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#### Developers Beware: Significant Changes in Store for General Storm Water Permits for Construction Activities

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The California State Water Resources Control Board (State Water Board) recently proposed its draft National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (Draft Construction Permit). The proposed draft permit significantly alters California's current General NPDES Permit for Construction Activities (General Permit) in ways that will have important implications for project design and approval strategies and could adversely affect many developers. At the federal level, the U.S. Environmental Protection Agency (EPA) also plans to issue a new, updated general permit for storm water discharges from construction activities, which will apply to sites that it (rather than a state) directly permits. EPA also plans to promulgate an effluent limitation guideline for storm water discharges for the construction and development sector, which will ultimately govern the content of storm water permits across the country. These potentially significant developments are further described below.

#### Background

Developers currently must comply with the State Water Board's long-standing storm water permit requirements for implementing best management practices (BMPs) and controlling erosion during the construction phase of projects. Pursuant to the Clean Water Act, the General Permit requires developers to obtain NPDES permits for discharges of storm water from construction projects that disturb one or more acres of soil (or less than one acre if the disturbance is part of a common plan of development or sale). The construction activities covered by the General Permit include demolition, clearing, grading, excavation, and similar land disturbance activities. BMPs typically used to address the requirements of the current General Permit include passive systems such as conventional runoff and sediment control, as well as treatment systems like coagulation and flocculation using sand filtration.

The existing General Permit officially lapsed on August 19, 2004, but remains in effect until the State Water Board adopts a new General Permit in its place. The Draft Construction Permit is a significant step in the State Water Board's process for issuing a new permit and represents the best opportunity to offer input on its requirements.

#### New Requirements

As proposed by the State Water Board staff, the Draft Construction Permit includes many more specific, quantitative, and potentially onerous requirements than are mandated by either federal regulations or the BMP-based approach entailed in the current General Permit. For example, the Draft Construction Permit includes numeric action levels (NALs), numeric effluent limitations (NELs), and very detailed management practices. More specifically, the following significant changes to the General Permit have been proposed:

- Technology-based NALs for pH.
- Site-specific, technology-based NALs for turbidity.
- Technology-based NELs for pH during any construction phase where there is a high risk of pH discharge.
- Technology-based NELs for turbidity for all discharges.
- A risk-based permitting approach that uses a four-level risk calculation. Factors in determining the risk level of a site include proximity to receiving waters, size, erosivity, soil erodibility, runoff potential, and slope steepness, among others. Those discharges determined to pose the most serious risk would be subject to an individual permit or another general permit scheme.

- More minimum BMPs, including practices that were previously merely elements of a permittee's Storm Water Pollution Prevention Plan (SWPPP) or suggested by guidance.
- Monitoring and reporting of soil characteristics at project locations.
- Effluent monitoring and reporting of pH and turbidity in storm water discharges.
- Quarterly visual inspections of drainage areas for authorized and non-authorized discharges.
- Monitoring of receiving waters for higher-risk dischargers to ensure compliance with water quality standards.
- Performance standards to reduce runoff at all sites not covered by a Phase I or Phase II Municipal Separate Storm Sewer System (MS4) NPDES permit in order to minimize any adverse impacts from post-construction runoff.
- Development and implementation of a Rain Event Action Plan (REAP) for each site, which will protect all exposed portions of the site within 48 hours prior to any forecasted rain event (where there is a 50 percent or greater chance of precipitation).
- Development and implementation of a Construction Site Monitoring Program (CSMP) prior to the commencement of construction activities. The CSMP must demonstrate compliance with the requirements of the General Permit, determine whether additional corrective actions are necessary, and determine the effectiveness of BMPs and whether additional BMPs are needed.
- Completion of a soil particle size analysis to ascertain percentages of sand, silt, and clay at a site to determine sediment basin design.
- Photographic monitoring of all sites during any quarter in which a discharge resulted from a rain event.
- Specific training and certification of key personnel to ensure adequate knowledge and skills required for compliance.
- Annual reporting and compliance certification by permittees.

Many of these changes are based on the recommendations of an expert panel convened by the State Water Board in 2005 and 2006 to investigate the feasibility of adopting NELs and NALs in California's storm water permits. In particular, the State Water Board staff relied on the expert panel's recommendations in proposing NELs and NALs for pH and turbidity. The primary purpose of the NALs is, according to the State Water Board staff, to assist dischargers in evaluating the effectiveness of their BMPs and trigger further action when they are not producing sufficient results. For pH, the State Water Board staff has proposed that proper implementation of a permittee's BMPs should result in discharges within the range of 6.5 to 8.5. Turbidity NALs will be site specific and calculated using the Modified Universal Soil Loss Equation (MUSLE).

NELs for pH and turbidity are, by contrast, enforceable permit limits that can result in penalties and citizens' lawsuits when they are exceeded. For pH, the State Water Board staff has proposed that proper implementation of preventive measures such as avoiding concrete pours during rainy weather, covering concrete, covering scrap drywall and stucco stored outside, treatment of impaired storm water in a filter or settling pond or basin (with additional natural and chemical treatment when necessary), and other BMPs should result in discharges within the range of 6.0 to 9.0. For turbidity, the State Water Board staff has proposed an NEL of 1000 NTU.

Moreover, the Draft Construction Permit includes new minimum BMPs not required by the existing General Permit. For example, the State Water Board staff has proposed the use of two different methods of Active Treatment System (ATS) in certain circumstances.

In addition to these changes to the current General Permit, the purpose of the Storm Water Pollution Prevention Plan (SWPPP), which is required in order to obtain a permit under both the current General Permit and the Draft Construction Permit, has changed. Whereas currently the State Water Board requires developers to have a SWPPP available and on site in order to document how the permittee will comply with the general requirements of the General Permit, the proposed Draft Construction Permit requires developers to revise SWPPPs to demonstrate each discharger's compliance with the detailed obligations and mandated outcomes, each of which will be individually enforceable as a permit term.

Finally, the Draft Construction Permit requires electronic filing of all Permit Registration Documents (PRDs), Notices of Intent (NOIs), annual reports, Notices of Termination (NOTs), and NAL exceedance reports. All electronically filed documents will be immediately available to the public on the State Water Board's website.

### **The Federal Context**

The State Water Board's proposed Draft Construction Permit comes as the EPA itself faces increasing pressure to impose strict effluent limitation guidelines for storm water discharges from construction sites.

EPA is currently in the process of finalizing a new general permit for construction storm water in states in which it is the permitting agency, as well as promulgating nationally applicable effluent limitation guidelines for the construction and development sector. A proposed draft of EPA's general construction permit is expected within the next month, as the current general permit is set to expire in July. EPA's proposed effluent limitation

guidelines are expected by December, with a final rule set for completion by December 2009. EPA may release its proposed effluent limitations sooner, but it is apparently awaiting the completion of a report on storm water pollution by the National Academy of Sciences. At this point, EPA has conducted a series of environmental and cost analyses and has met with representatives from the construction industry, including the National Association of Home Builders and the Associated General Contractors of America.

Environmental groups and at least one U.S. Senator, Ben Cardin (D-MD), are pushing EPA to include storm water controls such as low impact design as part of the proposed effluent limitation guidelines. EPA is also considering narrowing the scope of its effluent limitation guidelines for construction discharges to exclude post-construction runoff, a measure opposed by environmentalists and Senator Cardin, who favors additional controls on development projects in order to reduce the amount of pollution that municipalities are responsible for addressing under their own storm water permits.

### **General Permit Comment Process**

The proposed Draft Construction Permit was issued in response to comments submitted to the State Water Board on its initial preliminary draft permit, issued on March 7, 2007. Public workshops were held to explain the preliminary draft and to solicit early feedback. The State Water Board staff attempted to address concerns raised by initial comments through a series of focused stakeholder meetings in July, August, and September 2007. The draft permit purportedly addresses those concerns.

The State Water Board will hold a staff workshop on the proposed Draft Construction Permit on May 21, 2008, and a formal public hearing on June 4, 2008, at its headquarters in Sacramento. The State Water Board has also requested comments on the draft permit, which must be received by noon on June 4.

### **Conclusion**

The changes proposed by the State Water Board staff to the current General Permit are significant and would likely be both onerous and costly for developers in California. Because virtually all developers with California projects will be affected by these changes, anyone expecting to begin construction in the future should plan to attend the State Water Board's public hearings and file written comments on the Draft Construction Permit.

Developers with interests beyond California should also closely follow EPA's forthcoming actions in issuing an updated general permit for storm water discharges associated with construction activities and in promulgating a nationally applicable effluent limitation guideline for the construction and development sector.

Morrison & Foerster is recognized as one of the country's leading law firm 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** or Peter Hsiao in Los Angeles at **(213) 892-5731**.