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MEMO

To: City of Cupertino
Legislative Review Committee

From: Townsend Public Affairs, Inc.

Date: March 12, 2021

Subject: Consider adopting a position on Assembly Bill 377 (Rivas) Water Quality: Impaired Waters

Summary

AB 377 is introduced as the California Clean Water Act. The measure sets the following goal: All California surface waters shall be fishable, swimmable, and drinkable by January 1, 2050. To bring all water segments into attainment with this requirement, the state board and regional boards shall comply with the requirements of this chapter.”

AB 377 would prohibit the State Water Board and regional water boards from doing any of the following:

- Authorizing an NPDES discharge that causes or contributes to an exceedance of a water quality standard.
- Authorizing an NPDES permit that uses an alternative compliance determination, safe harbor “deemed in compliance” term, or any other best management practice permit term to authorize a discharge that causes or contributes to an exceedance of a water quality standard in receiving waters.
- Authorizing a permit that does not include monitoring sufficient to demonstrate compliance with water quality standards and, unless infeasible, that does not include end-of-discharge pipe monitoring.
- Authorizing a permit unless it establishes criteria for, and requires, monitoring to evaluate compliance with water quality standards.
- Authorizing a waste discharge requirement or waiver of a waste discharge requirement for a discharge that causes or contributes to an exceedance of a water quality standard.
- Authorizing a waste discharge requirement or waiver of a waste discharge requirement that uses an alternative compliance determination, safe harbor “deemed in compliance” term, or any other best management practice permit term to authorize a discharge that causes or contributes to an exceedance of a water quality standard in receiving waters.

Under AB 377, by January 1, 2030, a regional water quality control plan, including the program of implementation, would be prohibited from including a schedule for implementation for achieving a water quality standard that was adopted as of January 1, 2021, in an approved regional water quality control plan, unless specified conditions are met. The intent of this requirement is to ensure that all water quality standards in effect as of January 1, 2021, are fully implemented and achieved by January 1, 2030.

A schedule for implementation of a water quality standard that is adopted by the State Water Board or regional boards to be included in a regional water quality control plan after January 1, 2021 must meet the following conditions:

- The schedule is the shortest time necessary and is no longer than five years.
- The schedule is necessary for the permittee to undertake construction needed to achieve compliance.
- The water quality standard is not substantially similar to a water quality standard that was in effect as of January 1, 2021.

By January 1, 2030, the State Water Board and regional boards would be required to develop an Impaired Waterways Enforcement Program to enforce all remaining water quality standard violations (as defined) that are causing or contributing to an exceedance of a water quality standard.

An enforcement action taken by the program would result in “sufficient” penalties, conditions, and orders to ensure the person subject to the enforcement action is no longer causing or contributing to an exceedance of a water quality standard. A discharger would remain liable for a violation of a water quality standard until sampling at the point of discharge demonstrates that the discharge is no longer causing or contributing to the exceedance. Penalties collected would be deposited into the Waterway Attainment Penalty Subaccount, which would be created in the Waterway Attainment Account.

The Waterway Attainment Account would be established in the Waste Discharge Permit Fund. Moneys in the Account would be available for the State Water Board to expend, upon appropriation by the Legislature, to bring remaining impaired water segments into attainment in accordance with the plan submitted to the Legislature. By January 1, 2040, 50 percent of the annual proceeds of the State Water Pollution Cleanup and Abatement Account would be transferred annually to the Waterway Attainment Account. This division of funds would be repealed on January 1, 2051, or when all water segments in California reach compliance with water quality standards, whichever comes first.

Funds in the Waterway Attainment Account would be expended by the State Water Board, upon appropriation by the Legislature, to bring impaired waterways into attainment with water quality standards to the maximum extent possible. Moneys in the account shall only be expended on the following:

- Restoration projects, including supplemental environmental projects, that improve water quality.
- Best management practice research innovation and incentives to encourage innovative best management practice implementation.
- Source control programs.
- Identifying nonfilers.
- Source identification of unknown sources of impairment.
- Enforcement actions that recover at least the amount of funding originally expended, which would be deposited into the Waterway Attainment Account.

According to the author, “the California Clean Water Act will require the State and Regional Water Boards to close permit loopholes, ensure that all dischargers are in compliance with water quality standards, and direct a larger proportion of existing funding toward cleaning up impaired waterways. The effects of this bill will be especially significant in disadvantaged communities, where water is disproportionately likely to be polluted or even toxic.”

Status

AB 377 has been referred to the Assembly Environmental Safety and Toxic Materials Committee. The measure has not yet been set for a hearing date.

Support

Since AB 377 has not yet been set for hearing, an official list of supporters is not yet available. The author has indicated that the measure is sponsored by the California Coastkeeper Alliance.

Opposition

Since AB 377 has not yet been set for hearing, an official list of opposition is not yet available; however, a coalition of public agency associations has submitted a letter of opposition. The signers of that letter are: League of Cities, California Special Districts Assn, Assn of California Water Agencies, California Municipal Utilities Assn, California Assn of Sanitation Agencies, and California Stormwater Quality Assn.

The public agency association coalition letter states that “The approach outlined in AB 377 is foundationally flawed in that it is based on the notion that existing state and regional NPDES, WDR and MS4 programs are so problematic and ineffective that they need to be completely overhauled and replaced. The bill proposes a new prescriptive enforcement program with statutorily defined time limits that eliminate state and Regional Water Board discretionary authority for permitting and enforcement of water quality objectives. Under the hallmark Porter-Cologne Act which predates the federal Clean Water Act, local discretionary authority for permitting is tantamount to the design and structure of state and regional board oversight and regulation of water quality in the State of California. To instead have the Legislature set prescriptive permitting terms and compliance requirements for every single discharge permit throughout the state, as this bill does, would be a significant policy departure with severe adverse consequences and contrary to the goals of the state and these programs.”

Recommended Action

Make a recommendation that the City Council take an oppose position on AB 377

Note: AB 377 appears to fall outside of the scope of the City’s Legislative Platform.