MANAGING STORMWATER’S PERFECT STORM: management, finance, law, & politics
Agenda

- City challenges and successes
- The 10-Step Funding Plan
- Stormwater 101
- The Legal Update
- Q&A

Speakers:

Steven Machida          Dan Schaaf                           Tim Seufert                       John Abaci
Steven Machida
City of San Carlos
What is stormwater?

Defining stormwater...

Dan, please!
Storm drain master planning

Holistic Study of System

- Current Conditions Analysis
- Identify Capacity Projects
- Identify Condition Projects
- Identify Water Quality Projects
- Engineer’s Estimates
- Capital Improvement Program (CIP)
- Climate Adaptation
- Asset Management
Storm drain master planning

Capacity Projects
“Get it Out!”

- Undersized Pipes (10 year)
- Underserved Areas
- Nuisance Flooding
- Tidal Impacts
- Pump Stations
- Detention/Retention
- Future Conditions (land use, rain and tides)
Storm drain master planning

Condition Projects

“Ohops!”

• Pipe Failures
• Scour
• Reliability (Pumps)
• Damages
• O&M Issues
Storm drain master planning

Water Quality Projects
“Slow it down!”

- Mandated!
- Trash Capture
- Green Infrastructure (GI)
- TMDL Reduction
- Hydromodification (HMP)
Storm drain master planning

Cost Estimates and Priority

“How much!?!?”

- Unitized Costs
- Construction Climate (ENR)
- Cost to Benefit
- Known Issues + “Squeaky Wheels”
- O&M Costs
- Mandated Reporting
- Available Funding
Storm drain master planning

SDMP Report
“Now I get it!”

- Wide Audience
  (Engineering, Financial, Political, Public)
- Layered Information
  (Data, Methods, Results, Details)
- Planning Tool
- Hydraulic Models
- Basis of Design
Why are we here today?

How will YOU fund stormwater needs?
Stormwater funding in California today!!!
Why do we need to discuss $$\$$?
What are your stormwater priorities?

- Environment?
- Infrastructure?
- Maint. & services?
- Happy Hour
The fundamental process

1 Develop Priorities

2 Choose Funding sources and tool(s)
Priorities and policies

1

Priorities

Community needs and desires, fully vetted...and plans!
Choosing funding and financing tools

1. Priorities
2. Funding sources and tools
Capital vs. services

One-time capital investment

Ongoing services

Options
10 step plan

1. Water/Sewer/Trash Utilities
2. Development Impact Fees
3. Regulatory Fees
4. Property-related Fee
10 step plan | continued

5. G.O. Bonds
6. Community Facilities District/CFD
7. Special/Parcel Tax
8. Special/Benefit Assessment
10 step plan | continued

9  Grants

10  The General Fund!
Utility rates and property-related fees

- Utility rates for water, sewer, trash
- Other “property-related fees”
Storm drain fees?

Still need analysis and approval process

- Environment/pollution control
- “Water supply”
CFDs and parcel taxes

**NOT BENEFIT-BASED**
- Reasonable metrics
- Achieves local goals and policies

**APPROVAL MECHANISM**
- Voter approved, still 2/3 required
- CFD landowner vote(s)

**SAMPLE PROJECTS**
- Schools and libraries
- New development
- Storm and flood water efforts
**Special assessments**

**ARE BENEFIT-BASED**
- General benefit
- Rigor of assessment engineering
- Still viable...

**APPROVAL MECHANISM**
- Property-owner
- Protest ballot
- 50% + protest?

**SAMPLE PROJECTS**
- Infrastructure, new and replacement
- Ongoing maintenance
- PBIDs/CBDs
Property-related fee (*not* water, sewer, trash)

**ANALYTICAL RIGOR**
- Voluntary nature?
- Analytical analysis

**APPROVAL MECHANISM**
- “Property-based fees” balloted

**SAMPLES**
- Palo Alto Storm drain fee
- CSA fee
City of Culver City

- Parcel tax for stormwater/NPDES
- Creek restoration/environmental perspective
- Voter approved tax
City of Sacramento – Storm Drain Utility

- Examination of existing Utility needs
- Extensive outreach and polling with community
- Property owner ballots in the mail presently
- Stand by!
The Others...

One Shoreline
Regional approaches/JPAs
Foster City efforts

SFBRA
San Leandro efforts
PROPOSITION 218

1. Assessments

2. Property-related fees
Assessments

- Any levy or charge upon real property based on a special benefit conferred by a public improvement or service
- Special Benefit
- Particular and distinct benefit to property not generally conferred to all properties in district or to public at large
- Assessment must be in proportion to a special benefit
- May not exceed cost of providing special benefit
- Cal Const. art. XIIID, sec. 4
Assessment Ballot Election

• Mailed ballot assessment election
• 50% of weighted ballots submitted = proceed to approval
• Majority protest precludes establishment, renewal, or increase of assessment
Property-Related Fees

- Fee that is charged as an incident of property ownership
- Apartment inspection fee is not incident of property ownership
- Owner would have choice whether to use property for multi-unit housing or some other purpose which would avoid fee
- Electrical and gas not incident of property ownership
- Fee imposed no matter how the property is being used
- Cal. Const. art. XIIID, sec. 6
Majority Protest Proceedings

- Sewer, Water and Refuse Collection
- No Mailed ballots
- Majority Protest precludes establishment or increase of fee
- One written protest per parcel counted
- Owner or ratepayer can protest
- Apply to storm sewer fee under S.B. 231 but not under *H/JTA v. Salinas*
- Court has cited approvingly S.B. 231 as including “stormwater systems” in partial exception from 218
Sewer Fees

SB 231 (Hertzberg, D-San Fernando Valley)
- Effective 1/1/18, defines “sewer” under Prop. 218 to include storm sewers (GC 53750(k) and 53751)
- Seeks to overrule HJTA v. Salinas by statute, stating that sewer has always included both sanitary and storm sewers and citing Crawley v. Alameda and Griffith v. Pajaro broadening reach of water and refuse collection
- This authority is most safely used for stormwater reuse project benefitting water supplies or sewer operations because of “water” and “sewer” components
- Test litigation coming?
- Trial court will be bound by HJTA v. Salinas but appellate court can take into consideration SB 231 definition
- Cited favorably in Paradise Irr. Dist. v. Comm’n on State Mandates (2019)
Property-Related Fee All-Mail Ballots

- Property-related Fee that does not qualify as water, sewer or refuse collection requires both majority protest and election
- All-Mail Ballot election to all property owners affected by the fee
- Needs to pass by more than 50% “of the owners of the property subject to the fee”
  - 50% of properties or 50% of owners (no data on that)
  - Resolution to establish one vote per parcel
- More than 50% of ballots submitted
- Ballots must comply with Gov. Code section 53755.5 (b)(1) – (4)
  - Ballot form and tabulation
Property-Related Fee
General/Special Election

• City has option of not holding property-owner election
• Can hold a general or special registered-voter election to impose or increase a property-related fee
• A property-related fee subject to 2/3 vote of the electorate
• City pay costs of election.
Initiatives

• Rule is now pretty clear that simple majority can adopt an initiative special tax—despite Props. 13 and 218

• *City & County of San Francisco v. All Person Interested in the Matter of Proposition C* (2020) 51 CA5th 703, review denied Sep. 9, 2020
  
  Business license tax increase to fund homeless programs got 60% approval

• Appellate court held initiative proposing special tax may pass w/ 50% +1 approval despite Prop. 13, Prop. 218 and City charter
Initiatives

- *Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924
- Initiative may place general tax on special election ballot
- Rule limiting general taxes to general elections — and other procedural requirements of Prop. 218 — apply to government, not voters acting by initiative
Referenda

• No right to referend Prop 218 property-related fee
• Referendum exemption for taxes and appropriations under California Constitution applies to funding of basic and essential functions of government
• *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105
  Water service charges established through majority protest proceeding not subject to referendum
Prop 218 Recent Case Law Developments

*KCSFV I, LLC v. Florin County Water District* (2021) 64 Cal.App.5th 1015

- Prop 218 Majority Protest Proceeding
- Plaintiff never submitted written protest
- Said did not get the notice
- District argued administrative exhaustion precludes lawsuit
- Court held notice did not meet Prop 218 requirements (did not disclose all rates)
- Court held that where procedure does not comply with Prop 218 requirements plaintiff may sue even if did not participate
Prop 218 Recent Case Law Developments

*Hill RHF Housing Partners v. City of Los Angeles* (2021)
12 Cal.5th 458

- Property BID Mailed Ballot Assessment Proceeding
- Plaintiff vote against assessment but did not participate at hearing
- No Majority Protest
- City argue administrative exhaustion preclude lawsuit
- BID statute requires Council to consider all protests
Hill Decision

• Council consideration is not a requirement that it respond to protests or evaluate them

• Public hearing process is not conducive to submission, evaluation, or resolution of disputes

• Allowing party to sue does not mean that it will sandbag City with litigation later since some issues might only be significant at the public hearing (such as ability of businesses to pay, state of economy, etc.)

• Litigation-on-the-record rule might apply with or without an issue exhaustion requirement
Lessons from *Hill* and *Florin County*

- Whether or not you expect a majority protest, provide sufficient notice and develop a good record
- Cost of service analysis with accepted methodology
- Advisable to establish a local remedy that does apply to as-applied and facial challenges and to state in notice of 218 hearing that all challenges will be addressed
- Make record of notice to all owners/ratepayers
- Staff report and resolution findings
- Declaration during litigation not part of administrative record
Proposition 26

All fees, levies, charges by government are taxes except:
1. Assessments and property-related fees subject to Prop 218
2. Charges as condition for development of property (e.g., development impact fees, permits, inspections)
3. Regulatory charges (licenses, permits, inspections) not exceeding reasonable costs
4. Specific product or service that is not provided to others not exceeding reasonable costs
5. Use of governmental property (entrance fees, rent, license fees, etc.)
6. Fines and penalties

Cal. Const. art. XIIIC, sec. 1(e)
Joint Powers Authorities (JPA’s)

• Joint Powers Authority may be created by two or more public agencies
• Can create separate governmental entity
• Can exercise powers common to all parents and set forth in joint powers agreement
• Can also issue bonds under Marks-Roos Local Bond Pooling Act of 1985 (Gov. Code. Sec. 6585)
• Public capital improvement projects include acquisition, construction and financing costs (engineering, legal fees, costs of issuance, bond interest, etc.)
Development Impact Fees (AB 1600)

• Fees imposed as condition of development for anticipated increase in demand that requires public improvements to continue same level of service

• Must adopt report analyzing development impact fees every 5 years or may need to refund fees

  includes use of fees, reasonable relationship to improvements, sources of financing or funding, when expect fees will be paid into fund by developers

Government Code sec. 66000 et seq.
Development Impact Fee Litigation

• City have to refund as much as $10 million to developers who have paid impact fees if 5-year-report not make sufficient findings


  (DIF for beach parking. 5-year-report make insufficient findings of continuing need for funds. But City continued to collect fee)
Development Impact Fee Litigation

*County of El Dorado v. Superior Court of El Dorado County* (2019) 42 Cal.App.5th 620

- Statute of limitations to challenge DIFs is one year
- But suit can be filed after each year’s findings, so it serves to limit remedy, but not litigation exposure
- AB 1600 findings are burdensome, but it is very risky not to do a good job on them every year
- Limits *Walker v. City of San Clemente* which ordered refund of all fees collected since fee’s inception
Pending Legislation

A.B. 2536 (Grayson)

• New Gov. Code § 66016.6 re development fees
• Water and sewer connection charge or capacity charge require study to show reasonable charge for costs – effectively a current CIP Plan
• Public hearing to adopt study—30 days’ notice
• Must be updated every eight years
• Would take effect January 1, 2023
PL 566 Project in Morgan Hill

- Steven Machida and crew started long ago...
- 35 years later, construction is still underway!
- Long-term horizon (can span careers!)
- Give credit and thanks to projects accomplished
Recommended resources

• League Municipal Revenue Handbook and 218 Implementation Guide
cities.org/resources/publications
• NBS’ SFD Primer, Rate/Fee Compendium, Stormwater: A Ten Step Plan
nbsgov.com/publications
• CSDA Proposition 218 Implementation Guide
members.csda.net/iMIS1/CSDA2/store
• NRDC Issue Brief: Making it rain: Effective stormwater fees... nrdc.org
Questions and Comments

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STORMWATER
A Ten-Step Funding Plan
By Kim Boehler and Tim Seufert
Kim Boehler and Tim Seufert are both Directors with NBS, a firm providing innovative and practical financial, consulting, and administrative advice and support to local governmental agencies. They are experienced consultants in this arena and have worked with hundreds of such agencies across California.
The problem is no longer maintaining a permit and providing basic services to comply with the National Pollutant Discharge Elimination System (NPDES). Clouds are on the horizon, and a veritable financial storm is brewing, a storm which might engulf the general fund.

The following is a list of many stormwater challenges which may be brewing within your community, and it’s possible that all of them apply:

- Inadequate or failing infrastructure, as your baseline
- Additional infrastructure needs, in existing and newly developing communities
- Groundwater management and recharge
- Degraded local environment, including creeks, bays, marshes, etc.
- NPDES requirements, including trash capture in storm drains
- Sanitary sewer implications (inflow and infiltration)
- Recurring flooding

Responding to any or all of the above is a challenge, but it is doubly so considering the competing financial needs for public safety, streets and transportation improvements, community services and so on. It is an imperative to review your needs, and consider the tools in your financial toolbox. This effort must be broad-based, across virtually all departments, and include a healthy dialogue within your community.

VIRTUALLY EVERY COMMUNITY IN CALIFORNIA IS FACING SIGNIFICANT AND UNFUNDED NEEDS WITHIN THE SPECTRUM OF STORMWATER.
SOME BACKGROUND

The state and federal requirements that will be effective in the next few years for eliminating trash and pollutants from the storm drain systems, creating green infrastructure, and water quality monitoring will be arduous, and very expensive. Along with these water quality requirements, California’s storm drain systems are aging, the population is increasing, the climate is changing, and the demands on our systems are higher than ever. Developing or updating a well-vetted and technically appropriate storm drain master plan is needed, as a first step. (See Overview of Stormwater Master Planning on page 13.)

Storm drain management requires proactive planning and the right infrastructure, along with regular operations and maintenance. A storm drain master plan contemplates the needs, design requirements, and unique attributes of your community. For many years in many communities, storm drain management has been low on the priority list, until recently. With more population and increased impervious surface area due to development, storm drain management, with significantly increasing water quality standards, must be a priority.
THE FUNDING OPTIONS

After the technical issues are addressed, it is necessary to formulate strategies to finance both capital improvements as well as fund ongoing maintenance and operations. The history of funding storm drain projects in the Western United States is technically complex, and politically charged. California has many unique facets curbing the creation of storm drain utilities, a funding approach in other states such as Washington and Oregon. The passage of Proposition 218, and later Proposition 26, created challenging hurdles in establishing new funding sources, including for stormwater management.

Any community facing these challenges must first ask if all has been done in terms of enhancing current revenue streams. Then, one must investigate additional options: Storm drain financing and funding can be accomplished via a number of elements, as listed to the right. Items 1 to 3 should be most any community’s first steps, while the next may or may not apply:

01 WATER/SEWER/TRASH UTILITIES
In some cases, there are justifiable methods to allocate some revenues from these funded utilities. This should be a primary consideration for many communities. A proper analysis is necessary to justify such funds.

02 DEVELOPMENT IMPACT FEES (DIF)
These are one-time fees to fund capital only for newly-developing areas (can also be part of a development agreement). There is no ongoing maintenance component.

03 REGULATORY FEES
Plan review and inspection fees can fund specific functions. A fee study is required to implement such fees.

04 PROPERTY-RELATED FEES
A property-owner ballot process, with a 50% + hurdle or a voter-approved measure with a 2/3 requirement of registered voters are options to fund capital or maintenance or both. A detailed study is required for such an effort. See the City of Palo Alto case study on page 11. Note that with the recent passage
of SB 231, it is now also feasible to propose such a fee and pass it on to the users without an affirmative ballot or vote (a public hearing is required by Proposition 218) if the fee would provide for new or enhanced “water supplies.” Refer to the callout box on SB 231 and Author’s note, both on page 8.

05 **GENERAL OBLIGATION BONDS**
Voter-approved bonds to fund capital is an option. This requires an affirmative vote in an election.

06 **COMMUNITY FACILITIES DISTRICTS (CFD)**
A voter-approved (or landowner-approved in the case of undeveloped land) CFD can fund capital or maintenance or both. A 2/3 positive vote is required.

07 **SPECIAL PARCEL TAXES**
A voter-approved parcel tax mechanism can fund capital or maintenance or both. A 2/3 positive vote is required. Refer to the Culver City case study on page 10.

08 **ASSESSMENT DISTRICTS**
A property-owner approved Assessment District can possibly fund a portion of capital or maintenance or both, typically for a well-defined area within the larger community. For example, the 1982 Act Benefit Assessment District law provides for maintenance and operation of flood control and drainage services.

09 **GRANTS AND OTHER SOURCES**
Federal (FEMA and others), State and local grant sources are sometimes available, particularly as a match to the other funds mentioned herein. State Revolving Funds (SRF) loans are also a possibility.

10 **THE GENERAL FUND**
This is your last resort. It has been the source of most stormwater funds to date, and is the last recourse when all of the above sources don’t meet the need (though it’s a challenged fund for most).

These ten items are the funding alternatives that can be implemented to generate funds for storm system improvements, operation and maintenance in your community. While a stormwater utility can be created in California and there may be a good reason to do so in your community, there are no inherent funding options available beyond those discussed above.
Funding stormwater requires a broad and multi-disciplined effort. Establishing a multi-disciplined team, including staff, community leaders and specialists in engineering, public finance and public outreach is the key to success. Reaching out to the public early and often in the process and maintaining a focused approach can improve the chances of successfully creating a suite of funding tools that will allow your agency to endure the storm.

Author’s note on property-related fees: As of this writing, the current environment for property-related fees is in flux. Recent court cases, such as in Salinas and elsewhere, are challenging. A constitutional amendment to add stormwater categorically to the list of “water, sewer, trash” has been proposed, but not approved by either the legislature or the California electorate. SB 231 and AB 2403 must be taken in context with Proposition 218 and court cases to date. New court cases are on the horizon.

Date: January, 2018
CASE STUDY

CULVER CITY PARCEL TAX: THE “CLEAN WATER, CLEAN BEACH PARCEL TAX”

The voters of Culver City recently approved a new parcel tax aimed at stormwater, presumed to be the first in California. Measure CW was approved by 74% of the voters, over the 2/3 requirement needed.

Culver City was struggling with how to finance infrastructure needed to manage stormwater runoff, and provide funding to reduce/prevent water pollution in the local watersheds and comply with state and local regulations. After careful evaluation, the City decided to pursue a tax measure that generates $2 million in new revenue annually. This new funding source won’t fund 100% of the needs, but it is an initial first step in a long-term plan.

The main reasons Culver City pursued a parcel tax are due to the level of flexibility in the formula used to levy the parcel tax, and the fewer administrative and legal procedures required when compared to other funding mechanisms.

The critical efforts taken throughout the process ensured its success: This included careful evaluation of tax levels the public would support through the use of public opinion polling, and a public information campaign and timing of placement on the ballot.

Image © Joe Orama
CASE STUDY

PALO ALTO PROPERTY-RELATED FEE

Like many cities, the City of Palo Alto has significant stormwater funding needs. In 2000, property owners rejected a property-related fee to help fund stormwater management. A new broad-based effort was mounted in 2005 which resulted in a 58% “yes” ballot to such a fee.

In 2017, an increased fee was posed to the community, and approved again, this time at a 64% affirmative ballot. Interestingly, the new fee is permanent (i.e., no sunset) for operations, and there is also a fee for capital needs only with a 15 year duration. The fee is billed via the city’s robust utility billing system, though it could alternatively be billed via the county property tax collection system. The 2017 effort was thoughtfully led by a Blue Ribbon Committee, with broad participation by business, neighbors, environmental interests, and others.

Image © Craig Howell
OVERVIEW OF STORMWATER MASTER PLANNING

By Dan Schaaf, PE, Schaaf & Wheeler

Master planning for municipal drainage and stormwater systems typically involves analyzing the capacity, condition and ability to treat runoff. These documents are intended to be a “one-stop-shop” for engineers, planners, finance directors, elected officials and the general public to understand the community’s stormwater infrastructure. The two major functions of stormwater systems are to convey storm runoff in a manner that limits flooding and to treat the runoff to reduce negative municipal impacts on the environment.

The primary purpose of municipal drainage networks is to convey storm runoff from developed areas to larger systems such as channels, lakes, bays and oceans. A master plan should analyze how the existing infrastructure performs during a large storm, typically a 10-year event, to identify capacity deficiencies. The condition of the existing drainage network should also be assessed to assure the systems are functioning as designed. Capital projects to correct deficiencies in capacity and condition are sized, costed and prioritized.

Under the United States EPA’s NPDES (National Pollution Discharge & Elimination System) program, all California municipalities are required to address stormwater quality. Each region of the state has varying stormwater constituents that need to be reduced to protect waterbodies and natural resources. These constituents can include: trash, PCB’s (polychlorinated biphenyl), metals and bacteria. The master plan should address how the municipality is currently addressing the NPDES requirement and identify future needs to comply with the permit.

In 2014, AB 2403 (Rendon) was signed. The bill modified the definition of “water,” as known in Articles XIII C and XIII D of the California Constitution, to mean water from any source. This relates to situations whereby stormwater can be used as a source of usable water.
In some cases, the capacity and water quality projects can be combined to reduce costs. However, these two goals can often be at odds with each other. Water quality strategies typically rely on slowing flows, maximizing infiltration, and reducing runoff, whereas drainage improvements have typically relied on enlarging pipes and building pump stations to quickly move water to a larger waterbody (creek, river, lake, bay or ocean). New approaches are starting to bridge this gap by incorporating green infrastructure concepts into drainage system projects.

A stormwater master plan should clearly address how a community should approach drainage and stormwater issues. The documents should contain enough basic information that the layperson (council member or member of the community) can understand the problems and solutions, yet it should contain enough technical information that an engineer can take the projects into design and construction. The plan should prioritize the necessary capital projects, estimate costs to meet the requirements, and provide an outline of funding options. Done correctly, a stormwater master plan will be utilized on a regular basis and not become another document on a bookshelf or file buried on a server.