

### **SUPERIOR COURT STRIKES DOWN NUMERIC EFFLUENT LIMITS IN CALIFORNIA'S CONSTRUCTION GENERAL PERMIT**

*California Building Industry Assn. v. State Water Resources Control Board*, Case No. 34-2009-80000338 (Sacramento Superior Court; Dec. 2, 2011)

January 5, 2012 by *Keith Garner and Alex Merritt*

On December 2, 2011, the Sacramento Superior Court invalidated the numeric limits on turbidity and pH in California's Construction General Permit (CGP) because the limits were not supported by substantial evidence. The State Water Resources Control Board (State Board) has 60 days to decide whether to appeal the decision.

#### **Background**

The Clean Water Act prohibits the discharge of pollutants without a permit issued under the National Pollutant Discharge Elimination System (NPDES). The Environmental Protection Agency is responsible for issuing NPDES permits, but in California, it has delegated this authority to the State Board.

NPDES permits set limitations on the discharge of pollutants. One type of limitation, a "technology-based effluent limitation," requires the use of specific technologies to control and reduce discharges of pollutants. A technology-based limitation may take the form of a numeric limit, which is quantitative, or a narrative limit, which describes best management practices that a permit holder must implement to control pollutant discharges.

#### **The CGP**

In 1999, the State Board adopted a general NPDES permit to regulate stormwater runoff from construction sites. A general permit applies to a category of discharges (in this case, stormwater runoff from construction sites), rather than to a specific site or to a specific discharger. The 1999 CGP contained a technology-based limitation, requiring dischargers to use "best conventional pollutant control technology" to reduce pollutant in stormwater runoff. The permit did not include

numeric limits on turbidity and pH, but instead included narrative limits that prescribed best management practices for controlling turbidity and pH.

In 2009, the State Board revised its CGP to include numeric limits for turbidity and pH for certain high risk construction projects.

### **Analysis of the Numeric Limits**

The California Building Industry Association (CBIA) challenged the numeric limits, arguing that the State Board had not supported them with adequate evidence and had failed to evaluate the control technology as required by the Clean Water Act.

The court agreed with the Building Industry and ruled that the numeric limits were invalid and unenforceable. The court found that to set a numeric limit, the State Board was required to identify available control technologies, collect performance data for those control technologies, and set a numeric limit that was consistent with the performance data. In addition, pursuant to the Clean Water Act, the State Board was required to conduct a multi-factor analysis to assess the effectiveness of the control technology.

The court concluded that the turbidity and pH limits were not supported by substantial evidence because the State Board did not justify them with performance data for the chosen control technology. Moreover, because there was no performance data, it was impossible for the State Board to analyze factors such as the technology's capability to reduce discharges and its relative costs and benefits, as required by the Clean Water Act.

In establishing the turbidity limit, the State Board relied on three scientific studies, but the court decided the studies were limited and inconclusive and did not support the numeric limit. The first study analyzed turbidity levels in waters receiving stormwater runoff. But the study did not address turbidity levels in stormwater discharges—the relevant consideration—and therefore could not provide support for the numeric limit. The second study reported turbidity data from California construction sites; however it did not indicate which management practices were in place at those sites to control stormwater discharges. Thus, the data could not have helped the State Board identify an appropriate and achievable numeric limit. The third study did provide performance data for control technologies, but the study only focused on three highway construction sites in Washington. The court found that the study "may not reflect the variety of soil, rainfall, and topography conditions at California construction sites," and therefore could not adequately support the numeric limit.

The court reasoned that "until an attainable turbidity value is derived from performance data for available technologies, individual construction projects subject to the [numeric turbidity limit] are not able to select suitable technologies to carry out their obligations to control sediment discharges with reasonable assurance that the technologies are capable of achieving the [numeric turbidity limit]. Moreover, until an attainable turbidity value is derived, the technical aspects and cost-benefits of the [control technology] cannot be assessed in accordance with the multi-factor analysis required by the [Clean Water Act]."

In establishing the pH limit, the State Board relied on a Caltrans study that determined the mean pH of runoff from highway construction sites in California. This study identified the best management practices that were in place, but it did not analyze the effect of the management practices on pH levels. Thus, the study did not provide the required performance data, and the numeric limit had "no demonstrated relationship to management practices."