

Client Alert.

April 11, 2012

California Addresses Court Ruling on Storm Water Permit for Development and Construction Activities

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The California State Water Resources Control Board (“State Water Board”) recently proposed significant changes to its general storm water permit for developers and construction contractors—the Construction General Permit (“CGP”). The changes address a December 2011 decision in *California Building Industry Ass’n et al. v. State Water Resources Control Bd.* (Sacramento County Superior Court No. 34-2009-80000338-CU-WM-GDS) that found that numeric effluent limitation requirements in the CGP were not supported by substantial evidence and exceeded the requirements of the federal Clean Water Act (“CWA”).

The court’s decision was previously seen as an important victory for the building industry, undermining a central component of the CGP’s most stringent requirements. The State Water Board’s newly proposed action makes clear, however, that related numerically-oriented requirements remain and could present significant compliance challenges. Developers and construction contractors therefore need to be aware that enhanced storm water permit requirements are still in place, especially for so-called high risk areas near creeks, streams, and other surface waters and on sloped land.

BACKGROUND ON THE CALIFORNIA CGP AND ASSOCIATED RISK CATEGORIES

As a general matter, the federal Clean Water Act prohibits discharge of pollutants (including sediment) where it ultimately will be conveyed to surface waters, except as authorized by a permit issued by the federal EPA or an authorized state. The CGP is a California-issued statewide general permit that satisfies the federal CWA requirements.

For many years, a developer or contractor would automatically receive CPG coverage for their site in California after submitting a Notice of Intent (“NOI”) to the State Water Board and paying a fee. The applicant also had to prepare and implement a Storm Water Pollution Prevention Plan (“SWPPP”) that set forth best management practices (“BMPs”) to minimize pollutants in their discharge and address potential storm water impacts, as well as implement a site monitoring program based on visual inspections.

However, in 2009, California adopted an updated CGP entailing a new, more rigorous and quantitative approach to regulating storm water discharges from development and construction sites across the State. The CGP now classifies permit requirements based on site characteristics such as slope and erosion potential and the risk of sediment draining to a nearby or sensitive water body. Permits for projects with the lowest risk level (Risk Level 1) largely continue to implement the former CGP’s approach of general BMPs and visual monitoring. Risk Level 2 projects must implement additional BMPs or take corrective action if discharges exceed Numeric Action Levels (“NALs”) for specific pollutants. Risk Level 3 projects were additionally subjected to absolute numeric effluent limits for turbidity and pH, an exceedance of which would automatically constitute a federal CWA permit violation. The building industry vehemently opposed these numeric limits and challenged the updated CGP on a number of grounds, including based on an argument that the numeric effluent limits for turbidity and pH were not supported by sufficient evidence. The Sacramento County Superior Court agreed with the building industry on this point, though it rejected their other claims, including that certain other enhanced provisions of the CGP exceeded federal requirements.

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PROPOSED CHANGES TO CALIFORNIA'S UPDATED STORM WATER PERMIT FOR DEVELOPMENT AND CONSTRUCTION

The State Water Board's proposed changes to the CGP address the court's decision by removing the numeric effluent limits for turbidity and pH from the Risk Level 3 requirements. This is a significant change for those engaged in development and construction on steeply sloped sites or sites near or adjacent to creeks and other surface waters and diminishes the likelihood of them running into virtually indefensible enforcement actions or citizen suits. However, the State's proposed changes add a requirement for those with high risk sites to monitor waters that receive storm water discharges when effluents exceed certain "receiving water monitoring triggers." Those triggers are set at the same levels as the previous numeric effluent limits. While exceeding a receiving water monitoring trigger is no longer a *per se* CWA permit violation, it must be reported to the State Water Board. Repeatedly exceeding these receiving water monitoring triggers can still result in enforcement for failure to take sufficient corrective action and be used to become the basis for civil litigation and citizen suits under which injunctive relief and significant financial penalties could be imposed.

CONCLUSION

Developers and construction contractors remain subject to California's storm water permitting requirements and the updated CGP. Those involved with projects with the highest risk of storm water impacts (such as those located on steeply sloped sites or near or adjacent to creeks and streams) must still abide by enhanced best management practices and monitoring requirements and ensure that their monitoring results do not demonstrate repeated exceedances of numeric receiving water monitoring triggers. Failure to do so may result in enforcement actions or citizen suits notwithstanding the elimination of numeric effluent limitations for turbidity and pH from the CGP.

Members of the public have until May 14, 2012 to submit comments to the State Water Board on its proposed changes to the CGP. Morrison & Foerster is recognized as one of the country's leading law firms on storm water permitting and other water quality issues, and regularly represents and advises clients on these and other land use and environmental law matters.

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