



*Cal Cities City Attorneys' Department Presents:*  
**Turning the Tide: Successful Challenges of  
Municipal Storm Water Permit  
Requirements**

Presenters:

*John Harris, Casso & Sparks, LLP*

*Bruce Lindsay, Jones & Mayer*

1

Presenters

*John Harris, Partner, Casso &  
Sparks, LLP*

*Bruce Lindsay, Senior  
Associate, Jones & Mayer*

2

## THE CITY OF GARDENA AND CITY OF DUARTE CASES

• *City of Gardena v. Regional Water Quality Control Board- Los Angeles Region, State Water Resources Control Board; et al.*, (Jan. 28, 2021) - 2021 WL 289363.

• *City of Duarte and Huntington Park, et al., v. State Water Resources Control Board; The California Regional Water Quality Control Board, Los Angeles Region, et al.* , (Jan. 28, 2021), \_\_\_\_ Cal.App.5th \_\_\_\_; 2021 WL 287855.

3

## BACKGROUND ON MS4 NPDES PERMITS

California's NPDES permitting system regulates stormwater discharges under both State and federal law.

### *Federal*

- Distinction between industrial discharges and discharges from a MS4.
- Section 403(p)(3) of the Clean Water Act (33 U.S.C. § 1342(p)(3)) establishes two different standards.

4

## BACKGROUND ON MS4 NPDES PERMITS

### *California Law*

- The Porter-Cologne Water Quality Control Act (Water Code sections 13000, et seq.) gives the State Board, along with nine regional water quality control boards “primary responsibility for the coordination and control of water quality.”

5

## BACKGROUND ON MS4 NPDES PERMITS

### *California Law*

- Waste Discharge Requirements* (WDRs)- Functional equivalent of NPDES permits under the Clean Water Act.
- Permit Application*- A permittee city or county files a “Report of Waste Discharge” (ROWD), which is, in effect, its NPDES Permit application. (Water Code, § 13260, subd. (a)-(c))

6

## BACKGROUND ON MS4 NPDES PERMITS

### *Regional Permits- Phase I*

Los Angeles County (Order No. R4-2012-0175-A01)	San Diego County and South Orange County (Order No. R9-2013-0001)
Ventura County (Order R4-2010-0108)	Bay Area (Order No. R2-2015-0049)
North Orange County (Order No. RB8-2009-0030)	North Coast Region (Order No. R1-2015-0030)
Sacramento County (Order No. R5-2015-0023)	East Contra Costa County (Order No. R5-2010-0102)
Lake Tahoe (Order R6T-2017-0010)	City of Stockton and San Joaquin County (Order No. R5-2015-0024)
County of Fresno (Order No. R5-2013-0080-01)	Bakersfield/Kern County (Order No. R5-2013-0153-01)
Riverside County (Order No. RB8-2010-0033)	Riverside County- Whitewater River Watershed (Order R7-2013-0011)
San Bernardino County (Order No. R8-2010-0036)	City of Long Beach Order No. R4-2014-0024-A01
Port of Stockton (Order R5-2011-0005-02)	City of Modesto (Order No. R5-2015-0025)
City of Salinas (Order No. R3-2019-0073)	

7

## BACKGROUND ON MS4 NPDES PERMITS

### *Other Permits*

- **Phase II Permits-**
  - Small MS4 General Permit (State Board Order No. 2013-0001 DWQ)  
(i.e., City and County of San Francisco)
  - Caltrans Permit (State Board Order No. 2012-0011-DWQ)

8

## BACKGROUND ON MS4 NPDES PERMITS

### *What Did the 2012 Los Angeles County MS4 Permit Require?*

- New programs and requirements
- Compliance with NELs
- WMPs and EWMPs
- Effect of Non-Compliance

9

## WHAT WAS IN DISPUTE IN THE *GARDENA* AND *DUARTE* CASES?

- Water Code §13241 Requirements
  - More Stringent Requirements than Federal law must comply with §13241
- Numeric Effluent Limitations
  - The Regional Board did *not* consider the cost of compliance with the new NEL requirements in the 2012 MS4 Permit.

10

## NUMERIC EFFLUENT LIMITATIONS (NELS)

- What are numeric effluent limitations (NELs)?
- Distinguished from a Best Management Practice (“BMPs”)

11

## IMPACT OF THE *DEPARTMENT OF FINANCE* UNFUNDED MANDATE OPINIONS

### **Discretionary Permit Requirements**

*Department of Finance v. Commission on State Mandates*, 1 Cal.5th 749, 770

(2016):

- To the extent that the Regional Board imposes requirements in a Permit that are more stringent than those which are expressly required by federal law, it would have to rely on and comply with the requirements of California law, including the Porter-Cologne Act, to do so.

12

## IMPACT OF THE *DEPARTMENT OF FINANCE* UNFUNDED MANDATE OPINIONS

*Department of Finance v. Commission on State Mandates*, 1 Cal.5th 749 (2016):

- The Regional Board was *not* required by federal law to impose any specific permit conditions in MS4 Permits.
- Held that certain requirements in the 2007 San Diego County Permit were *not* required by federal law and were unfunded mandates.
- To be a federal mandate, a federal law or regulation must “expressly” or “explicitly” require the condition imposed in the permit.

13

## WHAT WAS IN DISPUTE IN THE *GARDENA* AND *DUARTE* CASES?

### The NEL Problem in the 2012 LA MS4 Permit

*Impacts on Cities:*

- Technical
- Financial
- Environmental
- Legal

14

## THE CITY OF GARDENA AND CITY OF DUARTE CASES

### *Trial Court's Decision in the Gardena and Duarte Cases*

September 24, 2019 Judgments - Overturned the 2012 MS4 NPDES Permit for Los Angeles County-

- *Granted* Gardena's and Duarte's requests for a peremptory writ of administrative mandamus directing the Water Boards:
  - To set aside each and every one of the provisions in the 2012 MS4 Permit pertaining in any way to "any and all Numeric Effluent Limits" ("NEL's"), and
  - To reconsider the 2012 LA MS4 Permit.

15

## THE CITY OF GARDENA AND CITY OF DUARTE CASES

### *Trial Court's Decision in the Gardena and Duarte Cases*

Trial court expressly found that the Boards failed to consider the costs of compliance for permittees with the NELs, as required by Water Code § 13241 and, therefore, failed to comply with California law when they included the NELs in the 2012 Permit.

16



## THE CITY OF GARDENA AND CITY OF DUARTE CASES

### *Impact and Significance of Trial Court's Order*

The court's decision striking the NELs directly affects the most challenging and expensive requirements of the 2012 Permit, including:

- Watershed Management Plans ("WMPs")
- Enhanced Watershed Management Plans ("EWPs")
- NEL monitoring requirements.

17

## COURT OF APPEAL OPINIONS

January 28, 2021 Opinions by Court of Appeal -*Reversed Judgments*

### ***Substantive Holdings:***

- Decision expanded the economic consideration factor of CWC 13241(d) beyond cost of compliance to consideration of *any economic* factor related to the Permit's terms (or even unrelated to its terms) that the Boards may consider in their complete discretion.

18

## COURT OF APPEAL OPINIONS

- Acknowledged the Supreme Court's rule in *City of Burbank v. State Water Resources Control Bd.* 35 Cal.4th 613, 625 (2005) that the ***cost of compliance for permittees must be considered*** when establishing permit requirements.
- The Court then ignored the rule and held that “the cost of compliance is one element, ***but not the only one***, to be considered as part of the economic considerations factor.”

19

## COURT OF APPEAL OPINIONS

- Decision attempts to effectively expand the economic consideration requirement of CWC 13241(d) beyond cost of compliance to consideration of any economic factor related to the Permit's terms (or even unrelated to its terms) that the Boards may consider in their complete discretion.

20

## COURT OF APPEAL OPINIONS

***Procedural Holdings:***

- *Flipped the standard of review.* In this case of independent review of the administrative record by the trial court mandated by CCP § 1094.5 (the “independent judgment” standard), the Court of Appeal:
  - Did *not* assume that the trial court’s ruling was correct
  - Did *not* try to determine whether substantial evidence in the record supported the *trial court’s* factual determination and decision.

21

## COURT OF APPEAL OPINIONS

***Procedural Holdings:***

- The Court of Appeal instead:
  - Independently reviewed and weighed the evidence in the administrative record itself.
  - Came to a contrary conclusion to the trial court that the Boards had adequately considered economic considerations.

22

## COURT OF APPEAL OPINIONS

### *Procedural Holdings:*

- The Court of Appeal did *not* hold that the trial court's decision:
  - Was *not* supported by substantial evidence; or
  - Was erroneous as a matter of law.

23

## THE CITY OF GARDENA AND CITY OF DUARTE CASES

### *Immediate Impact Of Decision*

- The 2012 MS4 Permit remains in place until replaced by the new MS4 Permit presently under consideration
  - Many Permittees could potentially be found non-compliant with the 2012 Permit if TMDL exceedances are found.
  - Could be subject to mandatory minimum penalties and citizens suits.

24

## THE CITY OF GARDENA AND CITY OF DUARTE CASES

### *Broader Impact of the Decision*

- Impact on new and renewed MS4 NPDES Permits
- Impact on issuance of non-MS4 Permits?
- Impact on pending Unfunded Mandate Litigation by counties and cities

25

## THE CITY OF GARDENA AND CITY OF DUARTE CASES

### *Where Do Cities Go From Here?*

- Potential petitions for review to the California Supreme Court.
- Where do the Regional Boards and the State Board go from here?

26

## DOF III

*Department of Finance v. Commission on State Mandates*, 59 Cal.App.5th 546 (2021) [“DOF III”]

Remand from the Supreme Court as a result the reversal of the Court of Appeal’s decision in *DOF I*.

- (1) Since cities had the authority to levy a fee on businesses to cover their costs of inspecting various facilities to ensure compliance, inspection requirement in 2001 permit was not an unfunded mandate.
- (2) Since cities did not have authority to charge a fee to transit agencies or adjacent property owners to install and maintain trash receptacles at transit stops, those requirements in the 2001 permit were unfunded mandates.

*Remittitur to be issued on March 3, 2021.*

27

## OTHER RECENT DEVELOPMENTS

### *Regional Phase I MS4 NPDES Permit for Los Angeles and Ventura Counties*

- Los Angeles County Flood Control District
- County of Los Angeles
- 85 incorporated cities within the coastal watersheds of Los Angeles County
- Ventura County Watershed Protection District
- County of Ventura, and
- 10 incorporated cities within Ventura County

28

## OTHER RECENT DEVELOPMENTS

- *Malaga County Water District v. Central Valley Water Quality Control Board*, 58 Cal.App.5th 418 (2020)
  - *Held* that the hearing procedure utilized by Regional Boards to control the administrative proceedings constituted an illegal underground regulation and remanded to the Board for a new hearing.

29

## OTHER RECENT DEVELOPMENTS

- *State Board Order WQ 2020-0038- In the Matter of Review of Approval of Watershed Management Programs and an Enhanced Watershed Management Program Submitted Pursuant to Los Angeles Regional Water Quality Control Board Order R4-2012-0175*

30

## QUESTIONS

### *John J. Harris*

Casso & Sparks, LLP  
 13300 Crossroads Parkway North  
 Suite 410  
 City of Industry, CA 91746  
 626.269.2980

[jharris@cassosparks.com](mailto:jharris@cassosparks.com)

<https://www.cassosparks.com/attorneys/john-j-harris/>

### *Bruce A. Lindsay*

Jones & Mayer  
 3777 N. Harbor Blvd.  
 Fullerton, CA 92835  
[bal@jones-mayer.com](mailto:bal@jones-mayer.com)

714-446-1400

714-446-1448 FAX

<https://jones-mayer.com/our-team/profiles/bruce-lindsay/>

31

LEAGUE OF CALIFORNIA CITIES

*Register now*

**VIRTUAL CONFERENCE**  
 INTERACTIVE • EXPERIENTIAL • COLLABORATIVE

APRIL 29-30, MAY 7,  
 17, AND 21

[www.cacities.org/events](http://www.cacities.org/events)

**CITY ATTORNEYS' SPRING CONFERENCE**

32