

## 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**



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX**

75 Hawthorne Street  
San Francisco, CA 94105

**Supplemental Memorandum**

**Subj:** **Non-Binding Comments on the Draft Regional Alternative Compliance System Summary Report, September 27, 2021 Revised Draft for Legal Review (Draft Report)**

**From:** Sara Goldsmith, Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Region 9

**Thru:** Laurie Kermish, Chief  
Clean Water Act Section  
Office of Regional Counsel  
U.S. EPA Region 9

**To:** The Project Team<sup>1</sup> for the Draft Report

**Date:** January 14, 2022

**I. Introduction and Disclaimer**

As provided by memorandum dated November 8, 2021, the U.S. Environmental Protection Agency (EPA) provided legal review of the Draft Regional Alternative Compliance System Summary Report (Draft Report) as requested by the Project Team. Subsequently, the Project Team held a meeting on December 6, 2021 with all the legal reviewers and others to discuss the collective comments submitted. The Project Team then circulated for review its written notes documenting comments offered during the meeting. This supplemental memorandum provides clarification and expansion on the Project Team's written notes regarding comments provided by EPA on the Draft Report. For background information, please refer to EPA's November 2021 memorandum.

EPA's legal review of the Draft Report is nonbinding, limited, and qualified as the Draft Report is a conceptual proposal that by design is subject to adaptive management changes as implemented. EPA legal counsel is reviewing this Draft Report solely for general consistency with EPA guidance and policy on water quality trading projects. EPA expressly is not reviewing the Draft Report for the legality of any assertions pertaining to local, municipal, or state law,

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<sup>1</sup> The Draft Report at page 1 says the "Project Team" is comprised of the Steering Committee and the Consultant Team. The Draft Report at page vii (Acknowledgements) states the "Steering Committee is comprised of representatives from the Cities of San Pablo, Walnut Creek and Richmond and Contra Costa County who are guiding development of the Contra Costa County System," and the "Project Consultant Team" consists of "Kelly Havens, Lisa Austin, and Ken Susilo, Geosyntec Consultants; Mark Kieser and David Chen, Kieser & Associates, LLC; Jill Bicknell and Lisa Sabin, EOA, Inc.; Susanne Heim, Panorama Environmental; George Kelly, Bespoke Mitigation Partners; with consultation from Legal Advisor Brooks Smith of Troutman Pepper."

regulation, or guidance. Similarly, EPA is not independently assessing or corroborating any underlying facts, assumptions, or assertions provided in the Draft Report.

## II. Clarifications on EPA Comments on the Draft Report

### Comment 7.a. by Sara Goldsmith of EPA (Please note it is Sara, not Sarah)

*Sarah 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

### Expansion on the EPA comment regarding the EPA 2019 Guidance

EPA’s most recent guidance, *Updating the Environmental Protection Agency’s Water Quality Trading Policy to Promote Market-Based Mechanisms for Improving Water Quality*, February 6, 2019 (2019 Policy), at n.1., strongly supports water quality trading and other market-based programs, which it broadly defines to include “other types of incentive- and community-based programs as well as other collaborative approaches, . . . including, for example, pay for success programs, coordinated point/nonpoint pollution reduction or offset projects.” The 2019 Policy further acknowledges that “EPA has long interpreted the Clean Water Act to allow pollutant reductions from water quality trading, offsets and other similar programs to be used for ensuring compliance with regulatory requirements. . . . Contrary to the Agency’s intent and expectations, [EPA’s earlier] 2003 [Water Quality Trading] Policy has not facilitated the widespread adoption of water quality trading. . . . [T]he Agency now believes that the 2003 Policy may be too prescriptive to be widely effective and implementable. . . . Like all agency guidance documents, the 2003 Policy provides recommendations to states, tribes, and stakeholders, but the Agency cannot mandate any specific regulatory action, outcome or requirement without first going through the rulemaking process. . . . **The EPA acknowledges that some principles in this [2019 Policy] may differ from the 2003 Policy and other guidance or technical memoranda the Agency previously issued concerning water quality trading. The intent of the [2019 Policy] is to clarify and expand the range of policy options available for states, tribes, and stakeholders to consider.**” Id at 2-3 (emphasis added). Finally, the now almost 20-year-old 2003 Policy itself did not “prohibit” trading programs of persistent, bioaccumulative, and toxics chemicals (PBTs), and in fact expressed EPA’s support for future pilot projects on trading of PBTs to obtain more information.

### Expansion on the EPA comment regarding future modifications of the Contra Costa County (CCC) System

Regarding public review and comment on non-minor amendments to the CCC System that occur after the Water Board already has authorized the System via an amendment to the Municipal Regional Stormwater Permit, EPA references 40 C.F.R. § 122.63, which defines “minor” modifications to a permit, that do not need to go through public comment and review. However, modifications “for cause” (i.e., non-minor modifications) are required to go through the public review and comment process, per 40 C.F.R. § 122.62 (“If a permit modification satisfies the criteria . . . for ‘minor modifications’ the permit may be modified without a draft permit or public

review. **Otherwise, a draft permit must be prepared and other procedures in part 124 (or procedures of an approved State program) followed.**” (emphasis added).

Changes to the underlying approved System are one-step removed from modifying the MRP itself, but if the changes to the System are sufficiently substantive (need to define that threshold), they may require public review to be consistent with the CWA. *See Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005) (CAFO rule invalidated, *inter alia*, on grounds that nutrient management plans prepared under the permit were not subject to EPA review and approval and not subject to public review). *See generally Environmental Defense Center, et al. v. EPA*, 344 F.3d 832, 857-858 (9th Cir. 2003) (court determined that the regulations for providing coverage under small MS4 general permits did not provide for adequate public notice and opportunity to request a hearing and remanded the rule accordingly. The court explained that under the Phase II rule, the NOI submitted by the MS4 contains the information describing what the MS4 will do to reduce pollutants to the MEP and is the “functional equivalent” of an individual permit application. Because the CWA requires public notice and the opportunity to request a public hearing for all permit applications, the court held that failure to require public notice and the opportunity for a public hearing for NOIs under the Phase II rule is contrary to the Act.)

The *Waterkeeper Alliance* case, 399 F.3d at 503, explains the CWA’s overarching public participation principle as follows, which as noted above includes public review of non-minor modifications to permits.

Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act. The Act unequivocally and broadly declares, for example, that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.” 33 U.S.C. § 1251(e). Consistent with this demand, the Act further provides that there be an “opportunity for public hearing” before any NPDES permit issues, *see* 33 U.S.C. §§ 1342(a), 1342(b)(3); that a “copy of each permit application and each permit issued under this section [1342] shall be available to the public,” *see* 33 U.S.C. § 1342(j); and that “any citizen” may bring a civil suit for violations of the Act, *see* 33 U.S.C. § 1365(a).

## **1. Defining the Scope of the Watershed**

It was clarified during the December 6, 2021 meeting that watershed for the Draft Report meant the entire San Francisco Bay Watershed. The Draft Report does not explicitly define watershed, even at Section 5.5.2 (*Watershed and Jurisdictional Restrictions*). EPA suggests the Draft Report define “watershed” for general clarification and because many definitions and provisions in the MRP are dependent on discharges within the same watershed.



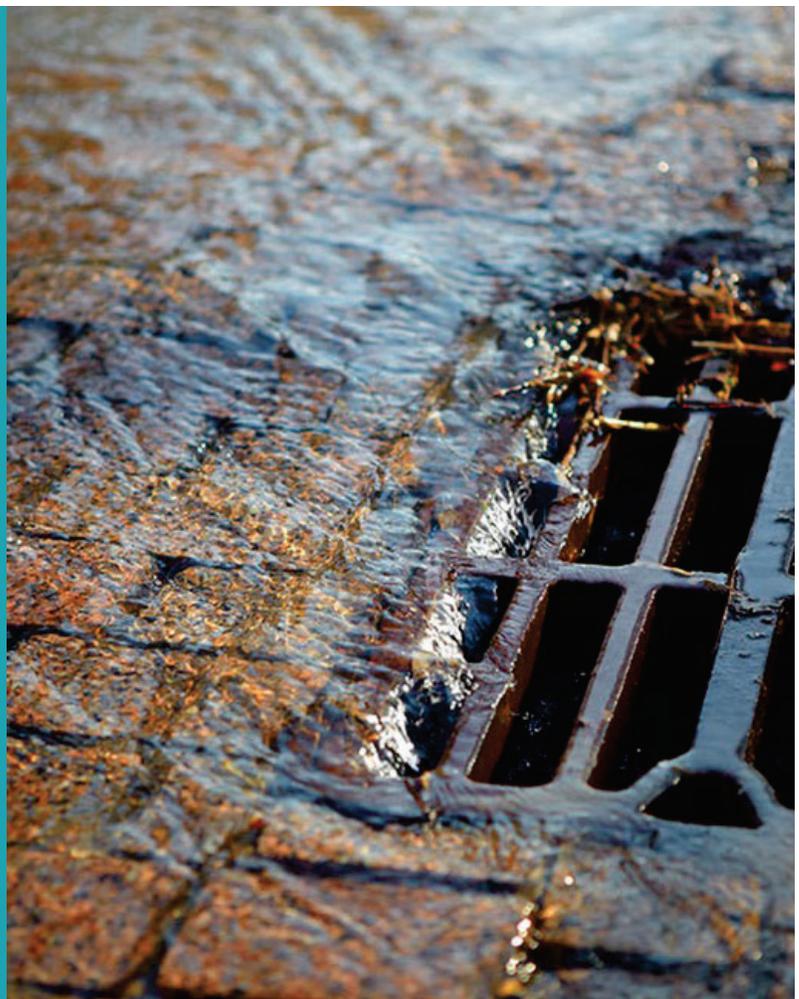
# Regional Compliance for a Sustainable Bay

TAC Meeting #5

December 6, 2021

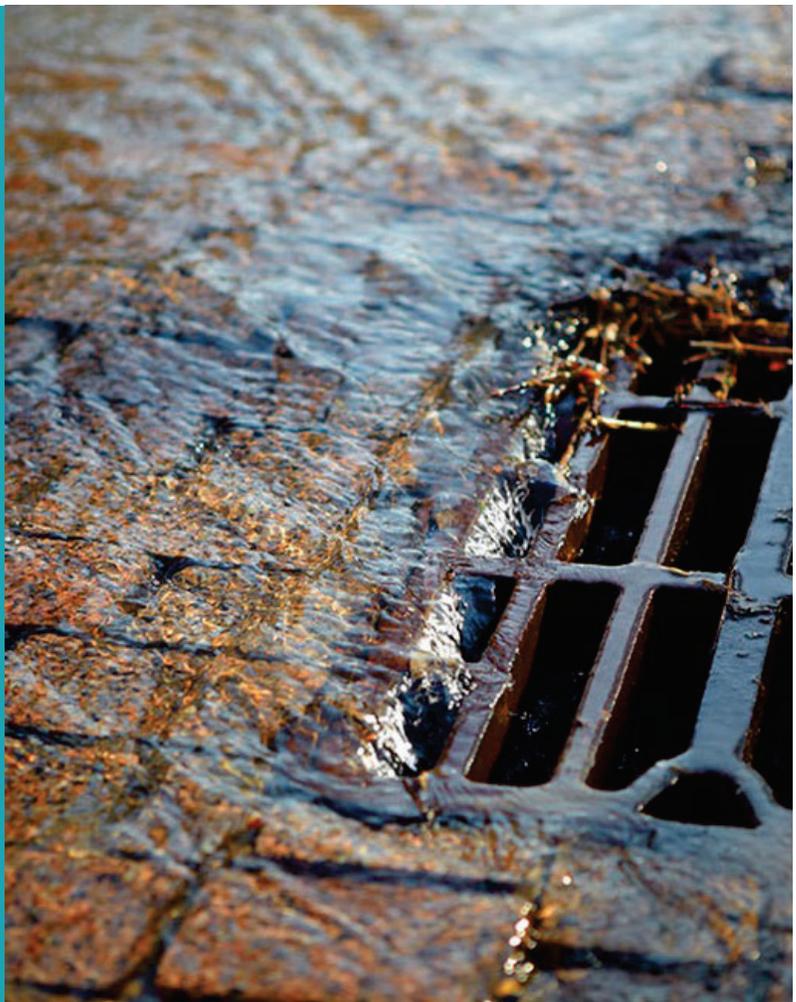


## 1. Introductions and Agenda Review

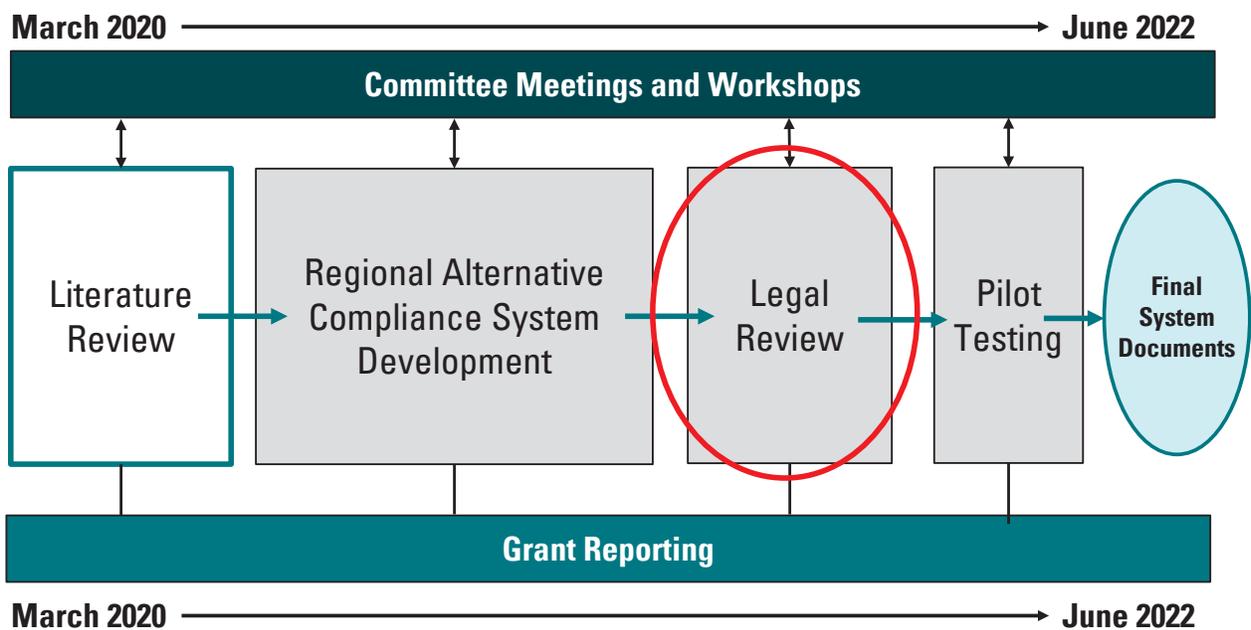


## 2. Notes Approval & Project Schedule

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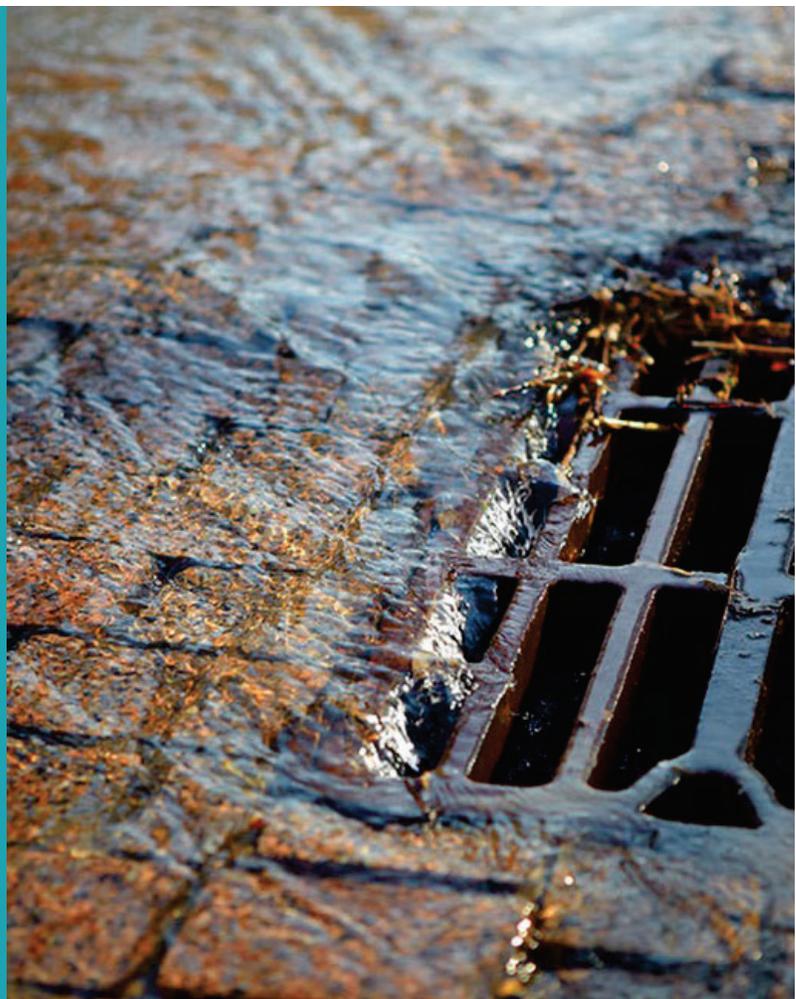
## Overall Project Schedule



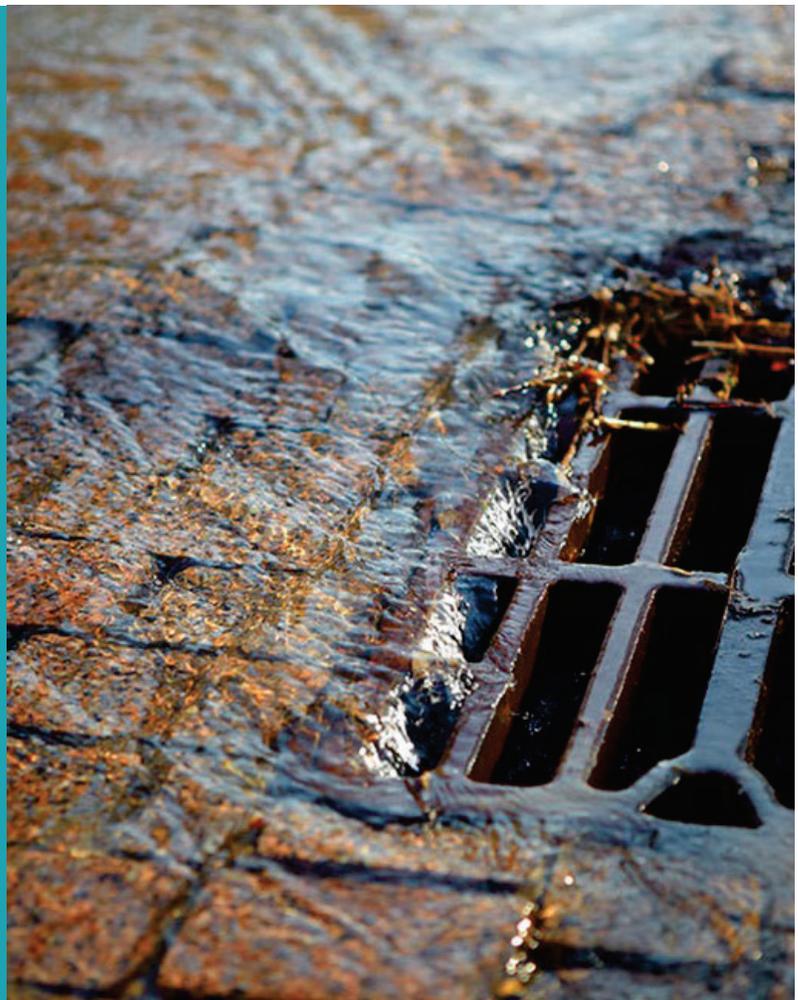
Project Deliverable	Completion Date
Responses to Legal Comments	January 2022
Draft Final Program Documents Provided to AC and TAC	February 2022
Stakeholder Workshop #2	March 2022
Test Drive of Templates for Pilot Project Exchange(s)	April/May 2022
Final Program Documents	June 2022
Final Project Report	June 2022



### 3. System Summary Report Legal Comments - Overview



# 4. System Summary Report Legal Comments by Topic



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## Item 1: System Objectives



### 2.2 Contra Costa County System Objectives

The following key objectives for the Contra Costa County System were developed with input from the Project Steering Committee and Advisory Committee:

1. Flexible compliance with the MRP, particularly Provision C.3.b-d (Regulated Projects requirements), but potentially also Provision C.3.j (Green Infrastructure Planning and Implementation);
2. Cost efficiencies through implementation of larger stormwater capture projects that provide treatment at a lower cost per acre as well as lower maintenance and inspection costs;
3. Targeted implementation of facilities that can provide higher load reduction benefits toward compliance with the San Francisco Bay PCBs and mercury TMDLs;
4. Implementation of stormwater capture and water quality improvement projects that provide multiple benefits, including benefits ancillary to those relating to MRP Provisions C.3, C.11, and C.12; and
5. Flexibility to adapt the system to meet future water quality needs.



## Item 2: PCBs and Mercury TMDL Drivers



- Legal comments requested clarification on how System can provide progress towards TMDL load reductions
- Constraints:
  - WQ Trading Policy restricts trade of bioaccumulative toxics
  - Demand for PCBs/mercury load reduction is limited
- Approach:
  - System metric is “Equivalent Acres Greened”
  - Encourage construction in Old Industrial through discount
  - Programmatic (e.g., project review, performance-based contracting)
  - Other possibility: Allow other high-PCBs reducing facilities



## Item 3: Administrative Structure – Permittee Role



Entity	System Role	System Responsibility
Permittees	Exchange Facilitator; Certifying Entity; Verifying Entity  <i>(Also: Buyers)</i>	<ul style="list-style-type: none"> <li>• For Regulated Projects:                             <ul style="list-style-type: none"> <li>○ Review, approve of Regulated Project owner participants.</li> <li>○ Calculate/confirm compliance purchase amounts.</li> <li>○ Collect/transfer compliance purchase payments.</li> <li>○ Enter participant data into System Tracking Tool.</li> </ul> </li> <li>• For Off-Site GSI Projects:                             <ul style="list-style-type: none"> <li>○ Approve applications from compliance unit providers.</li> <li>○ Perform plan checks.</li> <li>○ Conduct certification and verification processes.</li> <li>○ Perform ongoing O&amp;M.</li> <li>○ Enter data in System Tracking Tool.</li> </ul> </li> <li>• Notify participants, public of amendments to the System Framework or preapproved list of control measures.</li> <li>• <i>Likely need updated Stormwater Ordinance section</i></li> </ul>



## Item 3: Administrative Structure – Permittee Role



- Other Permittee Role Legal Comments:
  - *The Regional Alternative Compliance Subcommittee is expected to be made up of volunteer Permittee stormwater program representatives.*
    - Comment: Who are anticipated to be these volunteers, how will they be selected?
  - Alternative Delivery Approaches
    - Comment: These will require Permittee oversight.
  - Project Failure
    - Comment: Are these financial duties imposed on municipalities?
  - Programmatic Demand (discussed as part of Item 8)



## Item 4: Flood Control District Role/ O&M Assessment



- Proposed Approach:
  - As part of purchase agreements, participants would complete an O&M assessment ballot to pay ongoing O&M assessments to Flood Control Zone 100
    - Assessment levied on developed property for private
    - Separate assessment agreement for public retrofit purchasers
  - O&M assessments would be charged annually proportional to number of compliance units purchased
  - O&M assessment funds would be pooled and controlled by Flood Control District
  - O&M assessment funds would be disbursed proportional to amount of O&M conducted for Off-Site GSI projects
  - O&M assessment amount would be based on amount needed to properly operate/maintain Off-Site GSI projects



## Item 4: Flood Control District Role/ O&M Assessment



- Comment: District authorized to levy assessments [which]... may be used for... storm drainage..., but it is not clear that stormwater treatment facilities would fall into [this or other] categories.
  - Discussion: How could we determine this?
- Comment: Under Proposition 218, an assessment is defined as a levy on real property “for a special benefit conferred upon the real property,” ...It is not clear how an off-site GSI project ... would provide a special benefit.
  - Can Off-site GSI Projects be considered public improvements in all cases?
  - We have identified the special benefit as “ongoing compliance with MRP”
- Comment: “pooling” raises concerns for assessment revenues. An assessment may only be used for the services for which it was imposed. Any pooled funds should not include assessment revenues.
  - Discussion



## Item 4: Flood Control District Role/ O&M Assessment



- Document: “long-term participation in the Contra Costa County System and subsequent recurring payment of O&M assessment for long-term compliance with the MRP would be dependent on the System continuing to be a compliance option under the MRP”
  - Comment: The program must continue to function... if it becomes defunct at a later time, in a future permit term, O&M would still be required; otherwise, the respective permittee could be cited for violation of a previous permit.
  - Discussion
- Other Comments:
  - Project Failure – impacts to O&M assessments
  - Frequency of assessment – proposed annually
  - Development of assessment amount and increase cap – Phase 2 study



## Item 5: CEQA Approach



- Proposed Approach: Off-Site GSI Projects constructed and certified prior to compliance units exchanged.
  - Comment: Why couldn't funds be collected for a potential project before CEQA is completed for the project? I do not believe that is a pre-commitment issue. Further, the 2015 Permit provides 3 years to complete the Regional Project after the in-lieu fee payment. Why not take advantage?
    - With a specific Off-Site GSI Project can be identified, possible. In market-based system with pooled compliance units, a challenge as CEQA mitigation cannot be specifically identified.
  - Comment: [Approach] seems to conflict with... fees [being] pooled.
    - Pooled compliance purchases would be used to construct additional Off-Site GSI Projects and/or pay off upfront financing of constructed Off-Site GSI Projects.



## Item 6: Mitigation Fee Act



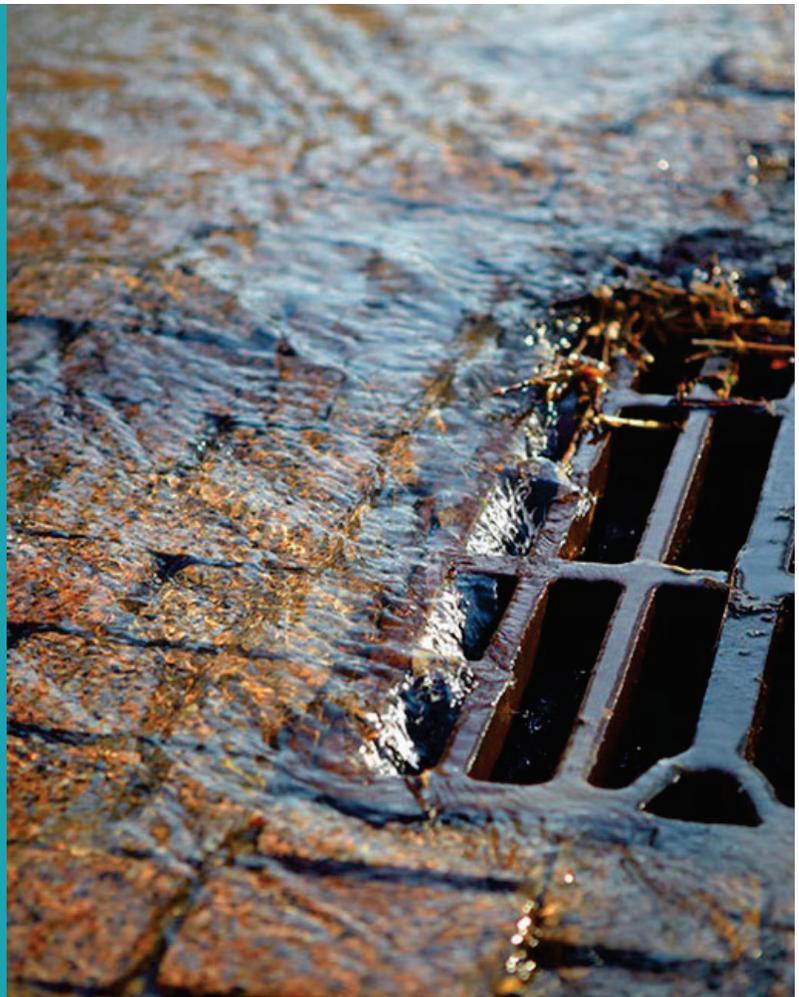
- Approach: Program participation optional, Mitigation Fee Act does not apply; some procedures followed for transparency
  - Comment: If a developer "opts in" and chooses to buy compliance units, an enforcement mechanism such as a condition of approval ...would be necessary. If the purchase becomes mandatory because of the applicable enforcement mechanism...the requirements of the Mitigation Fee Act may apply.
    - Discussion
  - Comments to omit reference to Mitigation Fee Act if it does not apply
    - Discussion



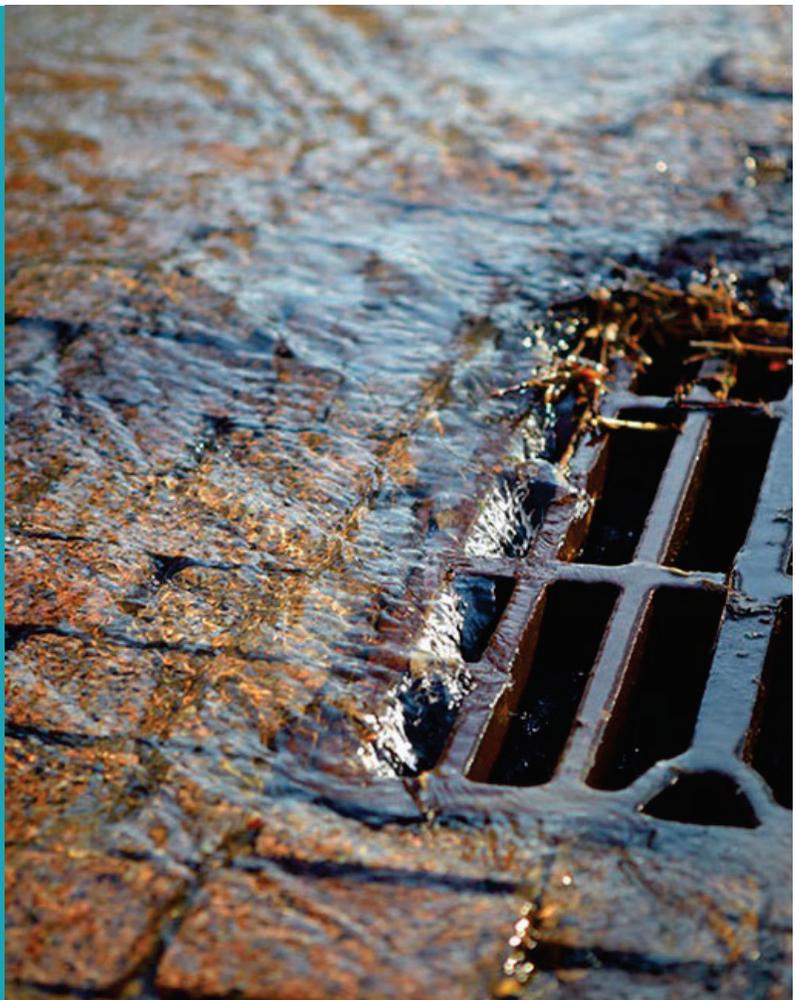
- Approach: “Same watershed” may refer to San Francisco Bay
- Approach: Limit trading between East and West County during Phase 2 due to different water quality requirements
  - Comment: Why would exchanges be limited?
    - Discussion



**10 Minute Break**



## 6. System Summary Report Legal Comments by Topic (continued)



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### Item 8: Funding and Financing



#### 8a Funding and Financing - Overview

- Funding and Financing approaches included in System Summary Report are intended to provide suggestions and considerations for System approach; not provide final funding/financing pathway
- Plan for System funding/financing will need to be developed as part of Phase 2 of the System

## Item 8: Funding and Financing



- 8b: Programmatic Demand approach
  - Approach considered for compliance unit cost setting
  - Provides built-in demand to launch System
  - Could serve as basis for pay-for-performance or CBP3 contract
  - Provides boundaries for unit cost, namely, the Equivalent Acre Greened unit cost (CostEAG) needs to be set at the level that:
    - Permittees would be willing to pay to meet compliance needs;
    - Is less than or equal to the Permittees' cost of constructing GSI facilities, with adequate data to demonstrate this cost to provide transparency to cost-setting; and
    - Off-Site GSI Projects could be constructed by compliance unit-generating entities and be economically feasible.



## Item 8: Funding and Financing



- 8c: Public Financing - Comment:
  - Proposal: ...A permittee or other public agency would obtain a loan or other funding to finance the construction of off-site GSI projects, which could be built by public or private entities on public or private property. This “borrower agency” could lend the proceeds to entities that will build the projects.
  - Issue: Counties, cities, and other political subdivisions are generally prohibited under the California Constitution from making loans to any person, association, or corporation.



## Item 8: Funding and Financing



- 8d: Prevailing Wage
  - Proposal: Possible use of private entities to construct projects “at a lower cost than standard procurement processes.”
  - Issue: If public money is used to construct or maintain a public works project, the laws that apply to public contracting, including bidding procedures and payment of prevailing wages, will apply to the project.



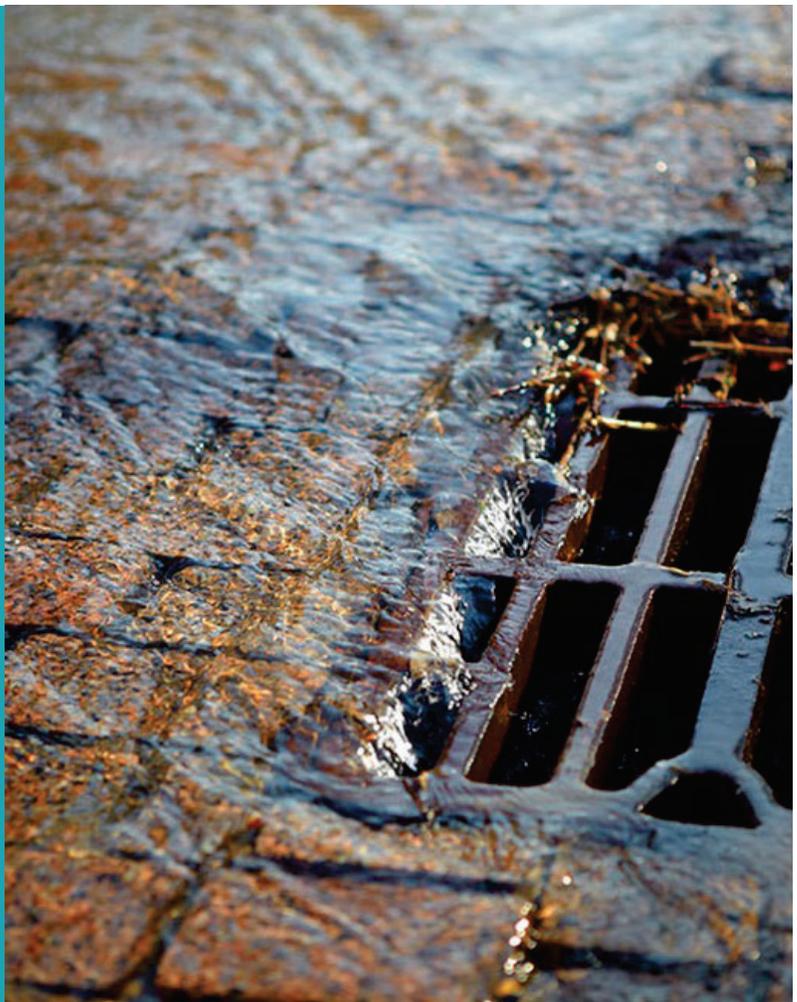
## 9: Adaptive Management and Permit Amendments



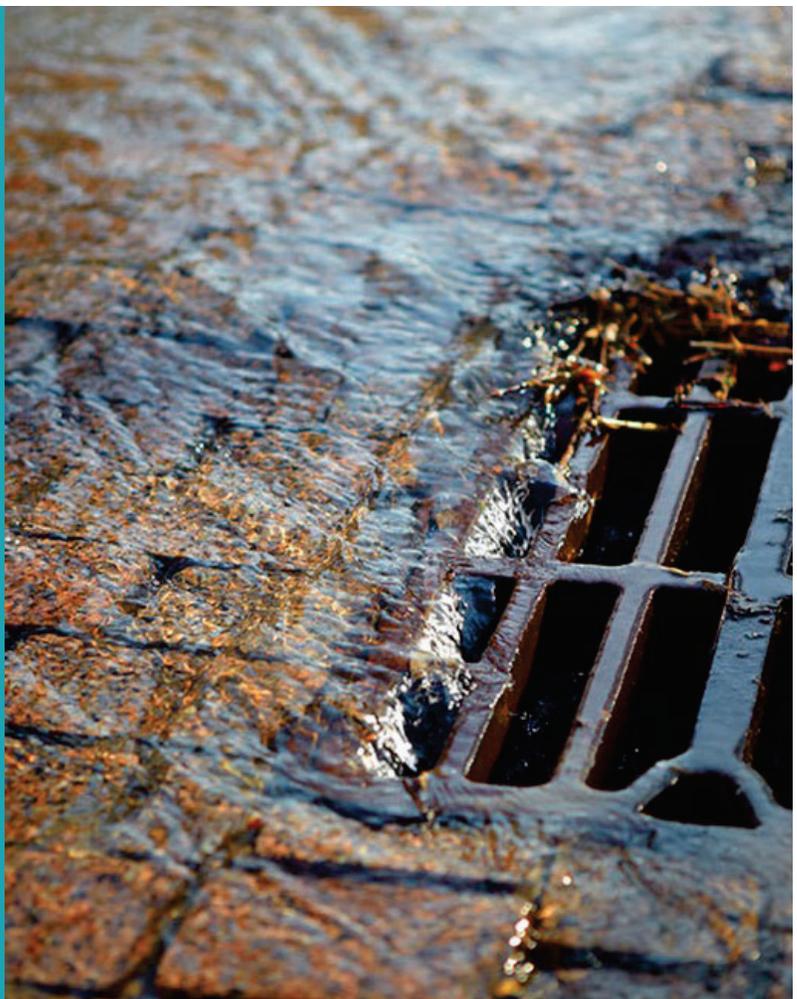
- Proposed approach for System adoption
  - Submit program proposal to Water Board in late 2022
  - Requires Board approval as permit amendment to C.3.e
- Many comments relating to System changes that would require additional amendments
  - What is a significant change that would cause a future permit amendment? Examples mentioned:
    - Adding Hydromodification Management Facilities
    - Adding Control Measures (i.e., non-LID/GSI)
    - Adding Eligible Buyers (i.e., Caltrans, others subject to TMDL)
    - Others?



## 7. Legal Responses Brainstorm/ Additional Discussion



## 8. Action Items and Next Steps



# Action Items

*Notes will be sent out before holidays, will request edits by specified deadline but there will be no approval of final notes*

Project Deliverable	Completion Date
Responses to Legal Comments	January 2022
Draft Final Program Documents Submitted to AC and TAC for Review	February 2022
Stakeholder Workshop #2	March 2022
Test Drive of Templates for Pilot Project Exchange(s)	April/May 2022
Final Program Documents	June 2022
Final Project Report	June 2022



## 9. Adjourn

