

Stormwater Runoff

Increased Regulation of Runoff from Commercial Properties Not Best Strategy

- 2022 marked the 50th anniversary of the Federal Clean Water Act, and water quality vastly improved in those decades.
- Stormwater traditionally has been considered a mere conduit for pollutants gathered in rainwater runoff, but more recently it has begun to be viewed as another source of water supply.
- Challenges remain for harnessing this resource, which is variable and relatively unpredictable in flows and possible contaminants.
- To make stormwater a more viable supply resource, elected leaders should focus on ways to meaningfully incentivize projects that capture and filter stormwater, rather than punishing owners of property onto which rain falls.

The Los Angeles Regional Water Quality Control Board (LA Regional Board) exemplifies the regulatory approach with its recent draft National Pollutant Discharge Elimination System (NPDES) permit for stormwater runoff from commercial, industrial, and institutional properties (CII Permit). This permit is the first attempt to regulate stormwater discharges from CII properties; historically, the NPDES permitting program has been directed to municipalities (which manage the storm drain systems in urban and suburban areas) and truly industrial facilities, pursuant to federal statute.

In short, this is the first time that a broad range of CII properties would be subject to state-level regulation of stormwater

runoff quality, including the risk of being sued under a private right of action.

WHAT IS AN NPDES PERMIT?

An NPDES permit provides the U.S. Environmental Protection Agency (EPA) — or a state with delegated federal authority — a mechanism to allow the discharge of pollutants, as defined, from a “point source” to surface waters. The owner or operator of a defined location from which water carrying pollutants enters a waterway usually must obtain an NPDES permit.

The NPDES permit itself prescribes the conditions under which the discharge can occur. For municipal stormwater NPDES permits, this often includes the use of “best management practices” to reduce the amount of pollutants (typically trash, oil, debris, etc. that collect on paved surfaces over time) entering the waterway. These permits are focused more on the actions that the permittee should take to avoid pollutants entering waterways than whether certain pollution thresholds are met.

Some permits have numerical effluent limits — that is, the water leaving the drain or pipe must be below a certain concentration of a pollutant, focusing on whether the water leaving a facility meets a specific quality with regard to a list of pollutants. This is particularly challenging in the stormwater sense, where the amount, timing and pathway of rainfall is highly unpredictable, which makes it hard to dial in treatment and filtration options that will consistently meet limits for potentially wildly varying quality of water entering storm drains. This method also requires a relatively robust sampling and analysis program to determine compliance.

The failure to comply with every provision of an NPDES permit exposes a permittee to two possible forms of enforcement: administrative enforcement by a regional water quality control board or the State Water Resources Control Board (State Water Board) *or* an aggrieved citizen can file a lawsuit against the permittee in federal court. Because essentially all required stormwater NPDES permit reporting is available online, it is easy for potential plaintiffs to gather potential

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violations. A potential plaintiff need only provide notice of the intention to file suit, and then wait 60 days to proceed to court.

Although a successful citizen plaintiff does not receive any monetary penalties, successful plaintiffs can receive an award of attorney fees. These lawsuits often are settled in their infancy to control costs, but plaintiffs nonetheless typically will recover substantial attorney fees. Sending demand letters can be particularly lucrative. For example, in 2018, the U.S. Department of Justice noted that a single law firm had sent more than 150 demand letters for alleged stormwater violations in a two-year period — all in California. (See United States’ Statement of Concern and Recommendation That Plaintiff File a Motion to Enter the Proposed Consent Decree, *Garcia v. Miller Castings Inc.*, No. 2:17-cv-07408-AB-AGR (C.D. Cal. May 18, 2018), available at https://legacy-assets.eenews.net/open_files/assets/2018/05/24/document_gw_06.pdf.)

DRAFT LA CII PERMIT

The unprecedented current draft CII Permit released by the LA Regional Board highlights the challenges that an NPDES permit creates for the commercial, industrial and institutional sector. First, the draft CII Permit would require property owners or businesses to incur considerable expense to meet all conditions and includes options that are not available or implementable. Most stormwater pollution prevention depends on the use of best management practices, which in turn is determined in part by using “best conventional pollutant control technology” or “best available technology economically achievable.” There are no established technologies for many of the facilities that would be regulated by the

CII Permit. It will be difficult if not impossible to adequately show compliance, and any difficulty in demonstrating compliance increases the risk of litigation.

The costs associated with compliance may not correspond to a meaningful improvement in water quality. EPA research shows that institutional sources, such as hospitals, universities and schools, contribute a relatively small total loading of copper and zinc on a per-acre basis when compared with other land uses. (See Paradigm Environmental, *Analytical Support for Stormwater Source Analysis* (April 24, 2015)). For these types of facilities, the costs of compliance would be much higher than any resulting benefit to water quality in the receiving water.

As of this article’s publication, the LA Regional Board was considering extensive public comment provided by various stakeholders on the draft CII Permit. It remains to be seen whether some of the identified issues and ambiguities can be resolved before businesses and organizations must obtain coverage.

CALCHAMBER POSITION

The California Chamber of Commerce believe that other solutions can avoid unnecessary risks and achieve water quality benefits.

Using an NPDES permit to regulate runoff from commercial properties is not the most efficient way to address water quality concerns. The benefits must match the risks that are presented to these properties. Regional projects that treat businesses and property owners as partners may be preferable approaches to both reduce stormwater pollution impacts and utilize stormwater flows as part of the region’s water supply.



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