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California's Proposed New Storm Water Permit Tightens the Screws on Developers

May 2009

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The California State Water Resources Control Board (“State Water Board”) recently proposed an updated National Pollutant Discharge Elimination System (“NPDES”) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities ([Draft General Permit](#)). The new Draft General Permit takes a significantly different approach to storm water regulation and project approval than the current General NPDES Permit for Construction Activities (“Current General Permit”). The changes will, if adopted, impose much stricter requirements that could have significant impacts on project design and construction planning. Developers with projects in California need to be aware of the proposed Draft General Permit and may wish to submit public comments by June 17th or attend the State Water Board’s hearing on it on June 3rd. These stringent permit compliance requirements will also significantly increase the risk of future permit violations and provide greater opportunities for the Water Boards or private citizens to bring enforcement actions.

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Background

The State Water Board issued the Current General Permit in August 1999, and amended it later that year to apply to sites as small as one acre. The Current General Permit officially lapsed on August 19, 2004, but remains in effect until the State Water Board adopts a new General Permit.

Under the current General Permit, a developer or its construction contractor automatically obtains NPDES permit coverage for their site after submitting a Notice of Intent (“NOI”) to the State Water Board and paying a permit fee. The developer must by that time have prepared and implemented a Storm Water Pollution Prevention Plan (“SWPPP”) setting forth Best Management Practices (“BMPs”) to prevent non-storm water discharges or address potential storm water impacts from the site. For the most part, SWPPPs used by developers have relied on conventional runoff and sediment control and treatment systems, including coagulation and flocculation using sand filtration. In addition to implementing the BMPs specified in their SWPPPs, the Current General Permit requires developers to implement a site

monitoring program which relies primarily on visual inspection and the correction of problems identified during such inspections (if any).

Proposed Requirements Under the Draft General Permit

The Draft General Permit proposes a radical departure from the status quo. Rather than relying primarily on the builder-developed SWPPP/BMP approach, the Draft General Permit will impose *quantitative standards* that all projects must meet and requires implementation of detailed BMPs specified in the permit itself. That is, permit compliance will no longer be measured simply by implementation of a SWPPP; but rather, the developer must implement specific BMPs and meet specified pollutant-specific Numeric Action Levels (NALs). Where NALs are not met, the developer will be required to implement additional BMPs and/or take corrective action.

In addition to the NALs, the Draft General Permit will specify a few, slightly more generous, pollutant-specific Numeric Effluent Limitations (“NELs”). Failure to meet an NEL will automatically constitute a permit violation and be directly enforceable in administrative or judicial forums. These numeric standards are a sharp change that, according to State Water Board staff, “ensures that the dischargers do not ‘write their own permits.’”

For pH, State Water Board staff has proposed that proper implementation of preventative measures such as avoiding concrete pours or covering concrete during rainy weather, covering scrap drywall and stucco stored outside, treating impaired storm water in a filter or settling pond or basin (with additional natural or chemical treatment when necessary), and other BMPs should result in discharges between 6.0 to 8.5 pH units. The turbidity NEL is 500 NTU.

The Draft General Permit also proposes new minimum BMPs such as Active Treatment Systems, which may be necessary where traditional erosion and sediment controls do not effectively control accelerated erosion, where site constraints inhibit the ability to construct a correctly sized sediment basin, where clay and/or highly erosive soils are present, or where the site has very steep or long slope lengths.

In addition, the Draft General Permit includes additional *post-construction* requirements. Specifically, it requires that sites match pre-project hydrology by maintaining drainage concentrations and times of concentration. State Water Board staff proposes that the most effective way to meet this requirement is to implement non-structural BMPs such as landform grading, site design BMPs, and distributed structural BMPs (bioretention cells, rain gardens, and rain cisterns). This “runoff reduction” approach is essentially a requirement to implement Low Impact Development (“LID”) design features.

Finally, the Draft General Permit requires electronic filing of all Permit Registration Documents (“PRDs”), NOIs, SWPPPs, annual reports, Notices of Termination (“NOTs”), and NAL/NEL Exceedance Reports. This will quickly give the Water Boards and citizen enforcers the necessary information to determine whether to initiate enforcement actions against the discharger, actions which can result in significant penalties.

Conclusion

The State Water Board’s proposed Draft General Permit for Storm Water Discharges from Construction imposes a significantly different permitting framework from the Current General Permit that has been in place for the last 10 years. This new framework includes mandatory BMPs, two forms of numeric discharge limitations, and onerous monitoring requirements that could be costly for developers in California and raise a significantly higher risk of encountering enforcement actions and citizens’ lawsuits in the future.

Morrison & Foerster is recognized as one of the country’s leading law firms on storm water and development issues, and regularly represents and advises clients on these and other land use and environmental law matters. If you would like additional information or assistance, please contact Robert Falk in our San Francisco office at (415) 268-6294, Mitch Randall in our Walnut Creek office at (925) 295-3377, or Peter Hsiao in Los Angeles at (213) 892-5731.

