

**A REPORT BY
THE 2012-2013 CONTRA COSTA COUNTY GRAND JURY**
725 Court Street
Martinez, California 94553

Report 1305

**GETTING TO CLEAN WATER IN
CONTRA COSTA COUNTY**

What's the Plan and Where's the Money?

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Date: 5/21/2013



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ACCEPTED FOR FILING:

Date: 5/29/13



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Contra Costa County Grand Jury Report 1305

GETTING TO CLEAN WATER IN CONTRA COSTA COUNTY

What's the Plan and Where's the Money?

TO: Cities and Towns of Contra Costa County; Contra Costa County Board of Supervisors; Contra Costa Flood and Water Conservation District (collectively "Permittees"), and the Contra Costa Clean Water Program

SUMMARY

The Contra Costa Clean Water Program (CCCWP) is characterized by an inability among the stakeholder organizations to reach agreement regarding exactly what they are trying to accomplish, in what manner, in what period of time, and the consequences of failing to do so. Stakeholders include CCCWP management and Permittees, empowered regulatory bodies, and interested activist community groups. They have different opinions and perspectives of what is important, what should or should not be prioritized, what is urgent, what quantifiable indicators should be used to gauge progress and compliance and what is the real exposure for non-compliance. The result is a stream of public communication and comment that is, at best, contradictory and, at worst, misleading. As a starting point, there needs to be constructive dialogue between each of the Permittees and the appropriate regulatory authorities.

The failure of Proposition 218, the 2012 Community Clean Water Initiative, to receive voter approval was a serious setback for the program. The ballot initiative was intended to, at least partially and for a short period of time, address the imbalance between the current and projected future costs for planned clean water activities that far exceeded available funds. Now the Permittees must determine alternative funding sources.

It is projected that by 2015, with no changes in the current permit requirements, a funding gap of several million dollars will exist. This shortfall could significantly grow if new permit requirements are incrementally more onerous than current requirements, as expected. This funding gap, if not resolved, may result in an inability to conduct critical activities needed to meet permit standards. It may also place some Permittees in a condition of non-compliance, with consequent exposure to fines, other monetary damages and enforcement actions.

As the challenge of finding additional funding is addressed, it is an appropriate time for the Permittees to make an effort to better define and understand their paths forward and develop more detailed plans, timelines, and desired outcomes. These re-evaluations should, at least,

include:

- a) negotiation of more realistic, better-defined compliance terms that take into account differences in participant characteristics;
- b) implementation of more efficient and effective operating practices of the Contra Costa Clean Water Program; and,
- c) identification of ways to make the impacted communities more aware of the importance of the program and the challenges ahead.

METHODOLOGY

In evaluating the stormwater pollution control activities as instituted in Contra Costa County by the Permittees, the following tasks were performed:

- Interviews with selected city managers and selected county officials
- Interviews with CCCWP staff, selected Permittee representatives to the CCCWP (collectively “program personnel”) and regulatory personnel
- Interview with a representative from an environmental Non-Governmental Organization (NGO)
- Review of the stormwater permits applicable in Contra Costa County
- Review of individual Permittee stormwater program budgets
- Review of CCCWP publications and operating data
- Review of Permittee Annual Reports for the most recent year
- Attendance at CCCWP Management Committee Meetings and review of minutes for those meetings and others not attended
- Review of Environmental Protection Agency (EPA) and California State Water Board literature with regard to stormwater programs and requirements
- Review of information prepared (and in some cases sent to voters) as part of the 2012 Community Clean Water Initiative, including a number of different outside consultant reports
- Review of public media articles involving the local storm water program and recent ballot initiative
- Review of informational websites including California Stormwater Quality Association (casqa.org), Bay Area Stormwater Management Agencies Association (basmaa.org) and Contra Costa Clean Water Program (cccleanwater.org)

BACKGROUND

The Federal Clean Water Act (as amended from time to time) established the National Pollutant Discharge Elimination System (NPDES) Permit Program to control water pollution. The program regulates point sources that discharge pollutants into the waterways of the United States. The Permit Program is administered by the individual states - in California, by the State Water Board and a series of Regional Water Quality Control Boards (RWQCB). The various water boards are responsible for issuing NPDES permits governing discharges into specific watersheds and determining and enforcing compliance with the individual permit requirements.

One requirement of amendments to the Clean Water Act in 1987 was that many municipalities were obligated to obtain NPDES permits for discharges of urban runoff from their storm sewer systems into local watersheds. Accordingly, the 19 incorporated cities/towns of Contra Costa County, along with the Contra Costa County Flood Control District and the unincorporated areas of Contra Costa County (collectively the "Permittees"), were required to obtain these NPDES permits. The Permittees are covered by one of two applicable permits as shown in the following table:

San Francisco Permit (Discharge into San Francisco Bay)		Central Valley Permit (Discharge into Delta)
Clayton	Pittsburg	Antioch
Concord	Pleasant Hill	Brentwood
El Cerrito	Richmond	Oakley
Hercules	San Pablo	
Lafayette	San Ramon	
Martinez	Walnut Creek	
Orinda	Moraga	
Pinole	Danville	

The Contra Costa Flood Control and Water Conservation District and Contra Costa County are parties to both permits. For purposes of the discussion in this report, no distinction is made between the two permits.

These parties to the two permits -- the Permittees -- are individually responsible for complying with the requirements of their respective permits. The activities typically include street sweeping, storm drain maintenance and cleaning, litter control, creek cleanup programs, construction site and business inspection and control, and public outreach.

In Contra Costa County, in 1991 the Permittees formed the Contra Costa Clean Water Program (CCCWP) to coordinate certain centralized services or group activities such as training and monitoring programs, and public outreach. The CCCWP also serves as the point organization for the Permittees' interface with the Regional Water Quality Control Boards and is expected to continue to do so in the upcoming permit renegotiations. CCCWP is run by a "management committee" comprised of representatives of each of the Permittees. Each of the Permittees and the CCCWP file an Annual Report detailing their compliance with the permit. Reviews of these reports indicate that, for the most recent period, no instances of non-compliance were reported.

However, in December, 2012, Contra Costa County received a “Notice of Violation” with regard to its stormwater program identifying 9 different violations and 30 required actions. Moreover, in January, 2013, several of the Permittees received “Notices of Deficiency” related to a review by the Water Board of certain sections of the 2012 Annual Reports. County personnel interviewed acknowledged that, the most recent Annual Report notwithstanding, the County is not in compliance under the permits. Additionally, a number of the cities interviewed suggested that they were either on the verge of non-compliance, if not already noncompliant.

Generally, the cities and county fund their storm water permit activities via a Stormwater Utility Assessment (SUA) levied on property owners (exceptions are Brentwood and Richmond which use alternative sources including general fund revenues). CCCWP is funded by the participating cities out of the assessment revenue collected.

According to a report to the CCCWP from SCI Consulting Group, since the implementation of the SUA, “inflation and ever-expanding permit mandates have progressively increased the cost of NPDES permit implementation and drainage system maintenance. All municipalities now charge the maximum authorized by the SUA.”

From a budgetary perspective, over the past two fiscal years the majority of cities are spending more than they collect in assessment revenue. Municipalities are absorbing shortfalls using non-storm water funds, general fund resources or prior years’ reserves. Several city managers indicate that, to the extent general fund monies are required for this purpose; there will be an impact on their city’s ability to provide other services.

The regulatory authorities are aware of and sympathetic to the fiscal challenges faced by cities with respect to the program, but have a somewhat different view as to why the cities face the challenges they do. The regulatory personnel indicate that when the SUA structure was enacted, many of the cities immediately shifted the funding of certain program-eligible activities (such as street sweeping and other elements of public works) out of their general funds to be funded out of the new stormwater assessments. While this may have been beneficial to the cities in the short term, in the long run it removed funds which should have been available for the long-term growth and development of the stormwater program, which all understood would necessarily grow increasingly more complex and rigorous over time.

Some city managers and program personnel indicate that, while still in compliance, they are not necessarily doing everything they need to do to ensure continued future compliance due to funding limitations. In a report by SCI Consulting Group commissioned by the CCCWP, consultants stated “Because of current fiscal difficulties, most municipalities are deferring some required maintenance on infrastructure. Some permit-mandated activities, such as staff training, routine surveillance and inspections and outreach are also being minimized. While these budget balancing reductions will not necessarily compromise permit compliance in the short term, in the long term, they could erode local program effectiveness.”

The current permits have introduced additional requirements including expanded storm water monitoring and increased trash control. It is expected that the renegotiated permits will have additional significant implementation requirements. For example, cities now have a requirement that 40% of all trash be removed from the storm water discharge by mid-2014. This rises to 70% by 2017 and 100% by 2022. The State Water Board has rejected the short-term plan submitted by CCCWP for meeting these requirements.

The exact timing of negotiations and program requirements of the new permits are not fully known at this time. Discussion with program personnel and observation of select CCCWP management committee meetings indicate that there is some disagreement as to what Permittees view as reasonable requirements. However, the Permittees also believe that, individually, they have very limited ability to influence the permit process.

The regulators believe that they must balance the requirements of the legal mandates (including Federal Clean Water Act requirements and California state requirements), the desires of outside advocacy groups (primarily environmental groups such as San Francisco Baykeeper, Natural Resource Defense Council, etc.) and the Permittees. Regulators feel the permits are sufficiently flexible to account for size differentials and, to the extent possible, take into account individual circumstances.

The overall structure of the Clean Water Program, with the resulting multiple layers of bureaucracy between the regulatory authorities and the individual Permittees may be a key contributing factor to the dramatically different perspectives of what needs to be done, how it should be done, and what happens if it is not done. Discussions with representatives of many stakeholder organizations revealed a lack of alignment on these issues. In particular, while regulators indicate that the underlying rules are flexible and enforcement activity is subjective, Permittees indicate they are forced to “interpret” the message and this makes formulation of their stormwater program plans and activities difficult. This is especially true during a time of scarcity of financial resources, and a need to make hard choices between competing demands for those resources.

To address the current and expected future fiscal shortfalls, the municipalities and CCCWP sponsored a county-wide Proposition 218 compliant ballot initiative to increase funding by approximately \$8.7 million per year. According to program personnel, this additional funding level was based on “what the public would accept”; however, consultants to CCCWP estimated future costs to be well in excess of those requested via the ballot measure. The ballot measure failed. In its Annual Report the CCCWP described the results as follows:

“The defeat of the 2012 Community Clean Water Initiative represents a setback for Permittees’ clean water programs in Contra Costa County. Permittees have exhausted their reserves. Many are now relying on other municipal revenues, such as their general funds, to implement MRP (Municipal Regional Permit) compliance. At the same time, reductions in general fund revenues due to significant losses in property and sales tax revenues has resulted in reductions in staffing, salaries and benefits, and community services and programs. Local elected officials are faced with agonizing and unpopular public policy decisions on how to use and allocate their limited resources and revenues to continue to provide critical services (e.g. public safety, road maintenance, public facilities operation and maintenance, natural resource protection).”

Some city managers have referred to the current storm water situation as an “unfunded mandate”. They indicate that specific solutions to the potential funding problems have not been determined. At least one city, El Cerrito, has held some limited public discussion on the issue and has begun to explore potential funding options including a city-specific bond measure. In its 2012 Annual Report, the CCCWP indicates that it does not believe any additional county-wide funding measures would be successful at this time.

Interviews with some city managers and program personnel indicate that, given the fiscal issues

they face, the level of deferred program activities, and both currently known and expected more rigorous future program requirements, the majority of cities in the county will be in non-compliance with the NPDES permits over the next 2-5 years. The impact of non-compliance is not clear at this point. There is a wide range of potential outcomes. In a report prepared as part of the ballot initiative effort, consultants to the CCCWP indicate the following:

“Non-compliance with Permit Requirements exposes the Permittees to fines from the RWQCB as well as to potential third-party lawsuits. All Permittees must demonstrate full compliance or be subject to regulatory actions including:

- Administrative Civil Liability - \$10,000 per day of violation and/or \$10.00 per gallon of discharge
- Cease and Desist Orders for either public or private development projects
- Third-Party lawsuits alleging non-compliance and recommending regulatory actions be taken against the entity until violations have been corrected or negative impacts eliminated.”

One regulatory agency made it clear that, while these statements might reflect the “letter of the law”, they in no way reflect the “spirit of the law” or any intention on the part of that regulatory agency to implement fines of any kind in the near term on Permittees making reasonable efforts to achieve compliance. An interview conducted with a member of a prominent environmental group echoed this position that they do not intend to put undue financial burden or bring third-party lawsuits against Permittees as long as they can demonstrate that concerted and continuous efforts are being made to fulfill the mandates of the permit. The environmentalist clearly stated that while they have in the past and will continue to rigorously monitor various Permittee compliance activities in the future, their approach remains realistic and mindful of the financial and personnel constraints of those Permittees.

Some city managers and program personnel acknowledge the potential for significant monetary fines or other regulatory actions. It is possible that the Regional Water Quality Control Boards will recognize the severity of the fiscal situation and enter into a consent-decree type arrangement which, while not changing the discharge requirements, will allow more time to reach those levels as long as continuous progress can be demonstrated by each Permittee and will not impose onerous fines or penalties.

Observation of discussions at the CCCWP Management Committee meetings and a review of their meeting minutes reflect that they have not developed substantive solutions to the fiscal issues facing the group. The CCCWP Annual Report describes actions which they are currently taking to ameliorate the situation as, “specific actions identified include, but are not limited to:

- Review and analyze alternative CCCWP organizational structures, staffing and consultant support levels, and tasks;
- Review other potential sources of revenue (e.g. increased fees) to fund mandated compliance activities;
- Engage local elected officials, municipal managers, businesses, citizens and other stakeholders in development of effective water quality attainment strategies;

- Identify prioritized actions to reduce the discharge of trash and other pollutants of concern to local creeks, the Delta and bay; and,
- Seek flexibility requirements to allow individual Permittees to focus their limited resources to address local water quality priority problems.”

It is not clear from interviews with program personnel or city managers that these actions have resulted in any significant or concrete changes which go to solve the current set of problems or at least partially ameliorate the current set of problems facing the Permittees.

Attendance at CCCWP Management Committee meetings, as well as a review of the group’s minutes and discussions with city managers and program personnel indicate that there are concerns with how the organization is operating and whether it is really in a position to provide or contribute significantly to resolving the current fiscal situation. City managers in particular believe that the 2012 ballot initiative was mishandled in the way it was conducted, and the public was not educated as to its necessity. Some individual city participants question whether they might be better off trying to resolve their issues independently rather than as a combined group. Discussions with program personnel and a review of the history of local watershed permitting, as contained in the current NPDES permits, show that the regulatory authorities have fostered the creation of larger groups of participants in Contra Costa County that share standard agreements. Doing so removes the necessity of negotiating a series of unique agreements with individual municipalities. This is also true outside of Contra Costa County.

The San Francisco Bay permit expires in 2014 and the Central Valley Permit expires in 2015. Both will require renegotiation of new pollution standards and required activities. It is not clear how successfully the CCCWP (including its various committees) has undertaken the efforts to actively communicate issues and problems in order to influence the structure and requirements of the next permits, including dialogue to understand the possibility and ramifications of potential non-compliance and the regulatory bodies’ likely responses.

While some Permittees have made excellent efforts to educate their constituents as to the nature and magnitude of the problems they face, most have not. Interviews with program personnel indicate that little or no discussion with citizens of either the current or the expected longer-term fiscal issues faced by the stormwater programs have occurred.

FINDINGS

1. In the most recent Annual Reports, Permittees reported compliance with their permits; however, Contra Costa County recently received a “Notice of Violation” with regard to its stormwater program.
2. Many Permittees are currently spending more than the total amounts collected from fees/taxes/assessments etc., designated for stormwater management purposes; any funding shortfalls are covered via supplements from the general fund.
3. Despite the current levels of money being spent on the stormwater control initiatives, many Permittees do not think they are doing as much as necessary to position themselves to meet future compliance requirements.

4. The requirements for compliance are expected to become increasingly demanding and the process of negotiating the terms and conditions of the next permit are unclear.
5. Permittees disagree on what reasonable/practical program requirements should entail.
6. All Permittees are forecasting that the lack of funds needed to undertake the critical activities to reach compliance levels will result in the majority of them being non-compliant in 2-5 years.
7. The CCCWP seems to be doing a reasonable job in terms of its role for centralized activities such as public education, outreach, training and monitoring.
8. As an intermediary between the Permittees and the regulatory bodies, the CCCWP appears to be failing because there is a significant difference between the expectations and views of the regulators and the Permittees. There are dramatically different perspectives of what needs to be done, how it should be done and what happens if it is not done.
9. It is unclear what the impact of non-compliance status will be for a Permittee.
10. The potential future risk associated with funding deficits and non-compliance is not being accurately communicated to citizens by the Permittees.
11. Following failure of the 2012 Community Clean Water Initiative, cities do not appear to have formulated realistic alternative plans.

RECOMMENDATIONS

The Grand Jury recommends that:

1. The permit negotiation process be clarified with roles, negotiating strategies, and negotiation objectives defined.
2. The CCCWP immediately begin to implement more direct communications between the individual Permittees and the regulatory authorities to eliminate the confusion that currently exists between the two parties as to program requirements, solutions for meeting long-term permit compliance and development of mutually agreed-upon plans for the path forward.
3. Permittees immediately quantify a range of future expenditure requirements associated with a range of negotiation outcomes and develop funding plans.
4. Permittees consider identifying funds to disclose to the public “the issues” surrounding the lack of funding to fulfill their NPDES permit requirements, including a discussion of potential, but realistic, impacts of non-compliance.
5. The CCCWP consider immediately beginning to re-align its activities and operating costs with; (a) probable outcomes from the negotiation of the next permit’s compliance requirements; (b) projected available funding; and (c) constituent needs.

6. Before any Permittee makes any effort to approach its citizens with another request for additional funding, all stakeholders reach consensus on a plan for the path forward that includes articulations of reasonable objectives, ways to measure those objectives and reasonable timelines for accomplishment of those objectives.

REQUIRED RESPONSES

	Findings	Recommendations
City of Antioch	1 – 11	1 - 6
City of Brentwood	1 – 11	1 - 6
City of Clayton	1 – 11	1 - 6
City of Concord	1 – 11	1 - 6
Town of Danville	1 – 11	1 - 6
City of El Cerrito	1 – 11	1 - 6
City of Hercules	1 – 11	1 - 6
City of Lafayette	1 – 11	1 - 6
City of Martinez	1 – 11	1 - 6
Town of Moraga	1 – 11	1 - 6
City of Oakley	1 – 11	1 - 6
City of Orinda	1 – 11	1 - 6
City of Pinole	1 – 11	1 - 6
City of Pittsburg	1 – 11	1 - 6
City of Pleasant Hill	1 – 11	1 - 6
City of Richmond	1 – 11	1 - 6
City of San Pablo	1 – 11	1 - 6
City of San Ramon	1 – 11	1 - 6
City of Walnut Creek	1 – 11	1 - 6
Contra Costa County Board of Supervisors	1 – 11	1 - 6
Contra Costa Flood and Water Conservation District	1 – 11	1 - 6
Contra Costa Clean Water Program	1 – 11	1 - 6