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Draft National Pollution Discharge Elimination System Construction General Permit Issued for Public Review and Comment in California

On March 18, 2008, the California State Water Resources Control Board (SWRCB) issued a Draft National Pollution Discharge Elimination System (NPDES) Construction General Permit (Draft General Permit) for public review and comment. SWRCB will hold two workshops on the Draft General Permit: in Los Angeles on May 7, 2008, and in Sacramento on May 21, 2008. SWRCB then will hold a board hearing on the Draft General Permit on June 4, 2008. If approved in its draft form, the Draft General Permit would result in significant changes to stormwater requirements for construction projects in California. These include, but are not limited to the following.

1. The Draft General Permit presents a risk-based approach to approximate a project's actual risk of impacting water quality during construction. The Draft General Permit contains an approach for estimating both sediment and receiving water risk separately. The Draft General Permit provides for an overall risk determination framework that reflects the applicable levels of implementation and monitoring for three risk levels. The risk factor worksheet to determine a project's risk level queries whether a project's disturbed area would discharge — either directly or indirectly — to a 303(d)-listed waterbody impaired by sediment. If "indirectly" is interpreted to mean discharge to a tributary of a 303(d)-impaired waterbody, then many projects immediately are pushed into a "high risk" category unless an active treatment system (ATS) is implemented. The significant costs of ATS may make development infeasible for all but the most expensive homes.
2. Projects determined to be Risk Level 4 would not be covered by the General Draft Permit; an individual permit would be needed. However, the Draft General Permit does not specify a number that would trigger a Risk Level 4. The Draft General Permit appears to leave this

decision to individual regional boards without any guidance. Thus, it is likely that different regional boards will establish different criteria for which projects qualify for this higher level of scrutiny and compliance. However, it is clear that projects that require individual permits also would need to comply with other regulatory mandates such as the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA), thereby adding significant additional costs to such projects.

3. The Draft General Permit sets an arbitrary Numeric Effluent Limitation (NEL) for turbidity of 1,000 nephelometric turbidity units (NTUs) for discharges not treated by ATS systems and 20 NTUs for effluent discharges from ATS units. If the effluent exceeds this limit, the project site could be alleged to be in violation of the Draft General Permit. While this proposed limit fails to consider background conditions of the receiving waters it would be enforceable under the citizen suit provisions of the Clean Water Act, exposing developers to significant legal liabilities.
4. The Draft General Permit would require receiving water monitoring. Depending on a project site's proximity to a receiving water, it may be difficult for many dischargers to perform this monitoring. Moreover, the Draft General Permit fails to take into consideration situations in which the discharger cannot obtain legal access to the receiving water both up and down gradient from the project site.
5. Dischargers are required to maintain permit coverage for properties that have been sold off until the new owner files a Permit Registration Document (PRD). Short of requiring the filing of the PRD as part of the escrow, the seller would have no control over the buyer's decision to file a PRD. Residential developers in particular would need to achieve final stabilization (a fully landscaped lot) before selling houses to retail buyers or

alternatively, force retail home buyers into a regulatory regime for which they are not prepared.

6. NELs for discharges from an ATS require that residual chemical be less than 10 percent of the maximum allowable threshold concentration (MATC). Determining the MATC would be very costly and it is unclear whether the MATC would be product-specific, lot-specific, site-specific, or a combination thereof.
7. Draft General Permit Attachment J is a list of coagulants that are "commonly available," including Polyacrylamide (PAM). However, PAM cannot be used legally in California because Proposition 65 prohibits the discharge of acrylamide into drinking water sources.
8. Draft General Permit identifies persons who are "qualified" to write, amend, and certify Storm Water Pollution and Prevention Plans (SWPPP). The Draft General Permit would require the person engaged in SWPPP preparation to engage in "the professional practice of rendering service or creative work requiring education, training and experience in engineering sciences and the application of special knowledge of the mathematical, physical and engineering sciences in such professional or creative work as consultation, investigation, evaluation, planning or design of public or private utilities, structures, machines, processes, circuits, buildings, equipment or projects, and supervision of construction for the purpose of securing compliance with specifications and design for any such work." Business & Professions Code § 6701. "In order to safeguard life, health, property and public welfare, any person, either in a public or private capacity, who practices, or offers to practice, civil engineering, electrical engineering or mechanical engineering, in any of its branches in this state, including any person employed by the State of California, or any city, county, or city and county, who practices engineering, shall

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submit evidence that he is qualified to practice, and shall be licensed accordingly as a civil engineer, electrical engineer or mechanical engineer by the board." Business and Professions Code § 6730. Thus, under the Draft General Permit, only a licensed professional engineer can qualify as a qualified SWPPP developer. Anyone who engages in the practice of SWPPP preparation under the Draft General Permit who is not a licensed professional engineer would be in violation of the California Unfair and Unlawful Business Practices Act.

9. The Draft General Permit provides new authorities to Regional Board staff without providing any due process to the permittees such as the right to take actions that include, but are not limited to: rescinding permit coverage, requiring public hearings or formal Regional Water Board permit approvals, requesting dischargers to revise their SWPPP and/or monitoring program within a specified time period.