

Client Alert

Latham & Watkins Environment Land &
Resources Department

A Critical Period: Potential New Stormwater Requirements for Private Development and Public Works Projects in California

The California Regional Water Quality Control Boards are in the process of renewing the National Pollutant Discharge Elimination System (NPDES) permits for municipal separate stormwater sewer systems, new provisions of which may: (1) place significant constraints on access to the public storm drains; (2) require stormwater from new projects (public and private) to be kept on site by sinking it into the ground or capturing it and then reusing it; and (3) minimize change to pre-development hydrology, as well as water quality. If adopted, the local governments which are the NPDES permittees must impose these requirements on new development and significant redevelopment that proposes to connect to the public storm drains. These requirements will usher in a new era of how the federal Clean Water Act influences and shapes the planning, design, construction, operation and cost of all new major projects in California, including public infrastructure, such as transportation facilities, as well as private development.

The proposed requirements threaten to make it harder to rely on natural stormwater treatment systems (e.g., riparian corridors and constructed marshes), and sequential Best Management Practices (BMPs), that

improve stormwater quality before releasing it off site to the public storm drain. While expensive, these approaches are considered relatively affordable compared to the on-site retention strategies being considered by the Water Boards and supported by some Non-Governmental Organizations (NGOs).

This *Alert* describes these unfolding developments, and potential opportunities to affect these permitting outcomes. These new policies are being adopted on a permit-by-permit basis for various regions, with milestones for key regions as follows:

- *June 8, 2009* – Date by which the Regional Board's adoption of the Ventura County permit can be petitioned for review to the State Water Resources Control Board;
- *June 22, 2009* – Date by which the Regional Board's adoption of the Central/North Orange County permit can be petitioned for review to the State Water Resources Control Board;
- *June 19, 2009 (comment cut-off) and July 1, 2009 (hearing)* – Continued proceedings on the South Orange County permit, to be held in Dana Point before the San Diego Regional Board;

"A critical juncture in stormwater regulation has arrived, and depending on the decisions made in the ongoing MS4 permit proceedings, the results will have significant and long-lasting effects."

- *July 2009* – Anticipated adoption by SF Regional Board of permit for Bay Area;
- *July 2009* – Earliest time by which the Santa Ana Regional Board is expected to issue a draft permit for the Inland Empire; and
- *September 2009* – Earliest time by which the LA Regional Board is expected to issue a draft permit for LA County.

Also at issue in these permit proceedings is whether a 2009 Ninth Circuit Clean Water Act decision effects a *moratorium* on new projects in watersheds that do not meet water quality standards unless and until the Regional Board specifically assigns a maximum allowable pollutant loading for stormwater from that new project. Water quality standards are both numeric and narrative pollutant limits designed to maintain designated beneficial uses of surface waters under the jurisdiction of the various Regional Boards. The permit process may be used by certain groups to press for this interpretation, who may wish to litigate the issue in order to make new law.

Finally, on June 17, the State Water Board is holding a workshop in Sacramento regarding “how infiltration capture and storage” of urban runoff can promote the Greenhouse Gas reduction goals of the California Global Solutions Warming Act of 2006 (AB 32). The State Board proceedings are creating added pressure for the adoption of on-site retention policies, and new limits on access to the public storm drain.

What Is At Stake?

How does one develop a project or build a highway in such a way that the developed property responds to rainfall as if 95 percent of the property is covered with grass? How can one build a project of any meaningful

dimension and, at the same time, leave nature and the hydrologic cycle virtually unchanged? Why, suddenly, are BMPs like natural treatment systems being relegated to an inferior status, available only upon showing of proof that stormwater cannot be retained on site? These are three of the key questions raised by the aforementioned permit proceedings. They illustrate the stakes for the regulated community which may get stuck with a slate of new requirements that answer these questions like the Nike ad: “*Just do it.*”

While the clock is ticking, there is still time to influence the outcome in several large regions and promote reasonable stormwater regulation for new projects, and continued reasonable access to the public storm drain.

Background

The federal Clean Water Act requires urban runoff from metropolitan centers to be regulated under the NPDES permit program,¹ administered in California by the nine Regional Water Quality Control Boards and the State Water Resource Control Board. These NPDES permits for public storm drains, called Municipal Separate Storm Sewer System (MS4) permits, are sweeping in scope. They include requirements for new development and significant redevelopment, which can include very small projects (5,000 square feet or more), and public as well as private activity.

The permits at issue are federal Clean Water Act MS4 NPDES permits. They expire every five years and are reissued within two to three years. The proceedings described above concern reissuance proceedings for MS4 permits issued by the various Regional Boards from 1999-2003.

National Research Council Report (Released October 2008)

A panel of the National Research Council (NRC), which provides science, technology and health policy advice under a congressional charter, recently completed a study called, "Urban Stormwater Management in the United States." In that report, the NRC panel calls for "[r]adical changes to the current regulatory program ... to provide meaningful regulation of stormwater dischargers in the future." The report supports, as a critical element to reduce volume and pollutant loads during small storms, an on-site retention approach espoused by certain NGOs which relies on BMPs that will "**harvest, infiltrate and evapotranspire stormwater.**" The report favorably cites the draft Ventura permit as an "application of low-impact methods to new development and redevelopment to hold the effective impervious area to 5 percent of the total contributing catchment."

There is strong NGO advocacy for the very restrictive permit regimes recommended in the NRC Report, even though there are questions as to whether some of them are permissible approaches to NPDES permitting under the current law. For example, even US EPA officials noted that the NRC committee was not constrained by any statutory or regulatory factors, and that its recommendations might need legislative amendment of the federal Clean Water Act to be lawful.²

Provisions of Particular Interest

Latham & Watkins lawyers have been very involved in the latest round of MS4 NPDES permit proceedings, including the Central/North Orange County permit proceedings which required more than three months of stakeholder negotiations with NGOs and Regional Board staff to reach a satisfactory

resolution. In the MS4 proceedings, the policy debate has focused on certain key provisions, including:

- *Low Impact Development (LID)* – LID includes a subset of BMPs considered more sustainable than mechanized devices that rely heavily on routing stormwater to the public storm drain. On-site retention through infiltration galleries, planter boxes, retention basins, cisterns and rain barrels are the kind of LID BMPs favored by the NGOs. It appears that some LID standard may be inevitable, so the regulated community has advocated a LID standard which includes BMPs that *detain*, but do not necessarily *retain*, stormwater, slowing it down and treating it with biotreatment, such as vegetated swales and extended detention basins. This broader conception of LID permits some off-site runoff to the public storm drain, rather than requiring 100 percent on-site retention of the design volume. It also is consistent with US EPA and State Water Board guidance documents on LID.
- *Effective Impervious Area (EIA)* – EIA is a concept used to restrict how much of a site, after development, can respond to rainwater, as if it were impervious (e.g., paved). In the Ventura permit proceedings, NGOs advocated for a maximum allowable EIA of 3 percent. Five percent ultimately was adopted as the standard in the Ventura permit. The Central/North Orange County permit does not contain an EIA provision.
- *Design Capture Volume* – This is the volume of stormwater that must be intercepted by LID BMPs. The Central/North Orange County permit requires the volume from about 0.8 inches of rainfall to be intercepted with LID BMPs. Agency staff first proposed a volume that was 3-5 times that amount. Because the Ventura permit contains an EIA limit, it is not clear what volume must be managed with LID BMPs.

- *Hydromodification* – Such provisions limit allowable change in the pre-project hydrograph—a graphical depiction of the relationship between rainfall and runoff for any given site. Provisions may be based on peak runoff volume, time of concentration and/or other hydrologic measures. LID, EIA and hydromodification provisions are intended to push new projects towards mimicking pre-existing hydrology, and matching of pre- and post-development hydrologic measures. This can require managing large amounts of stormwater on site, as site development typically results in more stormwater runoff than might occur naturally.
- *Maximum Extent Practicable (MEP) Standard* – NGOs also are advocating that the most restrictive version of LID must be mandated in order to satisfy the federal Clean Water Act MEP standard for MS4 permits, a standard which requires controls to reduce the discharge of pollutants to the *maximum extent practicable*. Such a LID standard may be particularly difficult to implement in practice. While MEP requires a maximum practicable effort, it is not necessarily a technology-forcing standard. Equally important, so far there is little indication that the use of such restrictive LID approaches has been successfully achieved on a widespread basis in any sizable jurisdiction. The NGOs tout as precedent for such a standard of a small (3,070 acres), recently dissolved development district along the Anacostia River in the Washington, D.C. area. In fact, it appears that the LID rules for that jurisdiction were never imposed upon particular projects. The requirements of MEP is a very live issue with respect to LID and the other new provisions in the MS4 proceedings.
- *Numeric Effluent Limits* – This new generation of MS4 permits is moving ever closer to incorporating numeric effluent limits that might be interpreted to apply end-of-pipe

numeric limitations to public storm drain pipes. NGOs long have sought such numeric limitations because compliance is easier to measure and enforce through citizen suits than other more qualitative BMPs. Municipalities and the regulated community, on the other hand, generally feel that the numeric standards cannot be met feasibly and would require major (perhaps unprecedented) stormwater capture and treatment. Yet, through the incorporation of numeric limits set out in Municipal Action Levels (see Ventura permit), and Total Maximum Daily Loads (TMDLs) into the MS4 permits, the permittee cities and counties are being forced closer to such numeric limits.

One strategy that can affect how these issues are addressed in the MS4 proceedings is to petition the Regional Boards to treat the proceeding as a formal adjudication of petitioner's rights. A formal adjudication proceeding allows the use of trial-like procedures, including discovery rights and the cross-examination of agency staff, which can be used to test the merits of these stormwater issues. This procedure could be an effective alternative to challenge proposals which may lack underlying evidentiary support, as opposed to simply submitting comment letters and providing oral comments. While a relatively reasonable result in a particular region can be achieved without a formal adjudication as in the Central/North Orange County permit proceedings in May, the more robust formal adjudication procedures can be used to great effect, as they were during the Ventura County permit proceedings in May.

The *Pinto Creek* Wildcard and the Moratorium Argument

In *Friends of Pinto Creek v. United States Env'tl. Prot. Agency*, the Ninth Circuit Court of Appeals vacated an

NPDES permit issued by US EPA to a new discharger on the grounds that the proposed “discharge of dissolved copper into a waterway that is already impaired by an excess of the copper pollutant” would violate the federal Clean Water Act.³ The court stated that, “no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards.”⁴ The court noted that an exception to this rule exists where the TMDL has been performed, and the “new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards.”⁵

Based on *Pinto Creek*, the NGOs are arguing that a “Regional Board is prohibited from approving a permit that allows new sources or discharge of any pollutant to waterbodies already impaired by that pollutant, unless the Tentative Order [the draft MS4 permit] demonstrates that an existing TMDL specifically provides sufficient waste load allocations for the discharge.” In short, the proposition is that new projects cannot proceed in impaired watersheds absent a very particular kind of TMDL that contemplates, and assigns a pollutant allocation to, the new projects.

Analogizing new development within a watershed already covered by an MS4 permit to a brand new, open-pit copper mining operation discharging copper deposits directly into an impaired waterbody misses the point that MS4 permits regulate categories of runoff, and take a programmatic approach. Those categories include municipal, commercial and residential runoff, as well as development runoff. Development, just like these other categories, is an ongoing activity, understood to be happening within the permitted region. Every new instance of this activity does not constitute a new permit trigger. A primary purpose of the MS4 permit program is to regulate jurisdictionally across a region.⁶ The

moratorium argument would stand the programmatic and jurisdictional nature of this permit program on its head.

Notwithstanding the arguments against the extension of *Pinto Creek*, the Regional Board proceedings may be used by the proponents as an opportunity to create a record on this issue and then seek to litigate to resolve it. Given the potential consequences of such an interpretation, many parties may want to join the issue during the Regional Board proceedings.

Conclusions and Recommendations

A critical juncture in stormwater regulation has arrived, and depending on the decisions made in the ongoing MS4 permit proceedings, the results will have significant and long-lasting effects. The proponents of more restrictive stormwater policies have made California their beachhead. Whether they ultimately will prevail on a broader basis very much may depend on the regulated community’s ability to muster a strong, coordinated response. Also hanging in the balance is the wildcard presented by the Ninth Circuit’s *Pinto Creek* decision, and whether, as some argue, that decision should be extended to stop new projects in impaired watersheds. The next key opportunity to test the evidentiary support for, and to challenge the merits of incorporating such concepts as LID, EIA, hydromodification, MEP and numeric limits into the stormwater management requirements likely will be the upcoming LA County MS4 permit renewal hearings. All who are concerned about the outcome of this debate need to consider joining the issues in the Regional Board proceedings now, in order to affect the debate, make a record, and be prepared to participate in potential litigation following the permit renewal.

Endnotes

- ¹ See Clean Water Act, 33 U.S.C. § 1342(p)(3)(B) (2009).
- ² See Andrea Fox, *Stormwater Report: Bold, Complex, Controversial, and Important – NRC calls for dramatic shift to watershed-based permitting*, 21 Water, Environment & Technology 2, Feb. 2009, <http://www.wef.org/ScienceTechnologyResources/Publications/WET/09/09Feb/09FebNews.htm>.
- ³ *Friends of Pinto Creek v. United States Env'tl. Prot. Agency*, 504 F.3d 1007, 1011 (9th Cir. 2007), cert denied, *Carlota Copper Co. v. Friends of Pinto Creek*, 129 S. Ct. 896 (2009).
- ⁴ *Id.* at 1012.
- ⁵ *Id.*
- ⁶ See Clean Water Act, 33 U.S.C. § 1342(p)(3)(B) (i).

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