in all circumstances, without regard to whether the action required a new program or higher level of service requiring subvention consistent with the Constitution and court decisions construing the Constitution.

The Court of Appeal's decision affirmed the trial court's decision. The Court of Appeal's decision makes clear that the permit's requirements were not properly before the Court and that the Court could not evaluate whether there was an unfunded state mandate requiring subvention. Instead, the Commission will need to evaluate the claims, taking account of constitutional and court-fashioned exemptions to Article XIII B, section 6.

The City suggests that the requirements of the tentative order exceed federal Clean Water Act requirements, but does not cite any permit requirement that is more stringent than federal mandates or otherwise indicate the manner in which the tentative order exceeds federal requirements. The tentative order implements the requirements of the Clean Water Act, as stated in Finding 20. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 confirms that requirements imposed by federal law do not lose their character as federal mandates merely because the state has some discretion in carrying out the requirements, as long as the state does not impose more stringent or additional requirements. Like the educational requirements in *Hayes*, the MS4 requirements are part of a comprehensive, nationwide regulatory scheme, and would apply to the City even if the state had no NPDES permitting authority.

**Comment: 2) The City contends that TMDL requirements are not federal mandates.**

**Response:** It is unclear why the City believes this is a factual determination if made by the Commission on State Mandates but an improper legal conclusion if made by the Regional Water Board, the state agency charged with implementing the Clean Water Act's TMDL requirements.

The City's comments are noted, but do not alter the conclusion that federal law requires the Regional Water Board to implement approved wasteload allocations in permit requirements.

**Comment: 3) The City disputes that the same requirements apply to all stormwater dischargers.**

**Response:** The City provides no authority to support its claim that the regulatory scheme in question is limited to the MS4 program and not the larger stormwater program (or for that matter, the entire NPDES regulatory program). Discharges from non-municipal separate storm sewers are also subject to regulation under the stormwater program (40 CFR § 122.26(a)(6)). Industrial discharges through MS4s are also subject to NPDES permitting requirements. (40 CFR § 122.26(b)(14).) These requirements support the view that the stormwater program is a single “regulatory scheme.”

**Comment: 4) The City disputes that a program-based approach is more lenient than numeric permit limits.**

**Response:** The State Regional Water Board has already addressed this issue in SWRCB Order No. WQ 2001-15, as cited in Finding 20; *see also, Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159. The BMP-based iterative approach is more lenient because it does not require strict compliance with numeric effluent limits. Under the iterative approach, exceedances of water quality standards will trigger a review of best management practices (BMPs) to see what more can be done to prevent future exceedances, followed by implementation of identified BMPs to determine whether they in fact prevent or reduce exceedances. Similarly, even where there are no exceedances, the BMP-based approach does not require end-of-pipe numeric effluent limits.

The City provides no evidence that the measures it would need to employ to meet numeric water-quality based effluent limits would be any less rigorous than the requirements of the tentative order. Moreover, as stated in the Finding, the City is free to seek numeric permit limits in lieu of the tentative order.

**Comment: 5) The City contends it has no ability to levy fees to defray costs of permit compliance.**

**Response:** In addition to storm water drainage fees, the City can defray the costs of its stormwater program through increased inspection fees, plan and permit review fees, transit fees, trash collection fees, or other fees related to program components.

**Comment: 7) Provisions of the Water Code that predate the constitutional subvention requirements do not save the order from subvention.**

**Response:** The City contends that every permit is a discrete action that may implicate state subvention. While that may be the case, the City fails to explain how the subvention implications are different in each of the discrete permits. Since the prohibition of pollution

and nuisance predates the subvention provisions, permits implementing it are exempt from subvention requirements. Reissuing new permits based on the pre-existing law would not “revive” a subvention claim.

**Comment: Post Development Standards (D.22.a). As currently written, this provision requires the City to contravene existing law in instituting after-the-fact requirements on various project approvals. Potential suggested language is provided below.**

**”Post Development Standards – Each Permittee shall ensure that all new development and significant redevelopment projects falling under the priority project categories listed below meet Development Standards. If the Development Standards are revised, the revised Standards shall apply to all priority projects or phases of priority projects at the date of adoption of the Development Standards which do not have the following: approval by the City of County engineer, permit for development or construction; or an approved tentative map.”**

**Response:** The Regional Water Board proposes to change the proposed language as follows:

**“Post Development Standards – Each Permittee shall ensure that all new development and significant redevelopment projects falling under the priority project categories listed below meet Development Standards. When the Development Standards are revised, the revised Development Standards shall apply to all priority projects or phases of priority projects at the date of adoption of the Development Standards which do not have one of the following: approval of a tentative map within two years prior to approval of the revised Development Standards, approval of improvement plans by the City or County engineers, or a permit for development or construction. Any extensions of a tentative map after adoption of revised Development Standards shall ensure compliance with the revised Development Standards. In addition, those infill projects that require only a Use Permit from the City or County that apply to the Priority Development Project Categories are subject to the requirements under the Development Standards.”**