

## STORMY WEATHER: GOVERNMENT AGENCIES WILL SOAK YOU FOR STORMWATER VIOLATIONS

Recent stepped-up enforcement by the California Regional Water Quality Control Board has subjected many landowners and developers to millions of dollars in penalties for failure to comply with groundwater discharge requirements. Even lenders, whose protection under CERCLA does not extend to violations of the Water Code or National Pollutant Discharge Elimination System (NPDES) permits associated with their collateral, have not been spared. In fact, massive fines may be levied for violations as minor as the failure to provide reports to the Regional Board, even in instances where there has been no actual discharge to the storm drains.

### The Context

Construction at levels deeper than the water table means that the removal and disposal of groundwater (also known as “dewatering”) will be necessary, at least for the duration of construction. Permanent post-construction dewatering may also be necessary, such as in cases where water intrudes through fissures or cracks in foundations constructed below the water table, including those for subsurface parking. Generally, dewatering takes the form of channeling groundwater into the storm drain system. Discharges of this nature necessitate obtaining and complying with the requirements of an NPDES permit which governs the amount of the discharge and imposes additional requirements regarding the substances that may accompany the groundwater into the storm drain, including heavy metals, petroleum hydrocarbons, silt and particulate matter. In addition, the California Water Code imposes various other requirements on the holder of an NPDES permit, such as the need to provide quarterly reports to the Regional Board when a discharge occurs – or is merely proposed, whether or not such discharge actually occurs. Fines for violating the provisions of the Water Code, or of the NPDES permit itself, can reach as high as \$25,000 per day.

### The Penalties

There are several particularly egregious aspects of the Regional Board’s levying of such drastic fines for what often amount to relatively minor violations of paperwork requirements. First, as a result of the ongoing economic downturn, many companies have been forced to lay off the project managers or other personnel tasked with tracking and complying with the many requirements associated with the NPDES permits, with the result that non-compliance is likely not only unintentional but also unknowing. Second, the fines are being imposed by the Regional Board at a time when most companies can ill afford to pay them. Third, the Regional Board appears to be conveniently taking the position that it need not provide notification of a permit holder’s violations of the Water Code prior to demanding the payment of fines for the violations, and has allowed penalties to rack up over a course of months or even years before informing the permit holder of the alleged violations. Therefore, a landowner or a developer, or a lender who has foreclosed on a property, may suddenly discover themselves liable for astronomical fines without having had any prior knowledge that violations were ongoing.

To say the least, this presents a significant moral hazard for the regulator assessing the fines, who benefits in direct proportion to the amount of time that it allows to pass prior to putting a violator on notice of the fines. That multi-million dollar fines are being imposed at a time when many governmental agencies are desperately searching for new sources of funding further complicates the ethics behind the Regional Board’s approach to enforcing the Water Code. In addition, there are mandatory minimums associated with the violations, so that even if the maximum is avoided there is very little ability to avoid some level of payment obligation, despite compelling circumstances arguing against the imposition of such penalties (i.e. where reporting was required for proposed discharges, but no discharges ever even occurred). In instances where a failure to report is combined with a violation related to the discharge itself, even the mandatory minimum fines can accumulate to staggering levels.

### Be Proactive to Avoid Penalties

To avoid this predicament, there are a few very important steps that landowners, developers, and lenders should take. First and foremost, the NPDES permit holder should determine which of its properties have groundwater dewatering taking place. Second,

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the permit holder should become intimately familiar not only with the requirements of the permit but also with the provisions of the Water Code that govern the additional steps (such as submittal of quarterly reports) that must be taken to stay in compliance. Third, when a permit is no longer necessary, it should be terminated as soon as possible – because enforcement of the permit's provisions and the Water Code is triggered not by an actual discharge but by whether the permit itself remains in effect.

### **Construction Sites**

While fully evaluating the discharge of water taken from below the ground, parties should also examine in detail the above-ground flow of water at their sites. Owners of construction sites larger than 1 acre in size at which water runoff could occur are required to obtain coverage from the State Water Resources Control Board, under the General Permit for Discharges of Storm Water Associated with Construction Activity. The Construction General Permit requires the filing of a notice of intent to discharge (NOI) and the development and implementation of a Storm Water Pollution Prevention Plan (SWPPP), which must contain a site map showing the construction site perimeter, existing and proposed buildings, lots, roadways, storm water collection and discharge points, general topography both before and after construction, and drainage patterns across the project. In addition, the SWPPP must list the Best Management Practices, or "BMPs," that the discharger will use to protect storm water runoff and the placement of those BMPs. The SWPPP must also contain a visual monitoring program; a chemical monitoring program for "non-visible" pollutants to be implemented if there is a failure of BMPs; and a sediment monitoring plan if the site discharges directly to specified water bodies.

The fines for the failure to satisfy these requirements can be substantial, reaching as high as \$10,000 per day of violation in certain jurisdictions and up to \$32,500 per day under the federal Clean Water Act. Recently, many non-active construction sites have been subject to such fines. To avoid liability, non-active construction properties may necessitate the filing of an updated NOI (reflecting new ownership), development of alternate SWPPP and dust control plans, and the stabilization of open, graded areas for purposes of terminating the permits.

### **Conclusion**

Property owners, developers and lenders are all well-advised to determine if they are subject to NPDES permits governing discharges of groundwater and storm water to storm drains. To avoid significant penalties, make sure all record-keeping and reporting obligations to the RWQCB are being performed.

*If you have any questions regarding this alert or would like to discuss issues relating to the acquisition, development or management of contaminated or potentially contaminated property, please contact:*

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