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**SENATE COMMITTEE ON ENVIRONMENTAL QUALITY**

**Senator Allen, Chair**

**2021 - 2022 Regular**

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**Bill No:** SB 426  
**Author:** Rubio  
**Version:** 3/1/2021  
**Urgency:** No  
**Consultant:** Genevieve M. Wong

**Hearing Date:** 3/15/2021  
**Fiscal:** Yes

**SUBJECT:** Municipal separate storm sewer systems: financial capability analysis

**DIGEST:** Requires the State Water Resources Control Board (State Water Board) to establish, by July 1, 2022, financial capability assessment (FCA) guidelines for municipal separate storm sewer system (MS4) permittees that are adequate and consistent when considering the costs to local jurisdictions.

**ANALYSIS:**

Existing federal law under the Clean Water Act (CWA):

- 1) Establishes the structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.
- 2) Makes it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit is obtained.
- 3) Provides that the National Pollutant Discharge Elimination System (NPDES) permit program control discharges. Point sources are discrete conveyances such as pipes or man-made ditches. Individual homes that are connected to a municipal system, use a septic system, or do not have a surface discharge do not need an NPDES permit; however, industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface waters.
- 4) Authorizes states to implement and enforce the NPDES permit program as long as the state's provisions are as stringent as the federal requirements.
  - a) In California, the State Water Board is the delegate agency responsible for the NPDES permit program (Water Code (Wat. C.) §13160).

Existing state law, under the Porter-Cologne Water Quality Control Act (Porter-Cologne):

- 1) Establishes the State Water Board and regional water quality control boards (regional boards) to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations. (Wat. C. §§13100 et seq.)
- 2) Requires the State Water Board to formulate and adopt state policy for water quality control and each regional board to formulate and adopt water quality control plans (aka basin plans) for all areas within the region that ensure the reasonable protection of beneficial uses and the prevention of nuisance as specified. (Wat. C. §§13140, 13240, 13241)
- 3) Prohibits the discharge of pollutants to surface waters unless the discharger obtains a permit from the State Water Board. (Wat. C. §§13260 et seq.)
- 4) Requires the State Water Board to establish an online resource center that addresses measures available for municipalities to comply with municipal stormwater permit requirements. (Wat. C. §13383.9)

This bill:

- 1) Makes various findings about local government compliance with the CWA and the NPDES stormwater permits.
- 2) Requires the State Water Board, by July 1, 2022, to establish financial capability assessment guidelines for municipal separate storm sewer system (MS4) permittees that are adequate and consistent when considering the costs to local jurisdictions.
- 3) Requires the State Water Board, when developing the guidelines, to do both of the following:
  - a) Document any source it uses to develop an estimate of local costs and overall costs of stormwater management.
  - b) Consider specified US EPA policies, but is not limited to those policies. Specifically requires consideration of:
    - i) Combined Sewer Overflows – Guidance for Financial Capability Assessment and Schedule Development, dated February 1997.

- ii) Affordability Criteria for Small Drinking Water Systems: An EPA Science Advisory Board Report, dated December 2002.
- 4) Requires the State Water Board and the regional boards to continue using available regulatory tools and other approaches to foster collaboration with permittees to implement permit requirements in light of the costs of implementation.

## Background

- 1) *Protecting Water Quality in California*. Porter-Cologne, enacted in 1969, established the State Water Board, along with nine regional boards, and gave those agencies primary responsibility for the coordination and control of water quality. The State Water Board establishes statewide policy. The regional boards formulate and adopt water quality control plans and issue permits governing the discharge of waste.

Porter-Cologne requires any person discharging, or proposing to discharge, waste that could affect the quality of state waters to file a report with the appropriate regional board. The regional board then prescribes requirements as to the nature of the discharge, implementing any applicable water quality control plans.

CWA, enacted in 1972, established the NPDES permit system. CWA is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. CWA prohibits pollutant discharges unless they comply with: (1) a permit; (2) established effluent limitations or standards; or (3) established national standards of performance.

CWA allows any state to adopt and enforce its own water quality standards and limitations, so long as those standards and limitations are not less stringent than those in effect under CWA.

- 2) *What is stormwater?* Stormwater is defined by the US EPA as the runoff generated when precipitation from rain and snowmelt flows over land of impervious surfaces such as paved streets, parking lots, and building rooftops, without percolating into the ground. Water runoff from cities, highways, industrial facilities, and construction sites can carry pollutants, such as oil, pesticides, herbicides, sediment, trash, bacteria, and metals, that harm water quality and impair the beneficial uses of California waters. In most cases, stormwater flows directly to water bodies through sewer systems, contributing

to a major source of pollution to rivers, lakes, and the ocean.

Stormwater pollution is a major environmental and public health issue. It leads to unsanitary living environments, unhealthy surface waters, such as lakes, creeks and rivers, unhealthy ocean and beach conditions, and street and neighborhood flooding during the rainy season.

The State Water Board and regional boards are responsible for regulating stormwater discharges under CWA and the NPDES permit program, requiring a NPDES permit for discharges of stormwater from each of municipal separate stormwater systems (MS4s), industrial activities, and construction sites. State Water Board also manages an online database to allow permittees to electronically submit permit compliance data, and allows the public to view reports and information on water quality control efforts with stormwater.

- 3) *Regulation of stormwater through municipal stormwater permits.* The Municipal Stormwater Permitting Program regulates stormwater discharges from MS4s, which are conveyances or a system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) owned or operated by a public agency with jurisdiction over disposal of waste and designed or used for collecting or conveying stormwater.

The CWA and federal stormwater regulations require MS4s subject to NPDES permits to reduce the pollutants in stormwater discharges to the maximum extent practicable (MEP). The MEP standard involves applying best management practices (BMPs) that are effective in reducing the discharge of pollutants in stormwater runoff.

The permits do not specify strict compliance with numeric water quality standards. Rather, compliance is achieved by following BMPs outlined in a Stormwater Management Program, evaluating the effectiveness of those BMPs, and modifying the management program accordingly (by changing the implementation of the BMP or replacing it with another BMP) in order to continuously achieve the discharge standard of MEP. "EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in [stormwater] pollutants on a location-by-location basis." (Federal Register, Volume 64, No. 235, page 68754, December 8, 1999)

- 4) *Municipalities are struggling to comply.* Thirty years after the federal CWA was amended to address stormwater pollution, stormwater runoff from MS4s,

construction sites, and industrial facilities continues to be a source of pollutants and has contributed to water quality impairments in California. In urban areas, some cities and counties are struggling to find adequate funding and open space sites to capture and treat stormwater.

For a municipality out of compliance with their MS4 permit standards, the State Water Board works closely with them to develop a process for reaching compliance. The city or county is given a schedule to comply, based off of various technical, infrastructure, and funding factors.

- 5) *Cost of MS4 compliance.* Southern California cities have some of the most expensive MS4 compliance costs nation-wide. In 2012, the LA Regional Water Board, pursuant to the CWA, issued a new MS4 stormwater permit that enacted some of the strictest permit standards with more than 30 pollutants being monitored. The total cost of compliance with the MS4 permit for the County of Los Angeles exceeds \$20 billion.

The City of Industry cites its annual costs at \$476,261,000. The City of Monrovia has estimated its cost to address stormwater would result in an annual parcel cost of \$1,334 for 30 years. The City of Carson estimates its cost of addressing stormwater will consume an amount equivalent to more than 13% of its operating budget for the first ten years.

Compliance is critical for protecting public health and the environment, but fines for non-compliance can add up, making compliance even more costly.

According to the LA Regional Board, failure to comply with the MS4 Permit conditions could result in a minimum \$3,000/day per violation, and can go up to a maximum of \$10,000/day; and, maximum \$25,000/day per violation if imposed by state court. Furthermore, violations of federal CWA can be enforced by US EPA, and federal penalties could reach \$37,500/day.

According to the State Water Board, over the past year about 5% of MS4 permittees have been out of compliance. However, this percentage includes both violations that are correctable (and not subject to enforcement action) and those that are of a larger scale (potentially triggering enforcement action).

- 6) *State Funding for Stormwater Projects.* Over the last decade, the Legislature recognized the necessity of assistance to local governments to fund stormwater projects. The state has provided funding for local governments through grants, bond funding, and other programs. Funds through loan programs also have been available, but as most local government do not have designated fees for

stormwater to repay loans, no loans have been made. The following bonds provided funds specifically for stormwater projects:

- The Clean Water, Clean Air, Safe Neighborhood Parks, and Coastal Protection Act of 2002 (Proposition 40) provided the State Water Board with \$15 million for Urban Storm Water grants; Proposition 84 - \$90 million;
- The Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006 (Proposition 84) made \$90 million available to the State Water Board for matching grants to local public agencies for the reduction and prevention of stormwater contamination of rivers, lakes, and streams;
- The Water Quality, Supply, and Infrastructure Improvement Act of 2014 (Proposition 1) authorized \$200 million to the State Water Board for providing matching grants to public agencies, nonprofit organizations, public utilities, state and federally recognized Indian tribes, and mutual water companies for multi-benefit stormwater projects; and
- The California Drought, Water, Parks, Climate, Coastal Protection and Outdoor Access for All Act of 2018 (Proposition 68) was a \$4,000,000,000 bond act that generally gave priority to projects that included stormwater capture for infiltration or reuse and encouraged projects that included the capture of stormwater to reduce stormwater runoff, reduce water pollution, or recharge groundwater supplies. Specifically related to stormwater, the act authorized \$725,000,000 for safe neighborhood parks in park-poor neighborhoods with additional consideration given to projects that incorporate stormwater capture and storage or otherwise reduce stormwater pollution; and \$100,000,000 for multi-benefit projects in urbanized areas to address flooding, including stormwater capture and reuse.

Stormwater projects have also been eligible for funding under these programs:

- Prop 50 IRWM– State Water Board administered \$250 million
- Clean Beaches Initiative (from Props 13, 40, 50 and 84) - \$148 million
- Areas of Special Biological Significance program grants (from Prop. 84) - \$35 million
- Santa Monica Bay Restoration (from Props 50 and 84) - \$38 million

Despite these funding opportunities, the State Auditor has found that because of the significant costs to address stormwater pollution, the demand for grants from the state for stormwater projects has exceeded the funding available. In 2016, the State Water Board received grant applications requesting \$322 million, and it awarded \$105 million for 27 projects.

- 7) *State Audit on costs of stormwater regulation.* On March 1, 2018, the California State Auditor released Report 2017-18, *State and Regional Water Boards: They Must Do More to Ensure That Local Jurisdictions' Costs to Reduce Storm Water Pollution Are Necessary and Appropriate*, and found the following:
- When imposing stormwater requirements, the State Water Board and the regional boards lack consistent information on the costs that local jurisdictions incur in complying with storm water requirements, and have not adequately considered the costs that local jurisdictions would incur to comply with these requirements.
  - Federal regulation requires local jurisdictions to annually report their actual and projected costs for meeting stormwater requirements to the regional boards. However, the State Water Board has not provided guidance to local jurisdictions on how to track or report their stormwater management expenditures, and as a result, the costs that local jurisdictions reported have been inconsistent.
  - The regional boards did not always consider the overall cost of stormwater management that local jurisdictions paid.
  - The regional boards did not obtain all relevant information on some water bodies before imposing stormwater requirements, potentially resulting in local jurisdictions incurring excessive costs or failing to meet water quality goals.
- 8) *Financial Capability Assessments (FCA).* An FCA is an analysis of a community's ability to pay for/deliver water services, with a focus on stormwater and wastewater requirements. FCAs consider a wide range of financial capacity factors, including residential capability (e.g. median household income) and the financial strength of a permittee organization. Financial strength considers bond ratings, debt, median household income, unemployment rate, tax revenue, and property tax rates.

- 9) *Current State Water Board and regional boards actions regarding MS4 compliance.* CWA allows the regional boards to adjust the timeframes for municipalities to come into compliance with their permits, and the regional boards actively work with municipalities to adjust the timeframes for municipalities to come into compliance with their stormwater permits based on the municipality's costs-of-compliance; often allowing municipalities 20 to 30 years to come into compliance with their stormwater permits. Pursuant the findings of the State Auditor, in 2019 the State Water Board was in the process of developing guidelines to further assist municipalities in estimating and tracking the costs of compliance. The intent of those guidelines was to provide useful information to assist the regional boards and municipalities to estimate the costs of compliance and to set reasonable compliance timeframes. Unfortunately, due to COVID-19, the development of the guidelines were temporarily delayed.

## Comments

- 1) *Purpose of Bill.* According to the author, "SB 426 aims to provide MS4 permittees with assistance as they seek to comply with the Clean Water Act. This bill will ensure that federal and state clean water objectives are achieved without unacceptable or infeasible cost burdens imposed on residential customers and MS4 permittees. Many cities are struggling financially because of the ongoing COVID-19 pandemic and should not have to make tradeoffs between funding permit requirements and funding other essential local services."
- 2) *Need for the bill.* The FCA methodology required by this bill is intended to provide information on the capabilities of a municipality to pay for the costs of implementing the regulatory requirements associated with their municipal stormwater permit. According to sponsors of the proposal, the FCA guidelines are needed for purposes of transparency; and once the State Water Board establishes the guidelines to help municipalities estimate and track costs of compliance (See Background, above), the FCA guidelines will help the permittees figure out if they can afford those costs. The sponsor has also expressed concern that not having a transparent process could potentially lead to inequitable situations and municipalities being treated differently. However, no examples have been provided of inequitable treatment.
- 3) *Are the FCA guidelines meant to be one size fits all?* The language of SB 426 implies that the State Water Board will be required to establish a general rule that could be applicable to the varying regions throughout the state.



However, according to sponsors of the proposal, the intent is to have a rule that could be generally applicable throughout the state, but still be nuanced enough to take into consideration the unique circumstances of each jurisdiction, such as what was done by the US EPA in developing their *Financial Capability Assessment Framework for Municipal Clean Water Act Requirements* (federal FCA). According to the sponsor, the State Water Board can use the federal FCA as a model for development, offering similar, nuanced guidance in its own FCA guidelines.

- 4) *Additional resources are needed but will the FCA guidelines be useful?* The Public Policy Institute of California declares stormwater as the state's "fiscal orphan" due to its critical funding gap, which is estimated to be on the order of \$500 to \$800 million annually. In spite of the aforementioned funding sources, local governments need more assistance to comply with stormwater requirements. Many jurisdictions in Southern California are struggling to comply with new standards and upcoming enforcement of MS4 permits. Recent propositions have offered some funding, but the cost remains prohibitive for some municipalities.

*Assumption of fixed financial situations.* When developing FCA guidelines, there is an assumption that the current financial situation of the MS4 is fixed and that municipalities are unable to raise additional revenues or obtain financial assistance from the state. The FCA guidelines would not take into consideration other sources of money that could be available in the future, such as bond moneys, state programs, or local programs or taxes. In fact, the State Water Board has provided hundreds of millions of dollars in assistance to local agencies for stormwater projects to help them comply with permit requirements, and Proposition 68 (2018) provides additional funding for stormwater projects. The Department of Water Resources also provides funding for stormwater projects through the Integrated Regional Water Management Program. Additionally, local governments themselves have the ability to raise revenues to pay for stormwater projects. Any benefit derived from a FCA relies on the financial situation of the local municipality being stagnant. However, as discussed above, that is not often the case and various financial options may be available that are not considered in the FCA.

*Federal water quality standards still apply.* It should be noted that the federal CWA requires regional boards to set water quality standards at a level to protect beneficial uses such as swimming, fish and wildlife, and drinking water; it does not allow the regional boards to consider a municipality's ability to pay when setting stormwater permit standards. Even if the State Water Board were to develop the FCA guidelines, the regional boards could not

revise the water quality standards based on a municipality's financial capability. It would not matter if the municipality could not afford the costs of compliance, they would still be required to comply.

*Adjusting compliance timeframes for permittees.* As noted above, the State Water Board and the regional boards already establish extended compliance periods for municipalities to come into compliance with their MS4 permits, taking into consideration the municipality's cost-of-compliance and the municipality's economic situation. The additional assessment of a permittee's ability to afford the cost-of-compliance would add little value; especially since that factor is already considered when compliance times are adjusted. According to the sponsor of the proposal, however, the State Water Board does not utilize a uniform set of guidelines when negotiating the compliance timelines.

- 5) *Considerations of the committee.* In light of all of the above, the committee may wish to consider whether the FCA guidelines required by this bill will be an effective and efficient use of the state's resources.
- 6) *Fourth time's a charm?* SB 426 is nearly identical to AB 1093 (Rubio, 2019) and AB 2538 (Rubio, 2018), and very similar to SB 589 (Hernandez, 2017). The difference between this bill and AB 1093 is a slight tweak to the intent language. AB 1093 was vetoed by Governor Newsom, AB 2538 was vetoed by Governor Brown, and SB 589, which contained a pilot project, was held in the Senate Appropriations Committee Suspense File. In his veto message of AB 1093, Governor Newsom stated,

“This bill would require the State Water Board to establish financial capability assessment guidelines for municipal separate storm sewer system permittees.

However, municipal finances are diverse, and a generic financial analysis as this bill suggests would not meaningfully advance our understanding of the ability of municipalities to meet stormwater permitting requirements.

The State Water Board is currently implementing and refining guidelines to assist local agencies in estimating and tracking the cost of compliance with their stormwater permits. Additionally, the State Water Board and Regional Water Boards work with permittees to create customized compliance schedules and offer grants and loans.”

## **Related/Prior Legislation**

AB 2364 (Rubio, 2020) is identical to this bill. AB 2364 was held in Assembly Environmental Safety and Toxic Materials Committee.

AB 1093 (Rubio, 2019) is nearly identical to this bill. AB 1093 was vetoed by Governor Newsom.

AB 2538 (Rubio, 2018) was very similar to AB 1093. AB 2538 was vetoed by Governor Brown.

SB 541 (Allen, Chapter 811, Statutes of 2017) requires the State Water Board, in consultation with the regional water quality control boards, and the Division of the State Architect within the Department of General Services, to recommend best design and use practices for stormwater and dry weather runoff capture practices that can be applied to new, reconstructed, or altered public schools, including schoolgrounds.

SB 589 (Hernandez, 2017) was very similar to AB 2538, with the exception that SB 589 was not amended to remove the requirement that the regional water quality board for the Los Angeles region use the guidelines in a pilot project. SB 589 did not get out of Senate Appropriations Committee.

SB 633 (Portantino, 2017) requires a regional board preparing a water quality control plan for a region having a population in excess of 10 million residents to additionally consider opportunities to convey stormwater to a regional site within the watershed in which the stormwater originated for capture and infiltration and to consider the opportunity for stormwater capture when determining past and probable future beneficial uses of water, as specified. SB 633 did not get out of Senate Appropriations Committee.

**SOURCE:** San Gabriel Valley Council of Governments

**SUPPORT:**

3 Valleys Municipal Water District  
City of Azusa  
League of California Cities  
Upper San Gabriel Valley Municipal Water District

**OPPOSITION:**

None received

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