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California Adopts New General Storm Water Permit That Ups the Ante for Builders and Developers

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The California State Water Resources Control Board (“State Water Board”) has adopted a new National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (“Construction General Permit”). The new Construction General Permit, which was issued pursuant to the federal Clean Water Act and is enforceable through citizens’ suits, represents a dramatic shift in the State Water Board’s approach to regulating new and redevelopment sites, imposing new affirmative duties and fixed standards on builders and developers. Those with projects in the planning pipeline or under construction in California should familiarize themselves with the new requirements and adjust their plans and operations so as to ensure compliance with the new Construction General Permit when it becomes effective on July 1, 2010.

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Background

The prior State Water Board General Permit for Construction Activities had been in place for over a decade and represented a different and far less stringent generation of regulatory requirements governing new and redevelopment sites. Under the prior Construction General Permit, a developer or its construction contractor automatically obtained permit coverage for their site after submitting a Notice of Intent (“NOI”) to the State Water Board and paying a permit fee. The developer prepared and implemented a Storm Water Pollution Prevention Plan (“SWPPP”) setting forth so-called Best Management Practices (“BMPs”) to prevent non-storm water discharges or address potential storm water impacts from the site. The requirements were largely qualitative and generally did not involve numeric limitations or triggers necessitating further action. For the most part, SWPPPs also relied on conventional runoff and sediment control, detention, and treatment systems, some of which were fairly rudimentary. In addition to implementing the BMPs specified in their SWPPPs, the prior Construction General Permit required developers to implement a site-monitoring program, which relied primarily on visual inspections and required little sampling and laboratory analysis.

New Requirements Under the 2009 Construction General Permit

The new Construction General Permit does not completely carry forward the former qualitative and self-selected compliance approach based on preparation of a SWPPP. Instead, developers and construction contractors must implement *specific* BMPs, achieve *quantitatively-defined* (i.e., numeric) pollutant-specific discharge standards, and conduct much more rigorous monitoring based on the project's projected risk level. The new top-down, fixed-standards approach greatly reduces developers' ability to design their own permits, will make them more accountable, and could involve significantly greater expense.

The State Water Board's new quantitative standards take a two-tiered approach, depending on the risk level associated with the site in question. Exceedance of a benchmark Numeric Action Level ("NAL") measured in terms of pH and turbidity (a measure related to both the amount of sediment in and the velocity of site runoff) triggers an additional obligation to implement additional BMPs and corrective action to improve SWPPP performance. For medium- and high-risk sites, failure to meet more stringent numeric standards for pH and turbidity, known as Numeric Effluent Limitations ("NELs"), will also automatically result in a permit violation and be directly enforceable in administrative or, in the case of a citizens' group taking up the cause, judicial forums.

New minimum BMPs include *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 new Construction General Permit includes several "*post-construction*" requirements. Fundamentally, these requirements entail that site designs provide no net increase in overall site runoff and match *pre-project* hydrology by maintaining runoff volume and drainage concentrations. To achieve the required results where impervious surfaces such as roofs and paved surfaces are being increased, developers must implement non-structural off-setting 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 State Water Board-imposed regulatory requirement to implement *Low Impact Development* ("LID") design features. Volume that cannot be addressed using non-structural BMPs must be captured in structural BMPs that are approved by the Regional Water Board.

Finally, the new Construction General Permit requires electronic filing of all Permit Registration Documents, NOIs, SWPPPs, annual reports, Notices of Termination, and NAL/NEL Exceedance Reports. This information will be readily available to the Water Boards and citizen enforcers who can then determine whether to initiate enforcement actions—actions which can result in significant penalties and legal fees.

Conclusion

The State Water Board's new General Permit for Storm Water Discharges from Construction imposes a significantly different and more rigorous and burdensome permitting framework from the longstanding status quo to which developers have become accustomed over the past decade. This new framework includes mandatory BMPs, two forms of numeric discharge limitations, and onerous monitoring requirements that could be costly for developers in California. The new permit affords more opportunities for 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.