

FINAL MEETING NOTES

Date of Meeting: December 6, 2021, 8:00 AM – 12:00 PM
Location: Online Meeting
Subject: Regional Compliance for a Sustainable Bay TAC Meeting #5:
Legal Review of Proposed Regional Alternative Compliance System
Attendees: Amanda Booth, Sarah Kolarik, Lynn Tracy Nerland, *City of San Pablo*
Michele Mancuso, Linda Wilcox, *Contra Costa County*
Lucile Paquette, *City of Walnut Creek*
Keith Lichten, Derek Beauduy, Zach Rokeach, *SFBRWQCB*
Luisa Valiela, Jacques Landy, Sara Goldsmith, *EPA*
Tim Jensen, Paul Detjens, *Contra Costa County Flood Control District*
Mitch Avalon, Karin Graves, *Contra Costa Clean Water Program*
Nicholas Ghirelli, Trisha Ortiz, *RWG Law, for Contra Costa Clean Water Program*
Viviana Heger, *Meyers Nave, for City of Walnut Creek*
Stacy Lee, *Shute, Mihaly & Weinberger LLP, for City of Orinda*
Tony Hale, *San Francisco Estuary Institute*
Kelly Havens, Lisa Austin, *Geosyntec Consultants*
Mark Kieser, *Kieser & Associates*
Jill Bicknell, *EOA*
Susanne Heim, *Panorama Environmental*
George Kelly, *Bespoke Mitigation Partners*
Brooks Smith, *Troutman Pepper*

Meeting Summary:

1. Introductions and Agenda Review

Roll call for those on the line. No questions or comments on the agenda.

2. Project Schedule/Deliverables and Notes

TAC Meeting Notes #4 were approved. The project schedule was presented by *Kelly Havens*. No questions or comments on schedule. See attached slide deck.

3. Overview of System Summary Report Legal Review Comments

System Summary Report Legal Review comment materials provided in the agenda package were presented by *Kelly*. No questions or comments on materials.

4. Discuss System Summary Report Legal Comments by Topic.

a. Item 1: System Objectives (all Legal Reviewers)

Viviana Heger - Objectives are broad, suggest adding more direct language. Alternative compliance will be through MRP Provision C.3.e, state this.

Nick Ghirelli – Water Board provided some comments on whether the program could target TMDL compliance, curious as to Water Board thoughts. *Keith Lichten* – Yes, load reductions realized as part of this program can be used for C.11/12. The report could discuss ancillary or co-benefits more specifically in item 4. Suggest a consistent level of citation throughout.

Amanda Booth – Agree we may want more detail but wanted to keep objectives broad as permits evolve and don't want them to become outdated. For example – we may want to mention Provision C.3.e (Alternative Compliance Provision) based on its current form. Including construction and implementation of GSI Projects is a good edit.

b. Item 2: PCBs and Mercury TMDL Drivers (all Legal Reviewers)

Keith – PCBs and mercury load reductions need to be tracked somewhere. There is a benefit to accounting for it within the System, as just tracking acres greened could pose a challenge for achieving load reductions. It seems that the overall system is about urban runoff pollution reduction – the suite of urban pollutants – this is a general statement of support for that approach.

Luisa Valiela – The System objective should be clear in that PCBs and mercury TMDLs are drivers. This is a bioaccumulative toxics trading system, not just GSI. Legal reviewers should be comfortable with this objective. EPA doesn't like the emphasis on the outdated EPA Trading Policy that would have restricted water quality trading for bio-accumulative toxics. EPA would like to reference the latest Policy update. EPA is comfortable with System approach (*also see attached Supplemental Comments from EPA*).

Zach Rokeach – Water Board included some comments about System guarantees. As long as we have a robust tracking system for PCBs and mercury load reduction benefits, that is what matters.

Lisa Austin – The County is tracking and reporting of PCBs load reduction and has a robust tracking system through ArcGIS OnLine (AGOL), which will still be used. Projects will be entered into the System for consolidated C.11/12 tracking. It makes more sense that this System is tracking the exchange portion, whereas the Countywide portion will cover PCBs and mercury load reductions.

c. Item 3: Administrative Structure – Permittee Role (Permittee Legal Reviewers)

Assessments and Fees (also see Item 4)

Linda Wilcox – The report gets into uncharted territory, language around administrative fees and pooling money is very general. Many statutes govern what fees and assessments can be used for, need to confirm legality. There are different rules for public funds going to public projects and those that go to private projects. *Luisa* – Not sure what statutes would prevent implementation? *Linda* – There needs to be legal authority to charge a fee to cover everything, need to point to the statute.

Mitch Avalon – If there is an appeal from a property owner, or a developer, wanting to talk about the level of fee who would they talk to? Would they go to administrator, Flood Control District

(FCD) Want to make sure that there is a clear demarcation of authority so there is no confusion in the future. *Kelly* – How that will likely work is they will go to the jurisdiction and there will be a clear process through the System Administrator to deal with appeals.

Zach – The System must be able to adapt; the ability to reassess O&M and administrative needs overtime to have adequate fees collected is important.

Off-Site GSI Project Inspection and O&M

Zach – One concern we had is that certain municipalities will have a lot more Off-site GSI Projects than others, is this fair? How can the System provide some assurances that this wouldn't be a potential burden? *Michele* – PCBs in older industrial areas are mostly in San Pablo, Richmond, and unincorporated Contra Costa County. Whether we do this System, GSI, or other control measures, the burden ends up on these municipalities to maintain facilities. The System tries at least to get input from other municipalities and developers that don't have the same level of PCBs. *Amanda* – The System allows an option for some cost recovery. We see this as hopefully solving the problem, not creating it.

Regional Alternative Compliance Subcommittee

Amanda – A committee would be set up within the Contra Costa Clean Water Program (CCCWP) to make decisions about the System. Volunteers would represent the diversity of communities, and we anticipate rotation of volunteers.

Off-Site GSI Project Failure (also relates to Item 4)

Lynn Tracy Nerland – The potential project failure concept versus general O&M needs to be more clear. It sounds like who is responsible in those situations is different. If there is an engineering failure, is the responsibility is on the System, or who? Needs to be figured out.

Nick – Comment about risks to buyers: If a developer in one city buys compliance units and everything is approved and subdivision is developed, is there certainty that there is no ongoing compliance requirement and that the buyer has satisfied its stormwater requirement?

Lisa – Thinking about timing for an Off-site GSI Project being built. It is reviewed and inspected by the local jurisdiction to ensure the construction is adequate. After the facility is built, it is certified, and compliance units could be sold (also see Item 5 on timing). After certification, the Off-Site GSI Project is expected to perform to provide compliance units. If inadequate ongoing O&M happens, it can lead to failure. There is less risk of failure with the ongoing O&M assessment. If there was a problem due to a design or construction issue and leads to a major or costly rehabilitation, how does the System accommodate that situation? Through the System, there would be a robust process for review that would prevent those larger treatment system issues. But is this realistic on private properties?

Tim – We don't currently use community facility district (CFD) fees to fix long-term failures. The County fixes a problem and then adds an assessment fee to the project to pay for the fix through

an NOV. This seems better than generating a fund that might be used to fix a problem that happens in the future.

Michele – There are two parts to the CFD. If there was a major failure of a facility that the owner did not correct, after going through the inspection and enforcement process, and the County needed to perform maintenance activities to correct the issues, the County, we can go back and levy a tax for getting that facility back to the way it should, to pay for the required maintenance activities.

d. Item 4: Flood Control District/O&M Assessment Approach (Contra Costa Watershed Program and Contra Costa Clean Water Program Legal Reviewers)

O&M Assessments

Tim Jensen – As the fiduciary agent, we don't want to be in the position where costs may not be recovered. If we could have a reserve fund to ensure all costs are covered, that would be great.

Nick – CCCWP comments outlined the comments for O&M assessments. I think the Program works conceptually, however, when this is brought to the City and Flood Control District level, a critical review of all fees will be needed.

Pooling O&M Assessments

Linda – Regarding the System fund that developers would pay into, the O&M assessment fund needs to be somehow available to fix the O&M issues. One of the problems is with the assessment. It will only be an assessment on the parcels, and there will be separate assessments in different municipalities within the County. Assessments are supposed to be going (directly) toward what it is they are funding. I don't know where you can take assessments from all over the County, pool, and put them towards wherever. To nail down legalities, we will need concrete examples of how this will work and which law will be used to charge fees and assessments.

Tricia Ortiz – Relating to pooling, we have to identify a mechanism and follow specific legal authority. When we look at assessment methodology, the assessment needs to be associated with a "specific benefit" for the specific project/parcel being assessed. There are concerns that one parcel could pay for benefits that benefit another parcel. After Prop 218, difficult to come up with a special benefit assessment that passes legal scrutiny. Mello-Roos might be a better approach. FCD has to make a legal determination about their authority.

Lisa – When an Off-Site GSI Project is built, the compliance units are available in the System. Buyer purchases units, signs agreement for long-term assessment. The assessment would presumably go towards those specific compliance unit generating projects.

Trisha Typically when an assessment district is formed, it is used only for the parcel using the benefit. For example, only the properties in a small subdivision that receive the benefit of a lighting assessment. When you talk about pooling, is a property that is receiving benefits paying for another part of the System? Don't want to be advising on structuring this, but when you levy an assessment, need some way to track services and benefits provided.

Nick – The way Lisa described it is more appropriate and could be structured to satisfy in Prop 218. Issue when you are taking money from one place and funding other improvement benefits.

Authority to Levy Assessments for Stormwater Treatment Facilities

Nick – Ultimate comment is that we would expect FCD to review the authority to levy the assessments.

Tim – Practically speaking, Flood Control District experience is before Prop 218. Flood Control District Act language – would have to look for interpretations or other flood control districts that have tried to implement this.

Trisha – This will depend on the ultimate financing enabling act. Some have validation acts. There would be a court action to ensure that the funding mechanism complies with the law. When evaluating the strengths and weaknesses of various funding mechanisms, we would validate this.

Mitch – The Flood Control District Act was amended in 1992 (AB 2768 chapter 565). Aside from state restrictions imposed by Prop 218, there is an underlying authority for the FCD to levy assessments for the NPDES program. FCD Act was modified in 1992 to specifically allow the collection and use of assessments for NPDES program requirements. *Tim* – Language is “storm drainage”, not stormwater treatment. *Mitch* – Act was amended to levy taxes and assessments on NPDES requirements. GSI is an NPDES requirement so this should be covered. Ultimately, there are two aspects of this – local level authority or FCD ability, and the state restrictions that Nick and Trisha talked about with special benefit.

Outside Funding

Luisa – Wondering about the new infrastructure bill and influx of funds, would that alleviate these issues, and/or help to build and maintain facilities? May have some flexibility in the use of these funds. *Mitch* – Usually those funds would help on the capital side but wouldn’t help on the O&M side. We still need to resolve the assessments. *Luisa* – The infrastructure bill will be significant cash that could have flexibility. Wonder if anyone has looked at what might be possible. *Tim* – We typically rely on CASQA to analyze this. Could someone reach out to them and see what they recommend?

e. Item 5: CEQA Considerations (all Legal Reviewers)

Susanne Heim – (Provided an overview of CEQA issues.) There are three places where CEQA applies. The three years associated with Provision C.3.e In Lieu Fee for project construction could be a reasonable time frame. For CEQA, mitigation needs to be specific and verifiable and can be enforced. If you have a project in planning that could be specifically identified, you could meet the 3-year time frame.

Viviana – CEQA exemption for Water Board permits in Water Code. This plan as written does not specifically state the fundamental steps associated with the compliance units: (1) Construction

phase; (2) Built and functioning; (3) Credits exchanged after built and functioning. For the three-year implementation, these steps should be cross-referenced. Suggest you clarify this section.

Comment on the need for CEQA for Water Board to adopt the program? *Keith* – CEQA required for the Water Board is an issue when Board is making a discretionary decision. We can talk internally and come back to the team. *Viviana* – 13389 of Water Code exempts Water Board from following CEQA when it comes to adopting Waste Discharge Requirements (WDRs). *Keith* – Federal action, exempt from CEQA. *Susanne* – There is also 21080.5 of CEQA Guidelines.

f. Item 6: Mitigation Fee Act (all Legal Reviewers)

Nick – We concluded that Mitigation Fee Act would not apply because participating in the program is voluntary and participants can avoid administrative fees and assessments by not participating. It is OK to disclose the amount of the fee and how it was set by using the procedures in the Mitigation Fee Act. Suggest that we drop references to Mitigation Fee Act in the Report. The System doesn't have to show a nexus if the Mitigation Fee Act does not apply.

Lisa – Note that the condition of approval could say “pay this fee or do it onsite” to keep it voluntary.

g. Item 7: System Boundaries/Restrictions (all Legal Reviewers)

Lisa – Suggest that we don't want to restrict exchanges between East and West County through the System. *Keith* – The accounting for the TMDLs does draw lines depending on where the project is located, but Water Board agrees that East County should be included. *Amanda* – I don't have issues with this. Flexibility and simplicity will only make this easier. I want to make sure that we are not cutting ourselves short in removing PCBs in West County if we do this.

5. *Break* 10:00 AM

6. Discuss System Summary Report Legal Comments by Topic

a. Item 8: Funding/Financing and Compliance Unit Cost Basis (interested Legal Reviewers)

Programmatic Demand Approach

Zach – Would permittees that participate in Programmatic Demand have a set amount of money or would it be a commitment that they will buy in the future? *Kelly* – Permittees would be required to commit to purchasing a certain number of compliance units (at a set price) if they participate in Programmatic Demand.

Mitch – Another way to guarantee a certain amount would be a demonstrated commitment through the CCCWP. The CCCWP is a mechanism that allows funding to flow from all of the permittees.

George Kelly – Other programs have used the “guarantee funds” aspect to promote offsite developers to participate.

Lynn – Would we be going to individual city councils to ask for money to fund offsite a project for offsite compliance in other cities? This may not be a legal issue, but how to get this approved?

Kelly – Compliance unit purchase would be in place of money dedicated to an on-site facility for a Regulated Project or for retrofit projects, which would likely also need approval from City Councils.

Public Financing Discussion

Lynn – What is the citation for the prohibition of a city making a loan? *Nick/Trisha* – Constitutional debt limit issue: a City can't borrow funds, but there are ways to structure loans to prevent this issue. The second issue is a limit on loaning funds without a public benefit. *Lynn* – So, a city is not absolutely prohibited from making a loan but there are issues to be addressed. Suggest we provide a hypothetical example (also related to prevailing wages issue). *Kelly* – CCCWP might be the agency that applies for the financing and then distributes it to municipalities or uses a public-private-partnership (P3) approach. These are all options that would be investigated as moving forward.

Prevailing Wage

Nick – There are so many variables that could happen to each project in the future, hard to say. For a private developer/private property this is probably not applicable (depending on whether public subsidy is provided to the project), but would apply for public projects.

Public-Private Partnerships

Lynn – Why would a P3 partner want to participate in this System? *George* – Third parties typically have a profit motive, but you are still able to see cost savings with this approach (as compared to typical procurement). Regarding the difference between performance-based and P3 approaches, a P3 entity would have to deliver in a specific programmatic way. For performance-based, payment is tied to project performance on a unit basis. In both cases, the public payer would put the onus on the contractor for failure. *Lisa* – In the stormwater world, P3s are happening in Prince George's County, Milwaukee, Chester Pennsylvania, and being developed in LA. The private partner engaging in the larger program can come in and manage the program but also deliver a larger suite of projects and optimize delivery while taking on risk from the public entity. Benefits to both municipalities and private partners. If you are interested in this topic, the P3 conference that happens every year has a stormwater track.

b. Item 9: Adaptive Management – Amendments (Water Board)

When would permit amendments be needed as a result of changes to the System? *Keith* – Though the program could be implemented under the current permit (MRP 2.0/draft MRP 3) language, RWB would like it to recognize it specifically under the MRP in the future, which will require a permit amendment. Regarding potential changes that could require an amendment to the MRP, can you get the review up front by categorically describing these components (e.g., hydromodification, additional buyers, additional control measures)? The more description that can happen upfront,

the more we can take this through without future public notice and board approvals. To add other buyers, that may not be a big issue. Adding hydromodification or other types of control measures could be a larger issue. The MRP has a firm description of Low Impact Development (LID) in C.3.c. We haven't yet determined how to recognize benefits for other types of multi-benefit projects that depart from C.3.c., this would take more review.

Lisa – We can frame these modifications. For example, C.12.c allows any treatment type to address PCBs TMDL. For amendments, we wouldn't want to come back within MRP 3 to amend, but could come back within Report of Waste Discharge (ROWD), and try to have amendments as part of MRP 4. *Keith* – For pollutant of concern (POC) tracking there is a general credit or a pollutant-specific benefit approach. The System approach is general urban pollutant treatment credit (i.e., through the exchange of GSI projects compliant with MRP Provision C.3; though TMDL load reductions can be credited separately), but this may be something to think about. The challenge with [fast-draining proprietary devices] is that we have a permit standard that recognizes both [water quantity and quality] as creating a pollutant issue.

Amanda – The Water Board request is understood for major changes. When it comes to minor changes, we want an internal process, don't want to have to go to Water Board for approval. Can Water Board describe what would trigger an amendment rather than those that are just administrative? *Keith* – Our focus is really on the water quality outcomes and application of permit language. It may be helpful to ultimately identify examples that would not require Water Board notification – how is money moving, who is the fiscal agent, etc. *Luisa* – A lot of this continues to be scoped out. Where is the nice balance that does not require another amendment? Is this a legal issue or is this a Water Board and permittee issue? Want to make this as strong a program as possible. *Keith* – Everything is now in the permit (i.e., MRP 2). The notion is that the language requires substantial public review. While there is enough general language in the permit even in the absence of Board review, that may lead to a degree of uncertainty. We have to be able to provide a public review process to limit uncertainty in acceptance. We could set up a process for decision criteria that could allow Water Board Executive Officer approval for future changes.

7. Discuss Responses to Legal Reviewer Input

a. Brainstorming with TAC members to respond to discussion items.

Stacy Lee – City of Orinda agrees with San Pablo that an example stormwater ordinance should be provided. *Amanda* – San Pablo agrees, and the intent is to provide common language to permittees.

Zach – What is the difference between addressing the comment in the document or adding to the matrix? *Kelly* - Comments that require clarification will be edited into the document. Larger or more detailed response needs were added to the legal comments matrix. Several Water Board comments will be discussed in a separate meeting.

Sara Goldsmith – Would be helpful to add examples and scenarios to the Report. Referencing EPA 2019 guidance would be useful. Regarding amendments to the document – “major or minor

modifications” language might be useful, look to the NPDES regulations for definitions of these two terms.

8. Action Items and Next Steps

The Project Team will set follow-up calls with Water Board, separate calls with CCCFCD in early 2022, including EPA.

Follow up with CASQA and other entities on Infrastructure Bill investments and how this could be applied to the System.

ATTACHMENTS

- 1. EPA Legal Review RAC Summary Report Supplemental Comments Jan 14 2022**
- 2. Slide Deck from TAC Meeting #5**