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

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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

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.
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.”

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))
### BACKGROUND ON MS4 NPDES PERMITS

#### Regional Permits - Phase I

<table>
<thead>
<tr>
<th>County/Region</th>
<th>Order No.</th>
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<tbody>
<tr>
<td>Los Angeles County</td>
<td>R4-2012-0175-A01</td>
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<td>Ventura County</td>
<td>R4-2010-0108</td>
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<td>North Orange County</td>
<td>R8R-2009-0030</td>
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<td>County of Fresno</td>
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<td>R9-2010-0036</td>
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<td>Port of Stockton</td>
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<td>City of Salinas</td>
<td>R3-2019-0073</td>
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<td>San Diego County and South Orange County</td>
<td>R9-2013-0001</td>
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<td>Bay Area</td>
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<td>R1-2015-0030</td>
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<td>City of Stockton and San Joaquin County</td>
<td>R5-2015-0024</td>
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<td>Bakersfield-Kern County</td>
<td>R5-2013-0153-01</td>
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<td>Riverside County-Whitewater River Watershed</td>
<td>R7-2013-0011</td>
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<td>City of Long Beach</td>
<td>R4-2014-0024-A01</td>
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<td>City of Modesto</td>
<td>R5-2015-0025</td>
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#### 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)
What Did the 2012 Los Angeles County MS4 Permit Require?

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

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.
NUMERIC EFFLUENT LIMITATIONS (NELS)

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

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.
**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.

**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
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.

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.
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.

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.
• 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.”

• 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.
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.

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.
**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.

**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.
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

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?
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.

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
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.

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*
### QUESTIONS

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