

# LOS ANGELES COUNTY STORMWATER PERMIT LITIGATION

Where are we now?

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# 2012 Los Angeles County Stormwater Permit

- Creates Watershed Management Programs (WMPs) and Enhanced Watershed Management Programs (EWMPs)
- Compliance with WMPs and EWMPs constitute compliance with receiving water limitations and interim TMDL Waste Load Allocations

# THREE LINES OF CASES

- Environmental Groups challenges to the Permit
- Ongoing unfunded mandate litigation
- Permittees' challenges to the Permit

*NATURAL RESOURCES DEFENSE COUNCIL v. STATE  
WATER RESOURCES CONTROL BOARD, Case No.  
B282016 (Cal. Ct. App. 2018)*

- Anti-Backsliding: The permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. 33 U.S.C. §1342(o)(1)

***NATURAL RESOURCES DEFENSE COUNCIL v. STATE  
WATER RESOURCES CONTROL BOARD, Case No.  
B282016 (Cal. Ct. App. 2018)***

- Anti-Degradation: Existing in stream water uses and the level of water quality necessary to protect those uses are to be maintained and protected. 40 C.F.R. §131.12(a)
- State Board Resolution No. 68-16: must maintain “the highest water quality consistent with the maximum benefit to the people of the State”. High quality water is the best water quality achieved since the State Board adopted the anti-degradation policy in 1968

# ANTI-BACKSLIDING

- Anti-Backsliding challenge. WMP and EWMP provisions rendered permit not as stringent as the 2001 Permit because permittees were relieved from immediate compliance with receiving water limitations
- Court: Receiving water limitations are not effluent limitations
- MS4 Permits are required to contain provisions that meet the MEP standard
- The anti-backsliding provision in §1342(o) does not apply to municipal stormwater dischargers

# ANTI-DEGRADATION

- Simple anti-degradation analysis was sufficient.
- Remand for reconsideration of anti-degradation applying correct legal standard (independent judgment standard). Water Code §13330(e)

# UNFUNDED MANDATES LITIGATION

*“Whenever the Legislature or any State agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government in the cost of the program or increased level of service . . . .”*

Cal. Const. Article XIII B, section 6



# UNFUNDED MANDATES LITIGATION

- 2012 Permit Test Claims still pending before the Commission on State Mandates

# *Department of Finance v. Commission on State Mandates (2016) 1 Cal.5<sup>th</sup> 749*

## Supreme Court Ruling:

- If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a “true choice,” the requirement is not federally mandated.
- Before the Commission on State Mandates, the state has the burden to show the challenged conditions were mandated by federal law.

## *Department of Finance v. Commission on State Mandates (2016) 1 Cal.5<sup>th</sup> 749*

- Supreme Court decision: trash receptacle and inspection obligations are State, not federal mandates
- Superior Court decision: permit obligations are not “programs” within the meaning of Article XIII B, section 6

# *Department of Finance v. Commission on State Mandates (2017) 18 Cal.App.5<sup>th</sup> 661 (San Diego County Permit)*

- San Diego 2007 Permit Test Claim
  - Commission had found the following to be mandates:
    - A requirement to conduct and report on street sweeping activities;
    - A requirement to conduct and report on storm sewer cleaning;
    - A requirement to conduct public education with respect to specific target communities and on specific topics;

*Department of Finance v. Commission on  
State Mandates (2017) 18 Cal.App.5<sup>th</sup>  
661 (San Diego County Permit)*

- A requirement to conduct mandatory watershed activities and collaborate in a Watershed Urban Management Program;
- A requirement to conduct program effectiveness assessments;
- A requirement to conduct long-term effectiveness assessments; and
- A requirement for permittee collaboration

# OPPORTUNITY/CHALLENGES AHEAD

- Cal. Const. Article XIII D, § 6(c): “Except for fees or charges for *sewer, water, and refuse* collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and *approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate* residing in the affected area.

# OPPORTUNITY/CHALLENGES AHEAD

- *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4<sup>th</sup> 1351, 1354: fee to fund the city's stormwater program is a property-related fee governed by Article XIII D and such a fee cannot be imposed unless it is approved by majority vote of the property owners or two-thirds of the electorate
- Not considered a "sewer" fee

# OPPORTUNITY/CHALLENGES AHEAD

- SB 231: Seeks to overrule *Howard Jarvis Taxpayers Association v. City of Salinas*
- Defines “sewer” to include systems drains, conduits, and outlets for surface or storm waters and all other works necessary or convenient for the collection or disposal of surface or storm waters.
- Still must conduct a public hearing on the proposed charge; cannot be imposed if written protests are presented by majority of owners of identified parcels. Cal. Const. Article XIII D § 6(a)(2)



# OPPORTUNITY/CHALLENGES AHEAD

- ***Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5<sup>th</sup> 174**
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- Requirement to hold protest hearing does not vitiate authority to assess fees

# CITY PERMITTEE CHALLENGES

- *Gardena v. Regional Water Quality Control Board*, Case No. 30-2016-00833722 (Orange County Superior Court)
- *Duarte v. State Water Resources Control Board et al.*, Case No. 30-2016-00833614 (Orange County Superior Court)

## CITY PERMITTEE CHALLENGES

- Regional Board must comply with Water Code §13241, including “economic considerations,” when adopting permit requirements more stringent than the Clean Water Act

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