

White Paper on Public Policy Options for Water Quality Improvements in the Critical Coastal Areas

by
The Association of Bay Area Governments
and the San Francisco Estuary Institute

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Introduction

Thousands of species of fauna and flora, hundreds of miles of beaches, and scores of streams and lagoons are just some of the features of California's biologically rich coast. In order to maintain this astounding biodiversity, coastal water quality must be protected. The Critical Coastal Areas Program is a non-regulatory program designed by those agencies tasked with implementing programs to meet applicable water quality standards to protect these natural resources - the California Coastal Commission (CCC), the State Water Resources Control Board (SWRCB), and their partners in federal, state, regional and local government. Specifically, the program was developed as a non-regulatory means to address threats to coastal water quality by diffuse (or "non-point") sources. Critical Coastal Areas (CCAs) are impaired or sensitive coastal waterbodies that need the implementation of management measures to maintain or improve beneficial uses. (For detailed background information on the CCA program, see Appendix 1). "Management measures" are defined in CZARA section 6217(g)(5) as "economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives." Management measures can be successful, or not, depending on the existence of practical policies at all levels of government.

While the CCA program so far focuses on watershed assessment and development of recommendations to protect or restore coastal waters, the implementation of those recommendations is dependent on the analysis of sometimes-conflicting public policy¹. For example, longstanding flood control policies direct runoff to streets and storm drains as fast as possible to prevent localized flooding. Continuing to employ practices that address those flood control policy objectives could conflict with newer policies aimed at encouraging more natural infiltration of runoff to protect receiving water quality from urban pollutants. Examination of the impacts of traditional strategies² has shown that directly connected impervious surfaces have significant detrimental effects to water quality by increasing the flow rates and quantity of runoff in natural stream reaches causing excessive erosion and moving land-based pollution into water bodies.

To evaluate whether policies are practical and effective, it is useful to ask the following questions: Are policies designed in a manner that incentivizes behavior change rather than the status quo? Can policies be implemented with relative ease? Are they sufficient to accomplish an agency's goals, or are new or revised policies needed? Are there aspects of existing policies that unintentionally work against reducing NPS pollution and protecting recreational and natural resources (for example addressing public safety concerns when determining street width without also considering the impact of additional impervious surfaces)? Do existing policies impede progress toward common public goals, or do conflicting policies keep us from moving forward? To help answer these and similar questions in the context of the CCA program, we will draw on examples and analysis from three pilot projects in the San Francisco Bay and central coast regions of California³ (Figure 1).

¹ "Public policy", for the purposes of this paper, is defined as the suite of decisions and programs implemented by government agencies to manage the resources under their jurisdiction.

² e.g. Schueler, T.R. 2000 in Schueler, T.R. and Holland, H.K., eds. 2000. "The Importance of Imperviousness" *The Practice of Watershed Protection* Article 1. Ellicott City, MD. Center for Watershed Protection

³The three pilot areas are Watsonville Slough CCA, Sonoma Creek CCA, Fitzgerald Marine Reserve CCA

This paper has two main goals: (1) to bring together related public policy and planning topics in one place for examination, and (2) to assist involved stakeholders⁴ who, either by statute, regulation, or voluntary means, intend to implement proposed practices in evolving “Action Plans” for beneficial use protection. The audience for this paper therefore consists of first, those representatives of government agencies who develop Action Plans that specify management measures and who may have encountered barriers in their efforts. The second audience for this paper includes the people who implement the management measures identified in the Action Plans. These include agency staff with less responsibility for planning and more for implementation (engineers, maintenance staff, etc.), private and public landowners, non-profit organizations, and the general public). For this second audience, this paper will provide some insight into the barriers that agencies face every day, and hopefully will inspire more innovative collaboration among groups to overcome such hurdles and progress towards the common goal of beneficial use protection.

The authors evaluated public policy issues associated with three pilot CCAs to identify which issues are common to many coastal communities. This report drew on information gathered during interviews with key stakeholders and managers about the challenges they faced. Certain public policies and government practices create incentives for innovation in environmental management while others create barriers to the implementation of programs like CCA. Another consideration in this paper is the way in which land use policy can cut across several land uses – urban, agricultural, transitional (e.g., rural to urban), military, rural residential and coastal recreation. Formally instituting low impact development (LID) techniques as standard operating procedure is an example of a public policy that can be employed across a range of land uses. Through appropriate site design using retention, detention, and /or infiltration, LID sites mimic a more natural hydrologic regime. For instance, using permeable pavement in a parking lot and treating excess stormwater runoff in a bio-swale increases infiltration of rain and removes pollutants from runoff before the runoff enters the stormwater system.

The project’s technical team⁵ members observed that public policies often relate to multiple disciplines – the biological sciences and the social sciences, including political science, urban planning, economics, cultural anthropology and social psychology—creating inter-disciplinary challenges in some cases, and exciting possibilities in others. For example, if public policy “solutions” do not accomplish what they set out to do, or can’t be effective due to current social and political climates – there may be a need to involve those who are schooled in the theory and practice of individual and institutional change, rather than public policy-making. These individuals are usually activists, “change agents,” or “champions” who understand the dynamics of power and authority, communities and institutions.

Sometimes the zeal and talent, willingness to take chances, ability to move beyond special and parochial interests, resource availability and program alternatives come together in just the right mix to create an exemplary public enterprise. Both the Elkhorn Slough and Morro Bay nonpoint pollution control efforts are commonly regarded as such enterprises, where standoffs were avoided and common interests were identified and acted on – although each also experienced growing pains. In both cases, diverse teams developed plans that garnered widespread support and have moved into the implementation phase.

⁴This paper does not address the workings of stakeholder processes, or, in detail, the public policy issues related to them.

⁵ The CCA Technical Team is comprised of agency staff from the CCC, SWRCB, Regional Boards 2 and 3, BCDC, and consultants ABAG and SFEI. The team provides guidance to the consultants for their Prop 50-funded grant.

It is notable that several efforts relevant to this policy analysis have been undertaken on both a statewide basis, and for individual watersheds. The SWRCB recently performed a similar analysis aimed at identifying regulatory and institutional nonpoint source control barriers to statewide implementation of low impact development techniques⁶. San Mateo County (home of the Fitzgerald Marine Reserve CCA) is also examining how to fill public policy gaps identified by the FishNet study⁷, which is focused on policy barriers to protecting steelhead habitat in [Mendocino](#), [Sonoma](#), [Marin](#), [San Mateo](#), [Santa Cruz](#) and [Monterey](#) Counties. The County is updating its Local Coastal Program and stormwater management program. The Southern Sonoma Resource Conservation District is busy updating its Sonoma Creek Watershed Enhancement Plan, and a steering committee for the Watsonville Sloughs CCA is revisiting technical and public policy analyses prepared in 1995 and 2003 by local government consultants and the Association of Monterey Bay Area Governments. Santa Cruz County is examining all of its cross-program commitments relative to a proposed Santa Cruz County / City of Watsonville Phase II stormwater permit. While these examples focus on various smaller areas of policy analysis in the CCA pilot counties, if results are combined, they provide helpful background information that has contributed to this paper and could be used towards future, broader policy analysis exercises.

This paper is divided into three sections, each covering one major public policy issue that has affected, in one way or another, the implementation of the CCA program's goals in the three pilot areas. First, it examines barriers to low impact development in the CCAs. Then, it looks at stormwater and flood management challenges. Lastly, it considers problems stemming from a lack of resources. These three topics were chosen by the authors for their relevance to all three pilot CCAs and to most other coastal communities across the state. In addition, these three issues were all brought up as priorities at public workshops organized by the authors and held in the three pilot areas in 2007. Major regulatory programs such as Phase I and II stormwater programs and Areas of Special Biological Significance (ASBS) are examples of important programs related to coastal water quality protection, but are not common among all three CCAs or across the state. The recommendations included in this paper are intended to serve as reference for local agencies to better manage their water resources.

⁶ Gearheart, Greg 2007. *A Review of Low Impact Development Policies: Removing Institutional Barriers to Adoption*. Low Impact Development Center: Beltsville, MD (Prepared for the State Water Resources Control Board Stormwater Program and the Watershed Academy)

⁷ Harris, R.R. and S.D. Kocher. 2006. Local agency policies and procedures for protecting steelhead habitat: San Francisquito watershed, Santa Clara and San Mateo Counties, California. University of California, Center for Forestry, Berkeley, CA. 58 pp. + app.



Figure 1. CCA Pilot Areas. The sites circled in yellow (Fitzgerald Marine Reserve, Sonoma Creek, and Watsonville Sloughs) are the case studies referenced in this paper.

Barriers to Low Impact Development

Low impact development (LID), as a project- and program-related element, has broad relevance and is worthy of public policy evaluation in each of the three pilot CCAs. Unlike what has become known as “best management practices” to reduce pollutants in stormwater runoff, LID is based on a broader design approach that can enhance the ability of developed landscapes to protect surface and ground water quality, maintain the integrity of aquatic living resources and ecosystems, and preserve the physical integrity of surrounding habitats. Through appropriate site design, LID either maintains or creates a hydrologically functional landscape that mimics a more natural hydrologic regime.

This objective is accomplished by:

- 1) encouraging innovative alternatives to traditional stormwater infrastructure that are cost effective and environmentally sensitive;
- 2) employing a variety of stormwater detention, retention and treatment measures dispersed throughout a site’s landscape; and
- 3) slowing runoff and infiltration rates to more natural (i.e., pre-development) rates by strategically routing flows to maximize travel time and control the rate of discharge to receiving bodies.

Some of the more common LID solutions are a landscape-appropriate mix of: replacing pavement with permeable pavers; reducing impermeable surfaces on a specific site; harvesting rainwater in cisterns of various capacities; establishing water-smart landscaping; planting rain gardens; retrofitting built-out cities with stormwater planters, curb extensions, and similar treatment systems; unearthing stormwater pipes and restoring natural creek channels and /or providing more naturalistic flood control channels.

The general conclusion from the research conducted for this paper is that there are few, but in some cases fairly strong, impediments to implementing LID in new or redeveloped projects in the three pilot CCAs, and there are many opportunities to improve policies to increase the amount of LID within a jurisdiction. Common challenges (or impediments) that explain the lack of low impact development (LID) implementation in California are listed in Table 1. Table 2

All jurisdictions adopt and implement general plans, specific plans, ordinances, and other policy documents. Some of those within the CCA communities include the Sonoma County, Santa Cruz County and San Mateo County General Plans; military facility management documents; Local Coastal Programs (e.g., San Mateo County Local Coastal Program Update); stormwater permits (e.g., Watsonville Municipal Stormwater Permit); and the new Municipal Regional Permit for the Bay Area. To assist those charged with implementing policies, a number of jurisdictions, including San Mateo, Contra Costa and Alameda counties, Emeryville, and the City and County of San Francisco have developed guidance documents. As an example, San Mateo County published the excellent San Mateo County Sustainable Green Streets and Parking Lots Design Guidebook⁸

Despite many good examples, the Bay Area lags behind jurisdictions like Portland and Seattle, which have been committed to LID for many years, and have implemented hundreds of LID projects. If CCAs and other Bay Area communities adopt pilot programs

⁸ *San Mateo County Sustainable Green Streets and Parking Lots Design Guidebook*. Prepared by Nevue Ngan Associations and Sherwood Design Engineers for the San Mateo Countywide Water Pollution Prevention Program, January 2009.
<http://www.flowstobay.org/documents/municipalities/sustainable%20streets/Title%20Page-Ex-Summary.pdf>

and LID-friendly policies, we believe the Bay Area can bridge the gap with those cities to the north.⁹

Table 1. Common challenges that explain the lack of low impact development (LID) implementation in California

a)	The lack of resources in planning agencies and building departments to learn about and implement new measures to address another element in an already complex menu of federal and state requirements.
b)	The uncoordinated nature of some local government programs, where municipal and county ordinances and codes were established in stages without adequate inter-departmental consultation, has resulted in unintended water quality consequences and slowed LID implementation. For example, setting street width requirements to accommodate the largest emergency response vehicles in the state, and establishing minimum numbers of parking spaces per residential unit and for commercial and retail projects work against reduction of impervious area.
c)	A knowledge gap between progressive and innovative private developers, architects, and builders, and agency staff who review and permit projects, can lead to costly permitting and approval delays.
d)	The lack of documentation to demonstrate to local jurisdictions and developers how LID features add value to projects from both short- and long-range operations and maintenance perspectives. ¹⁰ Given fiscal constraints, alternative stormwater management approaches need to have at least a cost-neutral (if not cost-savings) bottom line over the lifetime of the project for local governments. Cities in Oregon and Washington have documented these costs savings.
e)	Natural limitations to site design and soil condition prompt questions such as: is the underlying soil structure able to infiltrate stormwater within a reasonable period of time to comply with no net changes in pre-development hydrology ¹¹ ? How might certain water quality problems be exacerbated should the LID facilities malfunction or fail? What percentage of each developable site will be required for stormwater storage or filtration (how much and which part of a site will be off-limits to construction and thus, affect profit for the developer)?
f)	Questions about whether private property owners can operate and maintain LID features over the long-term.

To get around these perceived constraints to the application of LID, public agencies and public lands managers should consider the following strategies:

Table 2. Strategies for improving use of Low Impact Development (LID) measures in public and private development projects

a)	Train staff. Establish outreach and incentive programs for developers and landowners to inform and motivate them to implement and monitor LID techniques
b)	Identify publicly-owned parcels with stormwater storage and re-use potential and other relevant features. Use simple forecasting tools to predict potential load reductions and

⁹ Because LID guidance documents function like policy (another example is the State Office of Planning and Research California Environmental Quality Act guidance documents), and often reference a series of relevant policies, we assume that they fall under a public policy category.

¹⁰ The “beneficiary pays” principle was a hallmark of California’s CalFed Bay-Delta program and represents an effort to assign the costs of project development, operations and maintenance to those who benefit economically.

¹¹ Clay soils pose greater challenges for infiltration than sandy or loamy soils. Nevertheless, they can be amended to function in stormwater management programs. See Dreelin, Fowler and Carroll, Center for Water Sciences and Department of Fisheries and Wildlife, Michigan State University, Jan. 19, 2006, “A test of porous pavement effectiveness of clay soils during natural storm events.” Distinctions should be made among clay soil types in coastal areas, however, in order to design site-specific infiltration strategies. The rate of water penetration in clay soils is slower than in coarser material, and retention areas may need to be larger to compensate. This can pose challenges in urban areas where space is at a premium and cost is a concern.

cost savings for application of LID on those parcels, e.g., UC Davis's Center for Water and Land Use Stormwater Runoff Volume Calculator. ¹²
c) Include policies in general plans or city by-laws to establish a comprehensive approach that integrates planning for water conservation, water quality, flood control, habitat protection, and watershed management.
d) Incorporate LID as a standard requirement in building codes.
e) Develop high-visibility demonstration projects to show the function and value of LID

In planning for the soon-to-be-constructed pervious pavement parking lot and other LID features at the Fitzgerald Marine Reserve Visitor's Center in San Mateo County, the County considered some of the strategies in Table 2 to begin to address implementation challenges. The Visitor's Center is a publicly-owned facility. The improvements will serve as a high-visibility demonstration project for staff and visitors. Staff and stakeholders will have the opportunity to learn about, implement and monitor a variety of LID techniques. This project fits within the County's Sustainable Green Streets and Parking Lots initiative and serves as an example of multi-benefit LID implementation.¹³

Stormwater and Flood Control Management Challenges

Stormwater management and flood control programs are typically managed by public works departments; however, some municipalities are beginning to take a different approach. San Mateo County recently appointed a cross-departmental Mid-Coastside Stormwater Drainage Committee. This committee works with the Department of Public Works to implement the stormwater permit that is held by the City/County Association of Governments (C/CAG). In Santa Cruz County, the Environmental Health and Planning programs integrate their efforts with the Public Works Department where possible. Sonoma County's stormwater permit is jointly held by the Sonoma County Water Agency and the County Permit and Resource Management Department (which includes a division for Transportation and Public Works).

Stormwater management has improved in recent years due in part to the more prescriptive requirements of federal and state stormwater regulations and to local initiatives. California has recently re-issued its Construction Stormwater Permit. One provision of the permit is a Post-Construction Stormwater Performance Standard that requires sites outside of municipalities with stormwater permits to avoid, minimize, and/or mitigate post-construction stormwater runoff impacts. Sites developed in municipalities with permits are regulated by the local permit. As a result, construction sites throughout the state must minimize impervious surfaces and drainage system density that lead to erosion or the transport of pollutants in stormwater as demonstrated in Figures 2 and 3.

¹² See http://extension.ucdavis.edu/unit/center_for_water_and_land_use/low_impact.asp to download the tool and instructions.

¹³ <http://www.flowstobay.org/documents/municipalities/sustainable%20streets/Title%20Page-Ex-Summary.pdf>



Figure 2 Montara flooding, winter 2006



Figure 3 Sonoma Creek-related stormwater flows, winter 2007

Public works programs in the pilot CCAs have taken a few common steps toward understanding the major issues of development and stormwater. These include identifying the amount and distribution of impervious surfaces; identifying (and in some cases, mapping) local stormwater collection systems (or areas that function that way); and gaining a better understanding of how too much impervious surface significantly damages a watershed. Identifying and mapping problem areas within a watershed are important components of integrating stormwater, hazard mitigation, and flood control programs. However, identifying the problems has not necessarily resulted in the adoption of the policies plans, or programs that are needed to increase implementation of LID projects.

San Mateo County has responded to stormwater concerns – flooding, sediment, and pathogens - with a high-level community response to extreme flooding problems in the mid-coast region¹⁴. The Coastal Commission is working with San Mateo County on a winter grading ordinance as part of the LCP update, as well as policies to minimize the creation of impervious surfaces directly connected to the storm drain system. The county is also drafting a watershed protection ordinance in an attempt to integrate watershed management and water quality control. Stream buffer requirements are under discussion as part of this policy development, which may limit the extent of imperviousness within each county watershed. However, within the San Mateo CCA study area, flooding and sediment transport continue to occur as a result of soil disturbance in a variety of land uses and stream courses, undersized storm drains and culverts, and construction in vulnerable cliff and sloping areas. In all areas of the mid coast, strong Pacific storms and the presence of Montara Mountain can create flash flood-like conditions for which there is little control. Finally, infiltration of stormwater into conventional sewage collection and treatment systems remains a very large problem in San Mateo County's Mid Coastside.¹⁵ Absent a substantial public investment – requiring re-prioritizing existing programs, major loan commitments, or the development of new public policy and programs– these problems will only worsen.¹⁶ Storm drain mapping can help with the identification of areas susceptible to rupture, overflow and leakage, and infrastructure junctures where stormwater and sewer

¹⁴ Mid-Coastside Stormwater Drainage Committee, San Mateo County

¹⁵ In part II of this analysis, there will be a separate discussion of the public policy challenges facing publicly owned treatment works (POTWs).

¹⁶ Grant funding for infrastructure development, installation and maintenance is available in the State of California through a variety of competitive programs and through the state's revolving fund loan program. The competitive nature means that this funding is inherently unreliable for project planning and implementation. For this and other reasons, there are repeated calls for incorporation of unincorporated areas of pilot counties. See 2008 San Mateo County LAFCO decision.

http://www.sanmateolafo.org/smc/departments/es/home/0,,5526264_5530410,00.html

infrastructure may commingle. Such mapping can also assist in identifying areas where opportunities exist for stormwater detention and “harvesting”.¹⁷

Although Sonoma County has an aging infrastructure, it has accurate maps of stormwater drainage features, including urban, rural and residential water collection features that function like storm drains. However, areas where stormwater might be detained have not been identified.¹⁸ Maps that capture these features would help to determine solutions to flooding and sewage overflow problems and help planners identify alternative means for capturing stormwater. For example, pipeline cracks and joint offsets allow stormwater to infiltrate into sanitary sewer lines or for the reverse to occur. This dramatically increases the volume flowing to a treatment plant. In extreme wet weather events pipe capacity may be exceeded resulting in a sanitary sewer overflow or flooding. These problems were starkly illustrated by the flood of New Year’s Eve, 2005-6. Accurate maps can help planners identify opportunities to use alternative means to capture stormwater and mitigate flood risk or reduce infiltration into the sewer system.

This can either occur through priority-setting and budgeting at the local level, or through permitting requirements imposed by the state. The Sonoma County Water Agency, which owns much of the infrastructure in the watershed, may need to work with the city of Sonoma on a special basis to identify and apply for funding and technical assistance to address the problem. A public policy initiative could prompt this specific work, but is not required for the jurisdictions to continue moving forward. The Local Agency Formation Commission (LAFCO) provides a forum for such discussions as part of the state mandated Municipal Service Review process¹⁹.

In addition to sewage overflow issues related to stormwater runoff, Sonoma County also has legacy roads from logging and other resource extraction purposes in state park lands that were often haphazardly constructed, leading to frequent “washouts” that have consistently carried sediment into stream courses during wet weather or caused hillslope and catastrophic road failures. There is an opportunity to reduce erosion and protect streams from inundation through proper retirement. Road retirement consists of rehabilitating hillside and canyon gashes by re-contouring and vegetating, or otherwise stabilizing hillslopes where necessary. The state’s interest in funding road retirement efforts²⁰ suggests that existing public policy is not an obstacle to changing road conditions in the upper Sonoma Creek watershed, and, in fact, may be an approach that should be pursued aggressively.

In order to implement necessary stormwater management projects, Santa Cruz County and the city of Watsonville must address two needs. First, they must prioritize stormwater management projects already identified in multiple prior planning efforts.

¹⁷ Stormwater harvesting is the act of capturing stormwater runoff before its discharge into receiving waters, and using that water to recharge groundwater aquifers. The practice is most common in drier areas, which makes it applicable to most of California. The Orange County Water District has been harvesting stormwater runoff since 1949 (See Grenoble, P. B., 2007. Stormwater harvesting: a project survey. *Water Efficiency*, March-April 2007. Accessed at <http://www.waterefficiency.net/march-april-2007/harvesting-stormwater-runoff.aspx>)

¹⁸ A stormwater mapping effort was started for the CCA project (GIS files can be accessed at <http://www.sfei.org/cca/sc.htm>), however consultants found that certain newly developed areas of Sonoma Valley had incomplete or missing hardcopy maps and a comprehensive map for the county or valley did not exist.

¹⁹ This periodic review process in most Bay Area counties provides an overview and assessment of municipal services in an attempt to anticipate the types of land use and program changes that may be required in a given community, or group of communities and service areas Municipal Service Reviews for all participating counties can be found by linking off of the California LAFCO web site: <http://www.calafco.org/>

²⁰ Several bond-funded projects have involved road retirement, especially in the North Coast region, e.g., S.F. Elk River Erosion Prevention Project (PIN# 13015) and I- 23 : Steinacher Road Decommissioning-Phase III (PIN# 11272)

Second, the jurisdictions need to gain a better understanding of the hydrology of the sloughs and surrounding development so that environmentally-friendly stormwater management and flood control approaches can be implemented to benefit and protect private property values and public investments. Some of the perceived constraints that exist for LID implementation, for example, the slow rates of infiltration of clay soils, also apply to stormwater management concerns^{21,22}.

Dry weather stormwater management is another challenge. These flows, which may come from over-irrigation or leaking water conveyance infrastructure, often fall outside of the jurisdictions of planning and public works programs. Some public works departments have cited conflicting jurisdictions, policies, or a lack of funding²³ as reasons why they are not able to address dry weather flows. New municipal stormwater permits increasingly require local jurisdictions to take responsibility for managing non-stormwater flows that discharge through stormwater systems.

Public works and planning agencies (including state public works agencies) may have good intentions for effectively managing wet weather runoff for new development, but they may feel justifiably overwhelmed by the prospect of managing runoff from existing urban areas for reasons presented in Table 3.

Table 3. Common challenges that local agencies face in managing stormwater runoff in urban areas

a)	Redevelopment and retrofitting opportunities may remedy only a minor portion of the identified problem.
b)	Funding is very limited for needed management efforts (state bond funds, public works budgets and fees associated with new or redevelopment are rarely adequate to meet regulatory requirements and ongoing maintenance needs).
c)	Many local jurisdictions have recently carried out major infrastructure improvement programs related to federal requirements ²⁴ , and have no staff or funds to implement additional improvements.
d)	Community values and private property interests may conflict. ²⁵

Given these challenges, it is important to find ways for agencies to succeed beyond these perceived and real roadblocks. Several actions listed in the San Francisco Estuary Partnership's CCMP²⁶ could achieve large-scale coordinated stormwater management reform, including implementation of LID principles/ actions (Table 4) in Critical Coastal Areas as well as more widely throughout the Bay Area.

²¹ Robert Ketley, City of Watsonville Department of Public Works, Critical Coastal Areas 2007 meeting, Santa Cruz.

²² same as footnote #11

²³ See San Mateo County Counsel's comments on proposed changes to the State of California's Areas of Special Biological Significance public policy, dated August 15, 2006: "There is no mention in the Proposal of how this effort might be funded. The Proposal does not offer any source of funding from the State. Fees or charges to help pay for complying with the proposed requirements may have to be levied on property owners in the affected area if the Proposal is implemented."

²⁴ Curb cutting programs responsive to federal requirements, bulb-outs and public plazas responsive to Smart Growth advocates, and pathway development to meet recreational and public transit goals.

²⁵ A recent conflict on Watsonville Slough illustrates this point. A section of the channel has been periodically flooding farmland. The landowners would like the county to "maintain" the channel to prevent flooding, while other groups claim that the channel will flood no matter what and the landowners should allow for a more natural floodplain next to the channel. This example is a classic case of private property versus the natural tendency for channels to migrate and flood.

²⁶ San Francisco Estuary Project, 2007. Comprehensive Conservation and Management Plan. Available at <http://sfep.abag.ca.gov/ccmp.html>

Table 4. Actions from the San Francisco Estuary Comprehensive Conservation and Management Plan that lend themselves to regional applications of alternative stormwater management practices

CCMP Action #	Content
LU-1.5	Promote stormwater BMPs and guidelines for site planning
LU-1.6	Educate and train planners, public works departments, and builders on sustainable design and building practices
AR-4.10	Decrease adverse effects of dredging and flood control
AR-4.11	Protect remnant stream habitats
LU-1.1.1	Incorporate nonpoint source controls into local government and business practices
LU-2.3	Adopt and implement regional policies to protect and restore natural floodplains

A few regional and local efforts to improve stormwater management through integrated management plans include:

- a watershed ordinance in San Mateo County's unincorporated areas,
- several Integrated Regional Water Management Plans,
- the Bay Area and Pajaro Valley plans apply to the three pilot CCAs²⁷,
- the resource management planning process for the Golden Gate National Recreation Area, and
- the FOCUS program for dense development²⁸.

Other stormwater management strategies that agencies can employ are listed in Table 5.

Table 5. Strategies to move beyond stormwater management roadblocks for better integrated water quality projects

a)	Design conversion plans for impervious surfaces on a phased basis – with priority actions to occur where runoff rates are highest, or where they impact areas of special biological significance, for example.
b)	Create dedicated funding programs and easy access to grant and loan programs for water quality enhancement projects.
c)	Conduct a public outreach and education program to explain the social, economic and environmental value of modifying capital improvements and to encourage the public's help in preventing further impact on waterways.
d)	Incorporate runoff reduction and rain ²⁹ and stormwater harvesting ³⁰ into water conservation incentive programs.

Problems Stemming From Lack of Resources

Local jurisdictions within the coastal zone have made it clear that they are financially challenged to find sufficient economic resources to meet stormwater permit requirements.³¹

²⁷ Note: the Bay Area and Pajaro Valley plans apply to the three pilot CCAs.

²⁸ FOCUS is an effort of Association of Bay Area Governments (ABAG) the Metropolitan Transportation Commission (MTC), the Bay Area Air Quality Management District (BAAQMD) and the Bay Conservation and Development Commission (BCDC)—in partnership with congestion management agencies, transit providers, and local governments throughout the Bay Area.

²⁹ Rain harvesting is the act of collecting rainwater in cisterns or other containers and storing the water for later use, such as irrigating a garden. See <http://www.humboldt.edu/~ccat/waterconservation/karlaFA2003/>

³⁰ See Footnote # 19

There are many reasons why local government agencies lack sufficient funds to carry out their storm water and other water quality-related programs. Below is a summary of a few of the major impediments.

Local governments look to both the state and federal government for financial assistance for large infrastructure projects. The budgeting processes of both the state and federal governments make it difficult for local governments to make multi-year assumptions as to the availability of state or federal funds to support local projects. And, in an economic downturn, local sales taxes decline. It is not easy for municipalities to raise property taxes or add fees (Proposition 218 amended the California constitution, banning any assessment of fees without voter approval and restricting the use of such fees³²). For a more in-depth analysis of Proposition 218 and its impact, see Appendix 2.) Thus, local governments find themselves looking for loans and grants to address infrastructure issues.

Yet alternative options to fund storm water management are available that comply with Proposition 218 without requiring added effort to put an initiative on the ballot and spend precious money on promoting the issue. While resources are becoming available to help local communities follow the mandate³³ of the new law, more interpretation and technical assistance are warranted. Potential funding options pointed out by state government, associations of municipalities, and advisors to the state legislature are listed in Table 6.

Table 6. Funding options to fund stormwater management efforts that comply with Proposition 218

a)	Pursue a stormwater fee based on the amount of hard and impenetrable surfaces within urban and urbanizing areas (impervious surfaces) in an effort to assess properties for their respective contributions to the runoff problem. This was pursued by the city of Salinas. A similar option could also impose a fee on everyone who uses stormwater systems, and not just those who own improved property. ³⁴ Portland, Oregon uses an incentive program in which property owners are given credit for not discharging into the public stormwater infrastructure. The city of Sacramento has begun giving rebates to property owners who install rain gardens.
b)	Fund compliance programs with other revenues, including voter approved special taxes, property owner approved assessments, or other fee-based revenues. For example, San Mateo County took an alternative

³¹ San Mateo County Counsel correspondence dated Aug. 15, 2006 to the State Water Resources Control Board; 2007 interview with Richard Napier, Executive Director of C/CAG, San Mateo County; 2007 interview with League of California Cities' Prop. 218 expert, Betsy Strauss.

³² Interview with Betsy Strauss, attorney with the California League of Cities, 2/26/2008 "Cities are reluctant (to move forward with stormwater management fees) because it's not tested, and charter cities have the authority to create special benefit assessment districts – Bighorn has already established that this approach to public policymaking is property-related. This is undoubtedly why we are seeing a spate of special benefit assessment concepts surfacing around the state, including one in the City and County of San Francisco."

³³ See California Office of Planning and Research, "A Planner's Guide to Financing Public Improvements," chapter 3, Special Assessments, undated on www.ceres.ca.gov/planning/financing/chap3.html and California Legislative Analyst Office, "Understanding Proposition 218," Dec. 1996, www.lao.ca.gov/1996/120196_prop_218/understanding_prop218_1296.html

³⁴ Colantuono, Michael G., June 4, 2002, "Appellate Court Invalidates Salinas' Storm Water Fee." Publication of the law firm of Colantuono, Levin & Rozell, APC.

approach by adding a small surcharge to the vehicle registration fee in order to fund storm water programs. ³⁵
c) Restructure a property-related fee so that it would no longer be considered property related.
d) Demonstrate that a franchise fee or in-lieu property tax represents their water department's (for example) share of overhead costs.
e) Privatize certain municipal functions formerly financed by property related fees. Prop. 218 does not impose a limit on private fees.
f) Educate property owners about the advantages of the proposed assessment while being cognizant of the limits on public agencies' communications in elections.
g) Existing assessments "imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems, and vector control....." are <u>not</u> required to comply with Proposition 218. ³⁶

Conclusions and Possible Next Steps

We recommend that the Technical Team and Pilot Program Steering Committees work together with policy-setting and implementing agencies to use the recommendations of this paper to their benefit. Local "champions" may be able to make the most progress in encouraging agencies to determine any significant barriers to their programs and then develop appropriate plans for project implementation.

Emerging approaches leading to better integration of traditionally "stove-piped" governmental programs associated with infrastructure maintenance and re-development activities between public and private entities are encouraging (e.g., Pacific Gas and Electric, street maintenance, parks, sewer, and flood protection departments or districts, city architect offices, and many others with planning and implementation oversight). Local Agency Formation Commissions or other suitable government coordination bodies may want to encourage and support continuing integration efforts that could eventually lead to significant cost savings during multi-purpose infrastructure construction, renovation, and upgrade efforts. Examples include the coordination of under-grounding electric utility lines, water main or sanitary sewer upgrades, while retrofitting streets and sidewalks with low-impact development features, such as tree wells, pervious pavement, runoff harvesting and infiltration devices, or bioswales.

Several coordination and information exchange venues already exist at the regional and state level that could use issues raised in this White Paper as a starting point for prioritizing barrier removal for water quality improvement and aquatic resource protection efforts. They include the California Water and Land Use Partnership and a great number of regional LID forums. The coalitions and committees overseeing implementation and periodic updates of Integrated Regional Water Management Plans may also be a suitable forum for proposing appropriate policy adjustment mentioned in this paper (e.g. street width requirements and car-centric ordinances).

³⁵ The League of California Cities cites the novel efforts by C/CAG of San Mateo County to secure authorization in AB 1546 (2003) to impose an annual \$4 fee on motor vehicle registrations to fund traffic congestion and programs to mitigate stormwater pollution from roadways in the County (Gov. Code Secs. 65089.11 et seq. They report that a 2004 legislative effort to extend this approach to the 9-county Bay Area died in the state Senate, and Governor Schwarzenegger vetoed A.B. 1003.

³⁶ "A Planner's Guide to Finance Public Improvements," *supra*.

Appendix 1: Background on California's Critical Coastal Areas Program

This appendix supplements the attached white paper analysis of policy options in California's Critical Coastal Areas. It provides background information regarding the CCA program, the agencies behind it, and current progress.

"In 1990 Congress identified nonpoint source pollution as a significant factor contributing to coastal water degradation, noting the link between coastal water quality and land use activities. In response, Congress amended the Coastal Zone Management Act (CZMA) by passing the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). Section 6217 of CZARA requires each state's coastal zone management agency -- in the case of California, the Coastal Commission -- to develop and submit a coastal nonpoint source pollution control program. The legislation requires that a state's coastal nonpoint source pollution control program contain a continuing process for identifying "critical coastal areas" adjacent to coastal waters where there is a failure to attain or maintain applicable water quality standards, and for those coastal waters that are threatened by reasonably foreseeable increases in pollution loadings from new or expanding sources.

The CCA Program is designed to identify coastal areas where water quality is threatened or impacted by new or expanding development and to accelerate the implementation of The Plan for California's Nonpoint Source (NPS) Pollution Control Program (California NPS Program Plan) so that water quality is protected or restored. Through this program the state has identified one hundred and one (101) areas of the coast for **accelerated implementation** (emphasis added) of appropriate NPS Management Measures (MMs)³⁷.

The CCA program also begins to implement the recommendations of several state and federal statutes and initiatives -- e.g., Coastal Zone Management Act and Coastal Zone Act Reauthorization, amendments, California Ocean Initiative, U.S. Commission on Ocean Public policy, and the Pew Oceans Commission -- to address the

³⁷ Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 requires developing "Management Measures" beyond those already identified in the general federal guidance if such measures are necessary to protect against current and anticipated nonpoint source pollution problems. In 1995, the Coastal Commission submitted a program to meet these requirements.³⁷PT Due to the importance ascribed to them and to their building block nature, it's important to define management measures :

"Management measures" are defined in CZARA section 6217(g)(5) as "economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives."

detrimental impacts of onshore activities on coast and ocean resources.”³⁸

A group of state agency representatives with interest in improving water quality along the coast identified a set of pilot projects (of the 101 CCAs mentioned above) for early funding and to test implementation of the objectives. The criteria used to identify a coastal watershed as a CCA are as follows:

- 1) It has a 1998 303(d)-listed impaired coastal water body; AND
- 2) Flows into a Marine Managed Areas (MMA), or in San Francisco Bay, flows into a Wildlife Refuge or Waterfront Park/Beach; OR
- 3) Was on the original 1995 CCA list, comprised of watersheds that flow into a 1994 303(d)-listed impaired bay or estuary.

In addition, all waterbodies that flow into a marine State Water Quality Protection Area (SWQPA, also known as an Area of Special Biological Significance, ASBS) are part of the CCA list.³⁹

Action Plan Development

While important to the nation and the state economy and to public and long-term environmental health, these significant program objectives haven’t always been matched with appropriate resources to do the job. With much of California’s development occurring in the coastal zone⁴⁰ the task of addressing existing development is an immense one. State of California program managers have nevertheless moved the effort steadily forward,⁴¹ even in the face of daunting land use challenges and sparse federal funding due to competing Congressional and agency budget priorities. Non-governmental organizations have pitched in to promote the program and fund it in partnership with the California State Water Resources Control Board. This public policy analysis is funded by a Proposition 50 grant awarded to the San Francisco Estuary Institute to help advance the Critical Coastal Areas Program into an implementation stage.

As originally envisioned, committees comprised of a variety of interests were to develop a CCA Action Plan designed to protect and improve water quality in the CCA by implementing appropriate Management Measures. These committees were envisioned to bring their perspectives, staff experience and expertise to the table to accelerate the implementation of The Plan for California’s Nonpoint Source (NPS) Pollution Control Program (California NPS Program Plan). In practice, action plan development has been slower than envisioned, due to:

- complex nature of stakeholder processes
- perceived duplication of effort (in one case, a TMDL program was already in place)
- plan “ownership” issues and the role of stakeholder interests, and

³⁸ Ridolfi, K., Rainer Hoenicke, Kathleen Van Velsor, 2007. Critical Coastal Areas Program, Phase I Final Report. SFEI Contribution 541. San Francisco Estuary Institute, Oakland, CA.

³⁹ Identification Criteria Applied to Specific CCAs, Critical Coastal Areas web page, undated. http://www.coastal.ca.gov/nps/Web/cca_criteria.htm

⁴⁰ Pew Oceans Commission, 2003. *America’s Living Oceans: Charting a Course for Sea Change*. Pew Oceans Commission: Washington, D.C.

⁴¹ Al Wanger, Chief, Water Quality Unit, Calif. Coastal Commission, 3/3/08

- time it has taken to fully integrate the grant program concepts into steering committee thinking and existing work programs.

In the absence of formal “early action plans”, project or program concepts for implementation have surfaced as a result of technical reviews of available information. Action plan development in each of the three pilot CCAs is under discussion, however, and several tangible project proposals are emerging. In several cases, projects and programs are driven by related public policy developments or additional assessments — a) the Sonoma Creek CCA for example, with its sediment TMDL Plan up for public review in Spring 2008, b) the Watsonville Sloughs CCA and its identified need for definitive hydrologic studies and documentation of existing urban BMPs, c) the Fitzgerald Marine Reserve CCA and its ongoing assessment of water quality and hydrologic conditions, and d) Air Force, San Mateo County and Caltrans alternatives analyses associated with discharge prohibitions to the FMR Areas of Special Biological Significance.

A Watershed Management, Coastal Processes and Land Use Approach

The CCA program is a relatively new institutional framework in the State of California with collaborative, information-sharing and inter-agency coordination features. The program is redefining itself as it gains experience with different landscapes and shorelines, institutional players and their respective stakeholder interests within the coastal communities of California.

The program relies largely on new and existing stakeholder processes, loaned and partitioned agency staff and consultants to carry out its mission. In several cases, the pilot effort builds extensively on the work of Resource Conservation Districts and environmental non-governmental organizations. The CCA process does not rely on formal inter-agency agreements, but it is subject to administrative and legislative review.

This collaborative effort is guided by a “non-regulatory” approach,⁴² while acknowledging the regulatory roles that its agency members normally play in the control and management of land-based sources of pollution to coastal waterways. The hybrid and contrasting nature of this program has posed decision-making and communications challenges⁴³, leading to conversations about when regulatory functions are normally engaged, how new information may be used, and generating requests that the participating agencies spell out the nature of regulatory versus non-regulatory functions within the CCA.⁴⁴ In one case, a lead stakeholder group has called for a Memorandum of Understanding (MOU) to more fully define roles and relationships, and to capture concerns about private property issues in the process.⁴⁵ Some agencies of government have signed the MOU, while others are not signatories out of a concern for compromising their responsibilities and prerogatives under State law.

A hallmark of the Critical Coastal Areas program is its watershed-based approach to the control of land-based sources of marine and estuarine pollution. A CCA may encompass a single watershed or multiple watersheds and sub-watersheds. Another program hallmark is an emphasis on characterizing land uses and land use

⁴² Communications with Coastal Commission staff, 2006-2008.

⁴³ For example, when regulatory actions occur during the development phase of a CCA.

⁴⁴ Draft Memorandum of Understanding, San Mateo County Resource Conservation District, Fitzgerald Marine Reserve CCA #29.

⁴⁵ The CCA Memorandum of Understanding replicates MOUs employed by the RCD for other watershed programs.

practices that drive the cumulative loading and adverse affects of pollutants in CCA watersheds and shoreline areas. Coastal processes are increasingly factored into CCA thinking, with the realization that coastal hazards, unique coastal hydrologic features, coastal topography, climate and micro-climates, for example, create drivers of watershed and shoreline management concepts.

State staff members recognized early on that each pilot CCA might be in a different stage of watershed assessment or implementation and also have different needs for assessing and implementing NPS management measures. In order to help shape the CCA program after its initial success, and to encourage assessments and action plans where they didn't exist, Coastal Commission staff members developed a Watershed Assessment and Action Plan Outline⁴⁶.

Federal public policy also provides an impetus for watershed-based plans. The U.S. Environmental Protection Agency (EPA) enumerates nine (9) key elements for watershed-based plans⁴⁷. These elements are incorporated into the analyses for California's Critical Coastal Areas pilot projects. Many of these elements are technical, such as estimating pollutant load reductions expected for existing or needed MMs, and identifying the NPS MMs that need to be implemented to achieve load reductions. Some of the elements are educational in nature, and require community engagement and funding to be successful. Other elements may be accomplished through existing plans and programs, such as Total Maximum Daily Load (TMDL) plans and Local Coastal Programs (LCPs). Where TMDL plans do not exist, voluntary programs within CCAs will hope to achieve load reductions associated with a range of land uses – but thus far without specific numeric targets like those contained in the TMDL programs.⁴⁸

Agency Roles

The California Coastal Commission's (CCC) and State Water Resources Control Board are the two lead state agencies tasked with developing and implementing the CCA Program, however there are others that play minor roles. The CCC's lead role in coastal land use planning and resource management adds value to the mix of agencies implementing the NPS program for the State of California.

“The Coastal Commission is committed to protecting the coast from impacts of increased pollutant loading from new or expanding sources. These efforts include the commitment to update every coastal community's [LCP] to incorporate water quality policies that are designed to minimize or eliminate nonpoint source pollution”⁴⁹.

In practice, the Coastal Commission has had to balance its role as regulator and non-regulatory partner in an active planning context. In the case of FMR CCA, it has divorced its LCP update work from its CCA convening role. Clarification of its role was sought by some members of the FMR Steering Committee and is reflected in a draft

⁴⁶ See <http://www.coastal.ca.gov/nps/cca-plan-outline.pdf>

⁴⁷ See http://www.epa.gov/owow/nps/watershed_handbook/

⁴⁸ Recent litigation filed by the Natural Resources Defense Council and other groups is testing the provisions of the State's program for Areas of Special Biological Significance. “L.A. County, Malibu accused of violating clean-water rules; Conservation groups file lawsuit asking court to order the county and Malibu to reduce pollutants that flow into the ocean.” Los Angeles Times, 3/4/08.

⁴⁹ Protecting Coastal Waters: State of California 2002, Critical Coastal Areas Draft Strategic Plan

statement of operating principles (aka draft Memorandum of Understanding) which is still circulating at this time.⁵⁰

The State Water Resources Control Board (SWRCB), created in 1967, has water allocation and water quality protection responsibilities. Nine Regional Water Quality Control Boards (RWQCBs), established along major watershed boundaries, have development and enforcement responsibilities of water quality objectives and implementation plans. The U.S. Environmental Protection Agency (EPA) has authorized the SWRCB to administer the National Pollutant Discharge Elimination System (NPDES) program, which uses statewide and regional programs to fulfill the mandated requirements. Municipal NPDES permits are issued by the Regional Boards. The SWRCB also has the authority to adopt statewide water quality control plans, like the California Ocean Plan, the Plan for California's Nonpoint Source Pollution Control Program, and the California Thermal Plan. The Ocean Plan contains a prohibition of any discharge of waste (e.g., stormwater) to waters designated as Areas of Special Biological Significance (ASBS). The ASBS areas are closely linked to the Critical Coastal Areas in the strategic plan, and in practice – providing some clear-cut examples of immediate implementation. However, questions about the geographic boundaries of the ASBS, the standard for discharge (“zero” discharge, or other limitations), and other research and implementation approaches create significant program ambiguities. Part II of this paper will try to address these issues by evaluating the process of ASBS public policy review and several specific exception processes.

In January 2000 the CCC and SWRCB jointly submitted the NPS Plan to update California's nonpoint source pollution control program established under Clean Water Act (CWA) Section 319 and the coastal nonpoint program required under CZARA Section 6217. In July 2000, the 2000 NPS Plan was approved by the U.S. Environmental Protection Agency and the National Oceanic and Atmospheric Administration, the lead federal agencies that administer the CWA and the CZMA respectively⁵¹. The agency team divided the fifteen-year program period into three five-year implementation periods. Agency staff continuously updates progress toward plan completion in annual reports and in discussions with program leads⁵².

A group of state and federal agencies and NGOs have formed a statewide steering committee to discuss CCA program design and initiatives. The roster of participants includes: 1) State Water Resources Control Board and its Regional Boards, 2) State Resources Agency, 3) National Oceanic and Atmospheric Administration, 4) U.S. Environmental Protection Agency, 5) State Department of Fish and Game, 6) State Department of Forestry and Fire Protection, 7) State Department of Parks and Recreation, 8) State Department of Transportation, 9) State Coastal Conservancy, 10) San Francisco Bay Conservation and Development Commission, 11) California Coastal Commission, 12) Oceana.

The steering committee meets periodically as a subset of the 28 agencies forming the California NPS Program planning group, and some agencies participate with greater frequency than others. The steering committee serves as a bridge between government administrations, a place to exchange information and ideas, and has served to encourage the development of a core of professionals who have an intimate understanding of their target coastal areas and relationships to other coastal areas.

⁵⁰ Communication from Kellyx Nelson, San Mateo County Resource Conservation District, dated Nov. 6, 2007

⁵¹ Protecting Coastal Waters: State of California 2002, Critical Coastal Areas Draft Strategic Plan

⁵² Al Wanger, Deputy Director, Calif. Coastal Commission, 3/3/08

Agencies' key public policy areas (other than Coastal Commission and State and Regional Water Boards) will be described in detail in Part II of this analysis where they have a significant bearing on expected Phase II pilot project outcomes.

Appendix 2: Background on Proposition 218

California voters approved a state constitutional amendment – State Proposition 218 – in November 1996 in response to a voter campaign that proclaimed the “right to vote on taxes”⁵³. The measure was initiated (and is now defended) by property taxation critics after the successful California Proposition 13 campaign, which imposed strict limits on local property taxes.

Proposition 218, the Right to Vote on Taxes Act, finds and declares that:

- 1) Local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself.
- 2) This measure protects taxpayers by limiting the methods by which local governments can exact revenue from taxpayers without their consent.

Proposition 218 has several impacts to entities affected including thousands of California cities, counties, special districts, schools, community college districts, redevelopment agencies, and regional organizations. Many of these entities are part of the strategy for Clean Water Act and Porter Cologne Act implementation for the control of non point sources of pollution, so Proposition 218 comes into play as they are engaged to act. The proposition:

- restricts the uses of special assessments,
- increases local agency accountability for assessments,
- prohibits the imposition of assessments that lack the support of local property owners,
- prohibits local governments from imposing separate fees on property owners for services that are already available to the larger public (e.g. garbage and water treatment services; fees charged to the owners may not exceed the actual cost of the service),
- requires government agencies to pay their fair share of any benefit assessment, and
- provides for voter initiated reduction or repeal of any existing local tax, assessment, or charge⁵⁴.

Proposition 218 supersedes all related and conflicting statutory laws because it is a constitutional amendment. Its constitutional amendment status also shields it against voter revision⁵⁵. However, legislative initiatives that would curb and revise its authority have been proposed. The initiative also reversed long-standing policy and court decisions related to the implementation of special assessment programs, and thus it has intensely impacted all areas of special assessments.

⁵³ Initiative measure adding Articles XIIC and D to the California Constitution: “The Right to Vote on Taxes Act.” Nov. 1996 Statewide Ballot.

⁵⁴ California Tax Data Inc., Accessed online March 2008 at <http://www.californiataxdata.com/pdf/Proposition218.pdf>

⁵⁵ Bruce Cain (U.C. Berkeley) points out that there is an “odd puzzle in California....It is easy to amend, but almost impossible to revise the state constitution.” “Constitutional Revision in California: The Triumph of Amendment Over Revision.” Undated entry at www.camlaw.rutgers.edu/statecon/cain.pdf

One significant burden of Proposition 218 for municipalities is the lack of an exemption from its voter approval provisions for storm water management fees (the law provides an exemption for property related water and sewer services). The lack of an exemption has reportedly left storm water management entities hamstrung in their efforts to build responsive programs. And while an argument can be made that sewer and storm water management are correlative⁵⁶, this argument has fallen on deaf ears, and the original exemption language continues to be defended as the proposition's plain meaning.

In addition, municipality-supported legislation to remedy this situation has not come to fruition⁵⁷, and landmark litigation to decide the matter has sided with Proposition 218 advocates (see Howard Jarvis Taxpayers Ass'n, et al v. City of Salinas, et al., Sixth DCA Case No. H022665 (2002), and Bighorn-Desert View Water Agency v. Beringson⁵⁸). The City of Salinas case was important in that it tested the legality of municipal programs that wish to distinguish between property-related fees and fees on those properties that elect to use a city service (i.e. storm water management services), while testing the exemption provision for water and sewer services in the act. In its defense to the taxpayers' association, the City of Salinas pointed out that owners could avoid the fee by not using the storm water services after adopting an impervious area fee on every developed parcel of land within the city, and the owners and occupiers of those parcels. This might mean leaving the parcels in their natural state or making other arrangements to prevent the introduction of storm water into the city's facilities.

In rejecting the City's exemption argument, the Court sided squarely with the law's proponents. After arguments regarding the definition for sewer and water services, the court relied on the "broad construction" language of Section 5 of the act.⁵⁹

⁵⁶ Hoenicke, Rainer, San Francisco Estuary Institute, email correspondence, winter 2007.

⁵⁷ ACA 10, initiated in 2004, would have excluded fees and charges for storm water and urban runoff management from the Proposition 218 requirement of voter approval for property related fees. SCA 12 (Torlakson 2007) seeks to give California voters the opportunity to reverse the Salinas decision and carve out a fourth exception to Prop. 218, which would provide a much needed infusion of funding for local stormwater and runoff management programs (see Senate Local Government Committee report dated 6/18/07: Stormwater and urban runoff fees).

⁵⁸ This Prop. 218 case confirmed that the law applies to charges for a property related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. Interview with Betsy Strauss, attorney with the California League of Cities, 2/26/2008 "Cities are reluctant (to move forward with stormwater management fees) because it's not tested, and charter cities have the authority to create special benefit assessment districts – Bighorn has already established that this approach to public policymaking is property-related. This is undoubtedly why we are seeing a spate of special benefit assessment concepts surfacing around the state, including one in the City and County of San Francisco."

⁵⁹ Colantuono, Michael G., June 4, 2002, "Appellate Court Invalidates Salinas' Storm Water Fee." Publication of the law firm of Colantuono, Levin & Rozell, APC.