

manatt

June 10, 2008

REAL ESTATE & LAND USE

NEWSLETTER OF THE REAL ESTATE AND LAND USE PRACTICE OF MANATT, PHELPS & PHILLIPS, LLP

Proposed Construction Stormwater Permit Includes
Controversial and Potentially Onerous Provisions

[Dana P. Palmer](#)

The California State Water Resources Control Board ("State Board") is considering adoption of a new General Construction Storm Water Permit ("Construction Permit") that would regulate stormwater discharges from construction activities that disturb areas larger than one acre.

The current form of permit regulates stormwater discharges from construction sites of more than one acre, and requires preparation of a Storm Water Pollution Prevention Plan ("SWPPP"). The Construction Permit under consideration proposes several new requirements and procedures that would both classify areas based upon risk to water quality and impose monitoring requirements for various classes of construction activity.

The major permit changes most likely to affect businesses are:

- **Risk-Based Approach and Ranking of Sites:** The Construction Permit would rank sites by the risk they pose to local water quality. The Construction Permit establishes a four-level risk calculation under which Risk Levels 1-3 would be covered under the Construction Permit.
 - Site-specific data, including topography, soil characteristics, and distance between the site and storm drains or water bodies, determine the Risk Level assigned to a site. The determination is complex and a site cannot simply be viewed and classified without data collection and analysis.
 - Those sites determined to be Risk Level 4 would

NEWSLETTER EDITORS

Roger Grable

Partner

rgrable@manatt.com

714.371.2550

Robin Kennedy

Partner

rkennedy@manatt.com

650.812.1360

OUR PRACTICE

Manatt has a broad background in all areas of real estate practice that give our domestic and foreign clients the edge to succeed. Our professionals are recognized as some of the premier real estate and development advisors in the nation who promote the transactional expertise, market insight and government advocacy ... [more](#)

. [Practice Group Overview](#)

. [Practice Group Members](#)

INFO & RESOURCES

. [Subscribe](#)

. [Unsubscribe](#)

. [Sarbanes-Oxley Act](#)

. [Newsletter Disclaimer](#)

. [Technical Support](#)

. [Manatt.com](#)

not be covered by the Construction Permit; rather they would require coverage under a permit issued by the local Regional Water Quality Control Board ("Regional Board") (that permit could either be general to all Risk Level 4 sites, or it could be site-specific).

- **New Purpose for the SWPPP:** Under the current permit, the SWPPP is more a general guide for how the site will comply with permit requirements. Under the proposed permit, the State Board has signaled the SWPPP must demonstrate a discharger's compliance with the detailed Construction Permit requirements and expected compliance outcomes.
 - **Electronic Filing:** The SWPPP would be easily available to the public, since electronic filing of the SWPPP would be mandatory and a website would be available for the public to access the documents.
- **Numeric Action Levels ("NALs") and Numeric Effluent Limitations ("NELs"):** One of the most controversial recent issues in stormwater regulation has been whether numeric effluent limitations should be imposed by point source discharge permits. In late 2005, the State Board took the unusual step of commissioning a panel of independent scientists to evaluate the issue. The panel concluded that numeric effluent limitations were feasible for pH and turbidity at larger sites if "active treatment technologies" using chemicals were available. "Active treatment technologies" describe a variety of systems that physically or chemically treat discharges to reduce turbidity and ensure a proper range of pH.
 - The Construction Permit includes Numeric Action Levels (NALs) for pH and turbidity. The purpose of NALs is to "assist dischargers in evaluating the effectiveness of their on-site measures." Because dischargers must report NAL exceedances to the State Board within 10 days, the NALs will also serve to inform the State Board and the public about the levels and types of pollutants present in construction runoff.
 - Exceedance of the NALs requires the discharger to conduct a construction site and "runon" evaluation to determine whether site activities or runon caused the exceedance. Based on the evaluation, the discharger must amend the SWPPP to document the exceedance and specify the corrective actions already taken and the further actions that will be taken.

- The Construction Permit would contain Numeric Effluent Limitations (NELs) for (1) pH during any construction phase during which there is a high risk of pH discharge and (2) turbidity for all discharges. Exceedances of NELs would be reported, within two days of the exceedance, to the Regional Board possessing jurisdiction over the site.

- **Effluent Monitoring and Reporting:** The Construction Permit would require effluent monitoring and reporting for pH and turbidity in stormwater discharges at all sites, with the frequency of monitoring a function of the Risk Level attributed to the site. Monitoring for other pollutants would be required if those pollutants were identified in a pollutant source assessment performed prior to site construction.

- **Receiving Water Monitoring and Reporting:** The Construction Permit requires dischargers at certain Risk Level 2 sites, and those at all Risk Level 3 sites, to monitor receiving waters. Risk Level 2 dischargers would monitor receiving waters only when the turbidity NEL is exceeded.

- **Runoff Reduction Requirements:** The Construction Permit would specify runoff reduction requirements (termed "New Development and Re-development Storm Water Performance Standards") for all sites not covered by similar standards in municipal stormwater permits. The stated goal of the proposed requirements is to maintain the proportion of rainfall that runs off a site up to the 85th percentile storm event. The SWPPP would be required to document these post-construction controls.

- **Rain Event Action Plan ("REAP"):** The Construction Permit would require the development and implementation of a REAP that must be designed to protect, 48 hours prior to any likely precipitation event, all exposed portions of a site. The trigger for implementing the REAP is a forecast of a 50% or greater chance of precipitation in the project area.

Other features of the proposed permit are less burdensome, but nevertheless add to the challenge of compliance. These features include identifying soil characteristics, photographing the site periodically and uploading those photos to the State Board, annually certifying that the site is in compliance with permit requirements, and employing only certified or specially trained personnel to prepare site documents and manage site Best Management Practices ("BMPs").

As is obvious, the proposed permit would impose a variety of new obligations during and after site construction. The additional measures required by the Construction Permit will increase the costs of site construction as a consequences of more elaborate implementation of BMPs and more frequent and intense monitoring. These costs will vary markedly on a site-by-site basis, depending in part on the timing and strength of rain events, the site topography and soil type, and the distance between the site and nearby waters.

In addition to increasing compliance costs, the proposed permit may also complicate construction for the following reasons:

- Meeting the NALs and NELs may prove more difficult than the State Board expects, as turbidity in site discharges is notoriously variable.
- For Risk Level 4 sites, obtaining a site-specific permit could add considerably to a project's timeline and cost.
- Site construction prior to and during rain events would likely be delayed due to implementation of the REAP.
- The use of active treatment technologies at sites may be complicated by the capture requirements imposed by the proposed permit. As currently drafted, the active treatment system must be designed to capture and treat a volume equivalent to the runoff from a 10-year, 24-hour storm event in a 72-hour period with a specified runoff coefficient. Depending upon the region of California in which the construction site is located, meeting this standard may possibly be cost-prohibitive and could discourage the use of active treatment systems.
- Termination of coverage of the Construction Permit would no longer be as simple as filing a Notice of Termination with the Regional Board. The Regional Board would acquire enhanced powers to verify that sites comply with either the State's or the region's post-construction runoff reduction requirements (depending on which requirements are applicable).

For Further Information

The State Board is collecting written comments until June 11, 2008, after which time it will announce the date of future hearings. (Note that the next hearing would not be until July 1, 2008 at the earliest.) If you would like further information on the proposed permit, please contact [Dana Palmer](#) in Manatt's Los Angeles office or [Susan Hori](#) in Manatt's Orange County office.

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

[Dana P. Palmer](#) Mr. Palmer's practice involves energy and environmental issues, with a particular focus on land use, water quality, and climate change. As both a litigator and a corporate compliance counselor, Mr. Palmer's work takes him to court and before administrative bodies on a broad array of issues. Prior to joining Manatt, Mr. Palmer served as an attorney for Santa Monica Baykeeper, where he litigated matters concerning water pollution and energy.



[Susan K. Hori](#) Ms. Hori's practice is focused on the processing of land use entitlements and regulatory permits for real estate development projects and the resolution of environmental issues affecting real property. It includes substantial work on matters involving the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA), the California Coastal Act and other local, state and federal land use and environmental laws. Ms. Hori's clients include landowners, developers and builders in the residential, retail, hotel/resort, and commercial and industrial development industry.