

Date of Hearing: June 29, 2016

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Susan Talamantes Eggman, Chair

SB 1170 (Wieckowski) – As Amended May 31, 2016

SENATE VOTE: 36-1

SUBJECT: Public contracts: water pollution prevention plans: delegation.

SUMMARY: Prohibits local public agencies, including charter cities, from requiring contractors to develop, or assume responsibility for the completeness and accuracy of, plans to prevent or reduce water pollution or runoff on public works projects. Specifically, **this bill:**

- 1) Defines "plan" to mean a stormwater pollution prevention plan (SWPPP), water pollution control program, or any other plan required by a regional water quality control board to prevent or reduce water pollution or runoff on a public works project, pursuant to State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ.
- 2) Defines "plan developer" to mean a qualified stormwater pollution prevention plan developer (QSD) or a qualified stormwater pollution prevention plan practitioner (QSP), as those terms are defined in Appendix 5 of State Water Board Order No. 2009-0009-DWQ.
- 3) Prohibits a public entity, charter city, or charter county from delegating to a contractor the development of a plan on a public works contract.
- 4) Exempts state agencies from 3), above.
- 5) Provides that 3), above, shall not apply to a contract for architectural or engineering services relating to the development of a plan on a public works contract.
- 6) Provides that this bill's provisions do not restrict a public entity, charter city, or charter county from contracting with a duly licensed architect or engineer for the design of a plan.
- 7) Prohibits a public entity, charter city, or charter county from requiring a contractor on a public works contract that includes compliance with a plan to assume responsibility for the completeness and accuracy of the plan developed by that entity.
- 8) Provides that 3) through 7), above, shall apply to all public works contracts, except contracts that use design-build (DB), best value or construction manager at risk procurement methods, if the contractor or construction manager at risk is required by the bid or procurement documents to retain a plan developer for the project owners.
- 9) Provides that nothing in this bill shall be construed to prohibit a local public entity, charter city, or charter county from requiring a bidder or contractor on a public works contract to review any applicable plan and report any errors or omissions noted to the public entity or its plan developer. The review by the contractor shall be limited to the contractor's capacity as a contractor and not as a licensed design professional or plan developer.

- 10) Finds and declares that it is of statewide concern to require a public entity, charter city, or charter county to be responsible for the development of, and completeness and accuracy of, a plan to prevent or reduce water pollution or runoff on a public works project.
- 11) States that the addition to the Public Contract Code made by this bill does not constitute a change in, but is declaratory of, existing law, as specified.
- 12) Finds that there is no mandate contained in this bill that will result in costs incurred by a local agency or school district for a new program or higher level of service, which require reimbursement, pursuant to Section 6 of Article XIII B of the California Constitution and Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

EXISTING LAW:

- 1) Regulates the discharge of pollutants in stormwater associated with construction activity to waters of the United States from construction sites that disturb one or more acres of land surface, or that are part of a common plan of development or sale that disturbs more than one acre of land surface.
- 2) Requires the State Water Board and the nine California Regional Water Quality Control Boards (Regional Boards) to prescribe waste discharge requirements in accordance with the federal National Pollutant Discharge Elimination System (NPDES) permit program established by the federal Clean Water Act and California's Porter-Cologne Water Quality Control Act.
- 3) Regulates NPDES permit requirements under a General Construction Permit (Permit) via the State Water Board's Order.
- 4) Prohibits a local public entity, charter city, or charter county from requiring a bidder on a public works contract to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except as specified.

FISCAL EFFECT: According to the Senate Appropriations Committee, "Unknown significant local costs to cities, counties, special districts, and school districts, potentially reimbursable by the state General Fund. To the extent the Commission on State Mandates finds that the bill imposes a higher level of service, and identifies local costs that are subject to reimbursement, this bill could result in significant General Fund costs." See comment 7), below, regarding this bill's mandate/reimbursement language.

COMMENTS:

- 1) **Bill Summary.** This bill prohibits local public agencies, including charter cities, from delegating to a contractor the development of a SWPPP, a water pollution control program, or any other plan required by a Regional Board to prevent or reduce water pollution or runoff on a public works project. This bill also prohibits public agencies from requiring a contractor on a public works contract that requires compliance with any of these plans to assume responsibility for the completeness and accuracy of the plan developed by that entity. This

bill exempts state agencies from its requirements, as well as projects that use DB, best value, and construction manager at risk procurement methods.

This bill states that it is of statewide concern to require a public entity, charter city, or charter county to be responsible for the development of, and completeness and accuracy of, a plan to prevent or reduce water pollution or runoff on a public works project, and states that it is declaratory of existing law. It also finds that there is no state-mandated local cost contained in the bill. This bill is sponsored by the Associated General Contractors.

- 2) **Background.** In 1948, Congress passed the first version of the Federal Water Pollution Control Act, or the Clean Water Act. The NPDES was amended into the Act in 1972, with a focus on point sources of pollution, such as sewage treatment and wastewater from industrial and manufacturing facilities. After 1972, studies began showing that non-point sources, including stormwater runoff, were a major contributor to surface water pollution. This led to further amendments to the Act that created a framework for regulating stormwater. In 1990, the U.S. Environmental Protection Agency published final regulations establishing permit requirements for stormwater discharges associated with industrial activities, including construction activities. California's first Permit was adopted in 1992. The latest Permit, which is regulated by the State Water Board's Order, became effective July 1, 2010.

Owners of construction projects that disturb one or more acres of land must comply with the Permit, which regulates the discharge of stormwater and non-stormwater (i.e., improper dumping, spills, leakage from storage tanks) from certain construction activities and is enforced by California's nine Regional Boards. The Permit requires, among other things, the development of a site-specific SWPPP that demonstrates compliance with the Permit.

A SWPPP is a comprehensive, detailed, site-specific, written document that identifies potential sources of stormwater pollution on a construction site; describes stormwater control measures and Best Management Practices (BMPs) that will be used to reduce or eliminate pollutants in stormwater discharges from the project site; and, identifies the procedures the operator of the project site will implement to comply with the terms and conditions of the Permit.

SWPPPs are ever-changing documents. In order for a construction site to remain in compliance with the Clean Water Act's NPDES permitting program, a SWPPP must be developed and maintained throughout the entire construction project. As the project progresses and goes through changes, the SWPPP must be revised to reflect those changes. The SWPPP is comprised of site maps, BMP details, inspection reports, spill reports, corrective action logs and associated waivers.

A project's SWPPP may be furnished by the project owner or prepared by a contractor's SWPPP developer.

- 3) **Who Develops the SWPPP?** The Permit requires SWPPPs to be prepared and certified by a QSD. Many other SWPPP tasks (i.e. inspections) must be conducted directly by, or under the supervision of, a QSD or QSP. There are extensive qualification and training requirements for both the QSD and QSP. To become a QSD or a QSP, a person must complete a training course offered by a qualified California Construction General Permit Trainer of Record, pass an exam, and register and be certified by the California Stormwater

Quality Association. In addition, each qualification requires an underlying pre-registration or pre-certification.

To become a QSD, a person must be one of the following: Registered Civil Engineer; Registered Professional Geologist; Registered Landscape Architect; Registered Professional Hydrologist; Certified Professional in Erosion and Sediment Control (CPESC); Certified Professional in Storm Water Quality (CPSWQ); or, Professional in Erosion and Sediment Control registered through the National Institute for Certification in Engineering Technologies.

To be a QSP, one must be a QSD or be one of the following: Certified Erosion, Sediment, and Storm Water Inspector (CESSWI) or a Certified Inspector of Sediment and Erosion Control (CISEC).

- 4) **Responsibility and Consequences.** The Permit defines the “discharger” as “[t]he Legally Responsible Person or entity subject to the General Permit.” The Permit defines the Legally Responsible Person as falling into specified eligible categories, including “[a] person, company, agency or other entity that possesses a real property interest. . . in the land upon which the construction or land disturbance activities will occur for the regulated site.” The Permit states a contractor is not qualified to be the Legally Responsible Person, unless they fall into limited categories (those employed and duly authorized on U.S. Army Corp of Engineers Projects or those engaged in pollution and remediation projects).

The Permit is typically held in the name of the property owner. Consequently, the party required to ensure compliance with the Permit is the property owner, not the contractor. The Permit also requires the discharger (i.e., owner) to file Permit registration documents, annual reports and other compliance information. The discharger must certify that the information provided regarding the project site is accurate and complete. The discharger must allow entry to the project site for inspections and provide records required to be kept under the Permit.

There are serious potential costs for failure to comply with the Permit. Any person who violates a condition of the Permit is subject to a civil penalty, which could be as high as \$37,500 per calendar day of a violation, plus sanctions provided by the Clean Water Act.

- 5) **Author's Statement.** According to the author, "Local agencies have begun requiring contractors to prepare the state required storm water plan and submit it as part of the bid. At this point the contractor or subcontractor cannot price the storm water plan because it hasn't been designed yet – so the result is the contractor or subcontractor is forced to estimate the cost of implementing a storm water plan – and include that cost into a bid – even before the plan has been designed. This shift in responsibility: (1) undermines the intent of the Permit; (2) results in an inefficient allocation of responsibility and risk; and (3) is contrary to several existing laws.

"This bill ensures that adequate resources are allocated to the pollution prevention planning process by clarifying that public owners are responsible for the preparation of Stormwater Pollution Prevention Plans ('SWPPP') required on public works projects. The bill prohibits public owners from delegating responsibility to contractors for SWPPP design. Additionally, the bill clarifies existing law which requires licensed design professionals to create

engineering and architectural plans. Existing law already bars public owners from making contractors assume responsibility for the design of stormwater plans. The bill also clarifies and codifies the intent of the permit designation of project owners as the Legally Responsible Party."

The sponsors of this bill indicate that they are unaware of any litigation being brought as a result of local agency practices, and are seeking a legislative solution, instead.

- 6) **Contracting Agencies' Perspective.** According to staff at the State Water Board, the practice of delegating development of a SWPPP to the contractor is neither new nor unusual. This is frequently the practice they see in construction projects that must obtain a Permit and develop a SWPPP. They note that the discharger, or the responsible party for the Permit, is named on the Permit and is always the owner/agency, not the contractor. Thus, responsibility for compliance with the Permit remains with the owner/agency, regardless of which party develops the SWPPP.

State Water Board staff also assert that most municipalities don't have the expertise to develop SWPPPs and don't have the resources to retain QSDs on staff. QSDs are typically employed by environmental consulting firms that perform the work of developing SWPPPs under contract, either with a contractor (which is more common), or with the owner/agency. (Some large contracting firms keep QSDs on staff, but many smaller firms also don't have the resources to do so.)

Local contracting agencies indicate that they often require contractors to design and submit SWPPPs because a contractor's plan or approach for construction dictates the sequence of excavation, backfill, and temporary stockpiling of material on a typical project. They contend that a contractor-designed SWPPP can incorporate an optimal construction sequence selected by the contractor and incorporate it into their SWPPP, thereby maximizing efficiency and reducing costs.

An owner-designed SWPPP would necessarily have to assume a sequence of excavation, etc. (and effects upon drainage) that might occur under one construction sequence/scenario. This might not be the optimum sequence that the contractor would elect to use (and would have incorporated into its own SWPPP plan). For this reason, it makes more sense to require the party actually responsible for the construction sequence of operations to be the one implementing its sequence into the design of a SWPPP. An owner-designed SWPPP would unnecessarily lock in all bidders to one single type of construction sequence/plan envisioned by the owner prior to the bid opening, one that might not necessarily be the lowest cost option.

- 7) **State Mandate/Reimbursement Language.** This bill finds that there is no mandate contained in the bill that will result in costs incurred by a local agency or school district for a new program or higher level of service that require reimbursement. However, the Senate Appropriations Committee noted the following in its analysis of this bill: "By prohibiting a public agency from requiring a contractor on a design-bid-build project to develop a SWPPP or assuming responsibility for completeness and accuracy of a plan, this bill effectively forces the public agency to prepare a SWPPP in-house, or to contract with another entity to perform those functions, prior to soliciting bids for the construction of a project...SB 1170 would shift full legal responsibility for construction project water quality, and make public

entities responsible for violations of permit requirements, even if the contractor was at fault for a discharge.

"Local agencies would likely...incur additional costs on public works projects...Some of these costs would be mitigated by lower bids on construction contracts since contractors would not include costs to prepare a SWPPP in their bids, which are typically marked up to mitigate risk factors. However, these costs and additional risk and liability factors would be shifted from the contractor to the local agency. Whether any increased local costs would be subject to reimbursement from the state is unknown, and subject to a determination by the Commission on State Mandates that the bill's requirements constitute a higher level of service. Staff notes that the California Supreme Court has opined that 'simply because a state law or order may increase the costs borne by local government in providing services, this does not necessarily establish that the law or order constitutes an increased or higher level of the resulting service to the public under article XIII B, section 6, and Government Code section 17514.' (San Diego Unified School Dist. V. Commission on State Mandates (2004) 33 Cal.4th 859, 877).

"Staff notes that while the bill includes a legislative finding that it contains no mandate that will result in costs incurred by a local agency or school district for a new program or higher level of service which require reimbursement, the Legislature cannot limit a constitutional right to reimbursement through a finding that an act does not impose a mandate. The Commission on State Mandates has cited several decisions where the courts have determined that the evidence contradicts what is in statute. For example, the courts noted in Carmel Valley Fire Protection District v. State of California (1987) 190 Cal.App. 3rd 521, 541, that the Legislature itself concluding that costs are not reimbursable through findings, disclaimers, and control language is a 'transparent attempt to do indirectly that which cannot lawfully be done directly.' In addition, in Long Beach Unified School District v. State of California (1990) 225 Cal.App. 3rd 155, 184, the courts noted, in reference to a finding by the Legislature that an Executive Order does not impose a state mandated local program, that unsupported legislative disclaimers are insufficient to defeat a constitutional right to reimbursement.

"To the extent the Commission finds that the bill imposes a higher level of service, and identifies local costs that are subject to reimbursement, this bill could result in significant General Fund costs."

- 8) **Previous Legislation.** AB 1315 (Alejo) of 2015 was similar to this bill, but AB 1315 did not exempt state agencies or contracts using alternate procurement methods, did not specify it was declaratory of existing law, and did not include language finding that there was no mandate in the bill. AB 1315 was held in the Assembly Appropriations Committee.
- 9) **Arguments in Support.** The Associated General Contractors, sponsor of this measure, write, "SB 1170 ensures that adequate resources are allocated to the pollution prevention planning process by clarifying that local agencies are responsible for the preparation of Stormwater Pollution Prevention Plans ('SWPPP') required on public works projects. SB 1170 prohibits local agency owners from delegating responsibility to contractors to assume responsibility for SWPPP design.
"Some local agencies have raised objections to SB 1170, claiming that shifting stormwater responsibility to contractors are a longstanding practice under the revised stormwater permit

process. This is not true. The State Construction Permit was updated in 2009 by the State Water Resources Control Board and took effect July 1, 2010. Among the many changes, the State Board adopted the 2006 Blue Ribbon Panel of Experts recommendation to develop specific and appropriate training of Storm Water Pollution Prevention Plan (SWPPP) personnel. A qualified SWPPP Developer (QSD) certification is required to design and certify a SWPPP. A Qualified SWPPP Practitioner (QSP) certification is overseeing of actual infield SWPPP implementation. This was not required prior to 2010, just five and a half years ago – hardly a long standing time frame.

"Also, contrary to arguments by the local agencies, the contractor is not in the best position to design the stormwater plan. An owner's QSD is best suited to design a robust SWPPP given a better understanding of the local topography, hydrology and site. Most projects are planned and designed over a period of 12 months or more. This process includes a geology and hydrology study, and civil engineering of storm drain systems to carry and control runoff. This robust planning and design process is when the SWPPP is best prepared. SB 1170 makes it so."

- 10) **Arguments in Opposition.** The Association of California Healthcare Districts, the Association of California School Administrators, the Association of California Water Agencies, the California Association of School Business Officials, the California Association of Sanitation Agencies, the California Municipal Utilities Association, the California School Boards Association, the California Special Districts Association, the California State Association of Counties, the California State University, the Coalition for Adequate School Housing, the League of California Cities, the Rural County Representatives of California, the Three Valleys Municipal Water District, and Urban Counties of California, in opposition to this bill, state, "SWPPPs must be written, amended and certified by qualified personnel who are knowledgeable in the principles and practice of erosion and sediment controls and possess the skills needed to assess conditions at the construction site that could impact stormwater quality. Public agencies rely on the expertise of qualified SWPPP developers, known as QSDs, to conduct this work, as agencies do not have the resources nor the regular workload required to employ such personnel throughout the year.

"SWPPPs are currently created in accordance with the general contractor's construction plans. As construction progresses, SWPPPs must often be modified to accommodate the constantly changing conditions of a construction site. The general contractor is in the best position to create the construction plan and contract for the corresponding SWPPP. A general contractor-developed SWPPP can incorporate an optimal construction sequence selected by the contractor, thereby maximizing efficiency and reducing costs.

"SB 1170 would turn this standing process on its head by prohibiting public agencies from contracting with the general contractor to develop a SWPPP and statutorily restricting their remaining options to an engineer or architect. A separate entity developing a SWPPP would have to assume a sequence of work that might occur under one construction scenario but not another. Public agencies, engineers and architects simply do not have the direct control over the day-to-day construction, let alone the expertise, to perform this function.

"Ultimately, the success or failure of a SWPPP lies with the general contractor carrying out the plan. If the Legislature statutorily shifts the development and liability of the SWPPP to the public agency, or to a design professional or architect, it will create confusion and

conflict within the public works process. SB 1170 will only further disconnect the entity responsible for the development of the SWPPP from the entity that performs the work related to the SWPPP. This is akin to asking the public agency or design professional to separately plan and contract for the security of the general contractor's equipment on the job site, the number of portable restrooms needed or any other function that is intimately connected to the performance and sequence of a construction project."

REGISTERED SUPPORT / OPPOSITION:

Support

Associated General Contractors [SPONSOR]
California Chapters of the National Electrical Contractors Association
California Legislative Conference of the Plumbing, Heating and Piping Industry
California Precast Concrete Association
California Professional Association of Specialty Contractors
California State Council of Laborers
Norther California Allied Trades
United Contractors
Wall and Ceiling Alliance

Opposition

Association of California Healthcare Districts
Association of California School Administrators
Association of California Water Agencies
California Association of Sanitation Agencies
California Association of School Business Officials
California Municipal Utilities Association
California School Boards Association
California Special Districts Association
California State Association of Counties
California State University
Cities of Camarillo and Laguna Hills
City and County of San Francisco
Coachella Valley Water District
Coalition for Adequate School Housing
Counties of Contra Costa, San Diego, San Joaquin and Yuba
League of California Cities
Rural County Representatives of California
San Francisco Public Utilities Commission
Santa Clara Valley Water District
Three Valleys Municipal Water District
Urban Counties of California
Western Placer Waste Management Authority

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