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Allen Matkins

Land Use & Construction Alert



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## New Stringent Water Quality Rules For Construction Sites Adopted By State Water Board

On Wednesday, September 2nd, after three years of issuing drafts and taking in written and oral comments, the State Water Resources Control Board adopted the revised general permit that regulates water quality at construction sites

throughout the state (the Permit). The Permit will fundamentally change the way that new development and redevelopment projects are designed and managed during construction—adding significant costs and exposing landowners to substantial risk of fines.

**The permit becomes “effective” July 1, 2010. All builders and developers of current and future projects should begin revising their compliance programs now to meet the myriad of new requirements.**

The Permit governs all construction sites one acre and larger throughout the state, large-scale linear projects (e.g., utilities), and sites less than one acre that are part of a common development plan.

Despite the overwhelming expression of public comments urging the State Water Board to alter several core aspects of the Permit, the agency voted to adopt the Permit in a 3-1 vote. The State Water Board chose not to adopt any of the fundamental changes urged by the regulated community, and chose not to wait for new federal water quality rules that will likely be issued by the U.S. Environmental Protection Agency this coming December and that will



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affect the regulation of storm water from construction sites in California.

Most significantly, the adoption of this Permit will introduce numeric effluent limits for the construction industry—something the construction industry has never had to contend with before now. It was argued during the administrative process that these limits were developed by the State Water Board staff without the robust scientific and economic analysis necessary to justify them. Stakeholders are currently considering whether to legally challenge the Permit.

Key aspects of the newly-adopted Permit are:

- **Risk-Based Classification:** projects must be categorized into one of three risk categories using complex formulas based upon relationship to sensitive receiving waters and potential soil loss levels.
  - Risk levels 1, 2, or 3 will be assigned to correspond with perceived low, medium or high water quality risk.
  - Higher risk levels will equate to more stringent requirements in the Permit.
  - Risk 2 and 3 sites will require sampling of rainfall runoff and will be measured against new numeric action levels.
  - Risk 3 sites will be subject to numeric effluent limits and many Risk 3 sites will have to sample downstream receiving waters during rain events and perform bioassessments.
- **Numeric effluent limits** for pH and turbidity (a measure of sediment concentration in runoff) and for discharges from Advanced Treatment Systems.
  - Numeric limits would apply to many projects, especially in Southern California.
  - Exceeding the limits automatically subjects the site owner to potential enforcement.
  - Limits are set at what would be lower than natural conditions in many areas, meaning runoff would need to be abnormally clean.
- **Numeric action levels** for pH and turbidity.
  - Action levels would apply to most projects throughout the state.
  - Exceeding the levels will require reporting to the state and will necessitate evaluations and possibly new or additional water quality controls on site.
  - Exceeding the action levels could ultimately lead to enforcement actions.
- **Post-construction flow requirements** for sites outside of major metropolitan areas where local “new development” water quality programs have been adopted.
  - Will require sites to duplicate pre-development hydrology, affecting the design of developments.

- A 3-year moratorium of these provisions will apply; however, projects not completing construction by that time, will be required to meet the requirements unless a waiver can be obtained from the local water board.
- **Sampling of runoff and of downstream receiving waters:**
  - Site runoff sampling for Risk 2 and 3 sites.
  - Up to three times daily during storm events and from multiple areas on each site.
  - Receiving water monitoring (including bioassessment surveys) required for some Risk 3 sites that discharge directly into waterways.
- **Electronic filing of documents:**
  - All permit-related documents will be required to be submitted electronically to the state, including Notices of Intent, Storm Water Pollution Prevention Plans, sampling reports, exceedance notices for numeric limits, annual compliance reports, etc.
  - Electronically-submitted information will be made available to the public on the internet.

Penalties for Permit violations can be as high as \$25,000–\$37,500 per day per violation in either state or federal court, with 6- and 7- figure penalties not uncommon. Mandatory minimum penalties will apply for certain types of violations (e.g., exceedances of numeric effluent limits and filing reports late).

Developers, landowners, and construction companies all have a substantial stake in this Permit, as its terms will affect not only construction budgets and timelines but also will dictate specific design elements for many projects. Additionally, the potential liability for administrative enforcement or citizen-lawsuits is extremely high, with any violation of the Permit subjecting site owners to possible fines and other penalties.

Companies need to learn the new requirements and begin modifying their compliance programs to meet the Permit's terms.

A copy of the draft Permit along with the errata from this week's hearing and earlier may be obtained at the [State Board's website](#).

Water Board staff have indicated that a complete copy of the Permit incorporating all changes will be available September 17th.

Please contact us if you have questions regarding the new Permit or would like assistance preparing compliance strategies and documents to meet the new Permit requirements.

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