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## REAL ESTATE & LAND USE

NEWSLETTER OF THE REAL ESTATE AND LAND USE PRACTICE OF MANATT, PHELPS & PHILLIPS, LLP

### **UPDATE: Judge Modifies Order to Allow Construction Starts Requiring Stormwater Permit Coverage**

As we foreshadowed, on August 1, 2008, Judge Colaw modified his order to allow the processing of Notices of Intent (NOIs) and Notices of Termination (NOTs) under the Construction General Permit. Entities that had been rejected for coverage under the Construction General Permit due to Judge Colaw's July 2, 2008 order should now re-file their NOI per standard procedure. The revised order allows the Los Angeles Regional Water Quality Control Board to resume processing NOTs and enforcing both the Construction General and Industrial General Permits in Los Angeles and Ventura Counties.

To view a memorandum from the State Water Board's Chief Counsel further explaining the modification of the judge's order, please visit [here](#).

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*The article below was originally published in our [July 25, 2008](#) issue.*

### **Superior Court Orders Regional Water Board to Evaluate Water Quality Standards as Applied to Stormwater Discharges**

#### **Construction Starts Temporarily Curtailed in Los Angeles and Ventura Counties**

In a victory for the building industry and municipalities, Judge Thierry P. Colaw of the Orange County Superior Court has ordered the Los Angeles Regional Water Quality Control Board ("Regional Board") and the State Water Resources Control

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Board (together, "Water Boards") to review (and revise if appropriate) its water quality standards as applied to stormwater discharges and to suspend all activities relating to the implementation of the standards. The most immediate impact of the decision, tempering the victory somewhat, has been the Water Boards' interpretation that Judge Colaw's order prohibits the processing of enrollments in the General Permit for Storm Water Discharges Associated with Construction Activity ("Construction General Permit") and the General Permit for Storm Water Discharges Associated with Industrial Activities ("Industrial General Permit"). **Thus, developers of sites (where greater than one acre of soil will be disturbed) cannot obtain the necessary permit to begin construction. Significantly, sites already covered under the Construction General Permit are only modestly affected.** For these sites, the limited effect of the ruling is that the processing of a Notice of Termination ("NOT") will be delayed. However, because the Regional Board takes several months to process NOTs, the delay may not ultimately be significant if the duration of the judge's order is only a few months.

In addition to halting the Construction General Permit and Industrial General Permit programs in the region, the Water Boards are currently unable to enforce the terms of active permits while the judge's order remains in force. However, the U.S. Environmental Protection Agency, citizens, and local governments may continue to enforce these permits.

The lawsuit against the Water Boards was filed by a coalition of 18 cities in Los Angeles County and the Building Industry Legal Defense Foundation (BILD) (together, "Petitioners") to challenge the way in which the Regional Board regulates stormwater discharges. Many developers and municipal authorities believe that the water quality standards that apply to surface water bodies and the ocean were not meant to apply to stormwater discharges and that attaining such standards in stormwater discharges is impracticable and cost-prohibitive.

The focus of the lawsuit was whether the Regional Board followed the proper procedure when performing the intermittent evaluation of water standards mandated by law. Pursuant to federal Clean Water Act Section 303(c)(1) and California Water Code Section 13240, the Regional Board is required to periodically review and revise, if appropriate, water quality standards and the programs designed to attain those standards ("triennial review"). Petitioners argued that, as a part of their triennial review obligations, the Regional Board did not adequately consider certain statutory factors,

including the economic impact on dischargers, when reviewing the appropriateness of the existing water quality standards and did not determine whether the standards were “reasonable, considering all demands being made and to be made on those waters” under California Water Code Section 13000.

During the triennial review process, Petitioners had submitted evidence supporting their view that the Regional Board’s water quality standards as applied to stormwater discharges were not justified. The Regional Board responded to these comments by stating that they were “legally deficient” and “beyond the scope of the triennial review.” Later, when opposing Petitioners’ efforts in court, the Water Boards suggested that Petitioners should have submitted specific evidence during the triennial review. The court did not take kindly to this about-face and concluded that the Regional Board should not have brushed off Petitioners’ contentions during the comment and review period. According to the court, had the Regional Board included Petitioners in the process, and weighed their suggestions in light of the statutory factors, the court would have deferred to the Regional Board’s “properly exercised” discretion.

The court ultimately approved a wide-ranging order commanding the Water Boards to review and, where appropriate, revise the water quality standards that are applied to stormwater. The court also ordered the Water Boards to suspend all activities relating to the implementation and enforcement of the water quality standards as applied to stormwater.

Beyond the immediate effect of the judge’s order on obtaining coverage under the Construction General Permit, the ruling offers a genuine opportunity for those in the building community and at local agencies to have their views heard as to the appropriateness of the water quality standards that apply to stormwater discharges in Los Angeles and Ventura Counties. Judge Colaw’s ruling ensures that evidence submitted by interested parties will be properly scrutinized by Regional Board officials.

As with most trial court rulings, there are now opportunities for the parties to ask the court to reconsider its decision. On July 18, 2008, the Natural Resources Defense Council, an environmental group that had intervened in the litigation on the side of the Water Boards, filed a motion to vacate Judge Colaw’s ruling. Additional motions may be filed in the coming days, including a motion to modify the ruling to permit enrolling of projects under the Construction General Permit to

continue. The motions are likely to be heard in August, with the trial court's final disposition known by early September. After the trial court's ruling becomes final, it is possible that the ruling will be appealed to the California Court of Appeal. Manatt will update this news item as it unfolds.

Judge Colaw's order is available [here](#).

Members of Manatt, Phelps, and Phillips LLP's Real Estate and Land Use practice counsel clients in water quality compliance. If you have any questions about this matter, please contact [Craig Moyer](#) or [Dana Palmer](#) in Manatt's Los Angeles office or [Susan Hori](#) in Orange County.

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