

ABBOTT & KINDERMANN, LLP

**Current Issues in Storm Water
Regulation in California**

**California Precast Concrete
Association**

**May 2, 2013
South Lake Tahoe, CA**



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Overview and Brief History

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I. Statutory Framework
History of Water Quality Protection

1. Pre-enactment of Comprehensive State and Federal Legislation

- Prior to the enactment of state and federal water quality laws, water users depended on common-law rights such as nuisance or abatement suits to maintain usable water quality.
- The general rule was that a user (such as a riparian right holder) was entitled to have the water at his point in the stream in essentially its natural state and free from any material pollution.
- Minor degradation was permissible and therefore not actionable, so long as the water had not lost its suitability for the intended purpose, be it drinking or irrigation.

2. Federal Regulation of Water Quality

A. Federal Water Pollution Control Act (“FWPCA”) – 1948

- Recommended that states develop uniform water quality standards.
- FWPCA goals were hard to meet because it focused on the quality of the receiving waters and the “end of the stream” rather than the site of polluted discharge. It proved very difficult to start at the end of the stream and trace back to the source of the pollution, let alone apportion fault to multiple polluters.
- The law continued virtually unchanged until 1972, and depended on the individual states to set appropriate standards.

B. Clean Water Act (“CWA”) (33 U.S.C. § 1251 et seq.) - 1972

- Modeled on California’s Porter-Cologne Water Quality Control Act. (Wat. Code, § 13000 et seq., enacted in 1969.)

- The purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. (33 U.S.C. § 1251(a).)
- Section 301(a) of CWA generally prohibits the discharge of pollutants into waters of the United States except in accordance with the requirements of one of the two permitting programs established under CWA: Section 404, which regulates the discharge of dredged and fill material; or section 402, which regulates all other pollutants under the National Pollutant Discharge Elimination System (“NPDES”) permit program.
- Federal EPA administers the CWA, but states are responsible for implementation.

C. Clean Water Act Section 401; Federal Action Impact on Waters of the U.S. in the State

- Section 401 of the Clean Water Act (“CWA”) requires each federal agency authorizing an activity that could affect water quality to obtain state certification that the proposed activity will not violate state or federal water quality standards. (33 U.S.C. § 1341.)
- Water quality standards include beneficial uses of water, water quality objectives, and anti-degradation policy. (33 U.S.C. § 1313.)
- Water quality certification is typically issued by the RWQCBs.
- In California, the SWRCB and its RWQCBs are responsible for issuing water quality certification.
- The California Porter-Cologne Water Quality Control Act restricts any person (subject to the jurisdiction of the state) from discharging waste or proposing to discharge wastewater to land or groundwater that could affect the quality of the waters of the state without a permit from the RWQCBs (known as WDRs). (Wat. Code, § 13264.) (Discussed Above.)
- Relevance
 - Section 401 is triggered by any activity that requires the need for a permit from a federal agency for a project that could affect state water quality, including section 404/section 10 permits from United States Army Corps of

Engineers (“USACE”). (33 U.S.C. § 1341(a).) For example:

- Initial site development (including vineyards, processing facilities and support buildings that are located in waters of the United States);
 - Facility expansion in waters of the United States; and
 - Improvements to drainage, reservoir or other water facilities that are in waters of the United States.
- WDRs are triggered by land discharges from initial site development, facility expansion, and improvements that could affect water quality of waters of the state (not necessarily waters of the United States under USACE jurisdiction (e.g., certain isolated wetlands).)

D. Clean Water Act Section 402; National Pollutant Discharge Elimination System (“NPDES”) Program

- Section 402 of the CWA authorizes states to develop an NPDES program to permit “point source” discharges of pollutants into surface waters of the United States, including:
 - industrial facilities discharges,
 - municipal storm water discharges, and
 - storm water discharges associated with construction projects over a certain acreage. (33 U.S.C. § 1342(p).)
- In the past, only construction projects that directly disturb five (5) or more acres were required to comply with the state’s general construction permit. Since March 2003, operators disturbing one or more acres during construction must obtain NPDES coverage. (67 F.R. § 42647.)
- According to Section 402, discharge from any point source is unlawful unless the discharge is in compliance with an NPDES permit.
- NPDES permits can be individual (project or activity specific) or general (e.g., California’s construction storm water NPDES permit).

- In California, the SWRCB and its RWQCBs are responsible for administering the NPDES permit process.
- Three types of permits: Industrial, Construction, and Municipal

1. Industrial

- a. Industrial storm water must comply with NPDES permits containing the technology-based effluent limitations. “Technology-based” means the best available technology economically achievable (“BAT”) for toxic pollutants and Best Conventional pollutant control Technology (“BCT”) for conventional pollutants. (33 U.S.C. § 1342(p)(3)(A).)
- b. Along with technology-based effluent limits, the General Industrial Permit also requires the development of a Storm Water Pollution Prevention Plan (“SWPPP”) and a monitoring plan. (SWRCB Order 97-03-DWQ.)
- c. In July 2012, the State Water Resources Control Board (State Water Board) released the 2012 Draft National Pollutant Discharge Elimination System (NPDES) General Permit for the Discharge of Storm Water associated with Industrial Activities (2012 Draft NPDES Industrial General Permit) for public comment. The State Water Board has accepted comments and continued to work with industry groups. In addition, the State Water Board has conducted numerous hearings and staff workshops to answer questions about the 2012 Draft NPDES Industrial General Permit on August 8, 2012 and August 10, 2012.

The Executive Summary includes a cost analysis, and in the permit there are no numeric effluent limits other than those federal effluent guidelines already in place. There are, however, required actions if a facility exceeds action levels.

- d. The most recent communications with SWRCB staff were on April 19, 2013. The following are the key changes made by staff in response to industry comments:

- SWRCB staff is recommending an effective date of July 2014 (This is at least partly so they can get their systems in order)
- QISP's have been reduced to a single QISP certification.
 - California licensed professional civil, industrial, chemical, and mechanical engineers and professional geologists are eligible to complete a self-guided QISP training program and then must register as a QISP in SMARTS.
 - Non licensed and current construction QSD's & QSP's will need to take the class.
- QISP's will not be necessary for an operation unless a facility enters Level 1. (This seems to mean writing SWPPP's and other functions will no longer require a QISP and staff indicated that, but gave us no list of function changes) Also means not until July 2015 if implementation goes to SWRCB staff schedule.
- QISP will be needed to run a group.
- Pre-Storm visual observations removed/consolidated, quarterly Non Stormwater Discharge observations removed/consolidated.
 - Instead a monthly observation of authorized/unauthorized NSWD, Out Door Pollutant Sources and BMP's. (This change was an industry recommendation due to the uncertainty burden of tracking National Weather Service predictions)
- pH sampling – Litmus paper allowed until two trigger exceedances then hand held or 15 minute lab. (Cement facilities but not RMC facilities apparently have a federal requirement for the hand held or lab automatically)
 - Partial granting of industry comments.
- Sampling Changes

- No Rain Gauge – Qualifying Storm event will not be based on Rainfall amount but discharge.
 - 2 samples (Per outfall) each half of the year.
 - Group participants 1 sample in each half of year.
- Interval between storm events is changed to 48 hours with no discharge.
- Sampling frequency reduction available after 4 samples(not 8 consecutive).
 - Reduction to 2 samples per year 1 first half, 1 last half
 - Group Reduction 1 sample per outfall per year.
- Annual Report Simplified – single compliance checklist with an explanation option for any activities not completed.
- Existing Retention Basins will be OK per staff until/unless facility reaches level 2 – And even then depending on analysis results – (Change not shown on handout but we asked about it)
- Confidentiality – Trade Secrets (Also not on form)
 - Staff indicated there would be an ability to redact information submitted provided data would be on site.
- Inactive Mines – Requirement for certification documents has **not** been changed from an engineer (federal requirement according to staff) - Staff was going to look at who certified the site was inactive. (Not on sheet)
- Infrequent activity mines (Borrow Sites, intermittent etc)
 - Staff seemed to agree they were not inactive and were going to review our comments possibly provide clarification in their response to comments. They gave an indication using documents such as

the monitoring Implementation Plan and clarity of process at the site in SWPPP could be a likely path forward to handle those facilities.

- Staff Was looking into fixing the significant spills and leaks issue.
- NONA – See last Row in attached document

Some changes may still occur prior to the final release which is now expected the end of May.

2. Construction

- a. Construction discharges are one category of industrial discharge. Permitting has been separate for construction due to unique aspects of grading land and temporary nature of projects. EPA's early coverage threshold of five (5) acre disturbance was considered arbitrary, and now, it is half-acre disturbance.
- b. The State Water Resources Control Board adopted a State-Wide NPDES General Permit for Industrial Discharges and Construction Discharges. (SWRCB Water Quality Order 99-08-DWQ.)
- c. A new general permit for construction activities was proposed and the comment period closed June 11, 2008. The new general permit included the following revisions:

Numeric Action levels and Number Effluent Limitations for pH and turbidity;

Four level risk-based permitting approach;

Increased number of minimum BMPs and requirements;

Monitoring and reporting of soil characteristics, pH and turbidity by dischargers;

Establishes new development and re-development storm water performance standards

in order to address those sites not covered by Phase I or Phase II MS4 NPDES permits; and

Development of a Rain Event Action Plan for each site.

d. Cal BIA, et al. v. SWRCB, (Sacramento County Superior Court Case No., 34-2009-80000338)

After several years of debate and litigation, Sacramento Superior Court Judge Lloyd G. Connelly, invalidated Numeric Effluent Limitations ("NELs") in the State's new Construction General Permit issued by the SWRCB for stormwater runoff from construction sites. Adoption of the NELs relied on studies that were characterized by the Court as inconclusive and therefore lacking in substantial evidentiary support.

The Court held that the NELs for turbidity and pH were not supported by substantial evidence. Consequently, the NELs are invalid and unenforceable unless and until the SWRCB produces data supporting a finding that available technologies will actually be able to achieve the NELs.

The Court also found that the NELs were not analyzed with the cost-benefit factors set forth in the Federal CWA for establishing NELs.

The result is that while you must comply with the Best Management Practices in the Construction General Permit, requirements for turbidity and pH NELs have been removed from the GCP and no penalties can be assessed.

For more information, see http://www.swrcb.ca.gov/water_issues/programs/stormwater/construction.shtml.

3. Municipal Separate Storm Water Systems ("MS4s")

- a. NPDES permits regulate municipal storm water and are restricted by the following requirements:

- “may be issued on a system- or jurisdiction-wide basis;
 - shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers; and
 - shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.” (33 U.S.C. § 1342(p)(3)(B)(i)-(iii).)
- b. Phase I (1990)
- Applies to municipalities serving populations greater than 100,000.
 - Implemented through individual permits granted by the RWQCB which are updated every five (5) years.
- c. Phase II (1999)
- Includes smaller municipalities in the program.
 - Implemented through either individual or general permits.
 - MS4 permits require the discharger to develop and implement a Storm Water Management Plan/Program with the goal of reducing the discharge of pollutants to the maximum extent practicable. (33 U.S.C. § 1342(p).)
 - Minimum required measures include: public education and outreach, public participation/involvement, illicit discharge detection and elimination, construction site runoff control, post construction runoff control, and pollution prevent/good housekeeping.

- SWRCB adopted Water Quality Order 2003-0005-DWQ on April 30, 2003, which provides a General Permit for MS4s meeting certain criteria. (See http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/final_sm_ms4_fact_order.pdf.)

4. Relevance

- a. Runoff from construction activities;
- b. Discharges to surface water from processing facilities (e.g., “gray water,” silvicultural point sources).

E. Clean Water Act Section 303(d); Total Maximum Daily Load (“TMDLs”)

- Section 303(d) of the CWA requires each state to identify waters that will not meet applicable water quality standards after implementation of technology-based point source controls and to rank the identified waters, taking into account the severity of pollution and designated beneficial uses of the waters. This ranking list of waters not meeting water quality standards or “impaired waters” is referred to as the “303(d) list.” (33 U.S.C. § 1313(d).)
- Section 303(d) also establishes a process to set TMDLs for these waters to provide for more stringent water quality-based controls. This process is used when required federal, state, or local controls are inadequate to achieve water quality standards. (33 U.S.C. § 1313(d).)
- TMDLs specify the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and allocate pollutant loadings among point and non-point pollutant sources. By law, the U.S. Environmental Protection Agency must approve the list of waters and TMDLs established by states, territories and authorized tribes. In essence, TMDLs are a “pollution budget” for an impaired water body. (33 U.S.C. § 1313(d)(2).)
- CWA section 303(d) requires states to identify waters that do not meet, or are not expected to meet by the next listing cycle, applicable water quality standards after the application of certain technology-based controls, and schedule such waters for

development of Total Maximum Daily Loads (“TMDLs”). (40 C.F.R § 130.7(c) and (d).)

- The states are required to assemble and evaluate all existing and readily available water quality-related data and information to develop the list (40 C.F.R § 130.7(b)(5)) and to provide documentation for listing or not listing a state’s waters (40 C.F.R § 130.7(b)(6)).
- Waters shall be placed in this category of the section 303(d) list if it is determined, in accordance with the California Listing Factors that the water quality standard is not attained; the standard’s nonattainment is due to toxicity, a pollutant, or pollutants; and remediation of the standard’s attainment problem requires one or more TMDLs.
- At a minimum, California’s section 303(d) list shall identify waters where standards are not met, pollutants or toxicity contributing to standards exceedance, and the TMDLs completion schedule.
- The water segment listed shall remain in this category of the section 303(d) list until TMDLs for all pollutants have been completed, EPA has approved the TMDLs, and implementation plans have been adopted.
- RWQCBs and SWRCB use several factors to develop the California section 303(d). Among the factors is toxicity.
- Currently, California has 686 waters on its Impaired Water 303(d) list. Most of those waters are streams, creeks or rivers, and approximately fifteen percent (15%) of the waters listed are located in Los Angeles or Santa Monica Bay. (See <http://www.epa.gov/owow/tmdl/>.)
- One of the most difficult sources to quantify in calculating TMDLs is storm water. Many of the waters listed are impaired due to storm water sources, and various methods have been used by different regions and states to quantify storm water allocations. This issue has risen in importance recently with the continued implementation of National Pollutant Discharge Elimination System Phase II, which affects smaller municipalities and construction activities. (See “Total Maximum Daily Loads with Stormwater Sources: A Summary of 17 TMDLs” at http://www.epa.gov/owow/tmdl/17_TMDLs_Stormwater_Sources.pdf.)

California Toxics Rule

- Under section 303(c)(2)(B) of CWA, California must adopt numeric criteria for the priority toxic pollutants listed under section 307(a) if those pollutants could be reasonably expected to interfere with the designated uses of state's waters. Priority toxic pollutants are identified in 40 C.F.R. § 131.36.
- In 1994, a California state court found that the numeric criteria adopted by SWRCB were invalid. As a result, no numeric criteria for priority toxic pollutants existed for California.
- To fill the gap, the EPA promulgated the California Toxics Rule ("CTR") on May 18, 2000. The CTR regulations, codified in 40 C.F.R. § 131.38, establish numeric criteria for water quality standards for priority toxic pollutants for the State of California. To be able to implement the CTR, SWRCB adopted the State Implementation Plan in 2000.
- The CTR sets the following regulations in California:
 - 1) Ambient aquatic life criteria for 23 priority toxics;
 - 2) Ambient human health criteria for 57 priority toxics; and
 - 3) A compliance schedule provision which authorizes the state to issue schedules of compliance for new or revised NPDES permit limits based on the federal criteria when certain conditions are met.
- Numeric water quality objectives for toxic pollutants, including CTR/National Toxics Rule ("NTR") water quality criteria, are exceeded when the thresholds for toxicity of a pollutant, or pollutants is not met. When this happens waters shall be placed on the section 303(d) list. Remediation of the standards requires one or more TMDLs.
- The State must use the criteria together with the state's existing water quality standards when controlling pollution in inland waters and enclosed bays and estuaries. The numeric water quality criteria contained in CTR are identical to EPA's recommended CWA section 304(a) criteria for these pollutants published in December

1998. (See 63 C.F.R § 68353). For more information, see <http://water.epa.gov/lawsregs/rulesregs/ctr/index.cfm>.

- In March 2000, SWRCB adopted the state implementation plans (“SIP”) for priority toxic pollutant water quality criteria contained in the CTR. The CTR was promulgated by EPA in May 2000. The SIP also implements NTR criteria and applicable priority pollutant objectives in RWQCB’s Basin Plans. Together, the CTR and NTR and applicable Basin Plan objectives, existing RWQCB beneficial use designations, and the SIP comprise water quality standards and implementation procedures for priority toxic pollutants in non-waters in California.

3. State Regulation of Water Quality

A. Initial Attempts at Regulation

- The California Constitution was amended in 1928 to require that the water resources of the state be put to their fullest beneficial use and that the waste, unreasonable use, or unreasonable method of use of water was to be prevented.
- State Department of Public Health was responsible for preventing harmful discharges into the waters of California. The Department had the authority to deny a permit for discharge of waste or construction of a waste treatment or disposal facility if it believed the discharge would create a public nuisance or endanger the public health. Additionally, the department had the authority to investigate disposal facilities and order changes in their method of operation, design or even location.
- In 1947, the California legislature appointed an Interim Fact-Finding Commission on Water Pollution, chaired by Assemblyman Randal Dickey. The Commission spent eighteen months on hearings and investigations, presenting its findings to the 1949 legislature in a comprehensive report. In response to the commission’s reports, the legislature made several changes to existing water law. First and foremost among these changes was the Dickey Water Pollution Act of 1949 (“Dickey Act”), which created the State Water Pollution Control Board and nine regional boards, which still exist today. While the water boards were given control over various aspects of water quality, including economic ones, the power to abate an actual nuisance posing harm to the public health remained vested in the State Department of Public Health.

- Another bill passed at the same time creating a revolving State Water Pollution Control Fund for the purpose of giving loans to municipalities to build sewer and storm drainage facilities as approved by the State Board. Additional bills authorized the then Division of Water Resources (now the Department of Water Resources) and the Department of Fish & Game to investigate all sources of pollution and report findings to the appropriate Regional Water Pollution Control Board.
- None of the bills authorized continued monitoring of a discharger.
- In 1951, an amendment to the Dickey Act provided that dischargers must maintain and furnish such technical reports as the Regional Board may specify. The result of this amendment was that it gave the regional boards the statutory power to require self-monitoring programs, a huge step for continued enforcement. However, because at the time the requirement was not enforceable through injunctions or misdemeanor charges, the self-monitoring requirements lacked the teeth they have today.

B. California Porter-Cologne Act (Wat. Code, § 13000 et seq.)

- The Porter-Cologne Water Quality Control Act was used as the basis of the 1972 Federal Clean Water Act. The Porter-Cologne Act entrusts the State Water Resources Control Board (“SWRCB”) and the nine Regional Water Quality Control Boards (“RWQCBs”) with protecting California’s waters. (Wat. Code, § 13001.)
- RWQCBs are responsible for developing Basin Plans and regulating all pollutant or nuisance discharge that may affect either surface water or groundwater. (Wat. Code, § 13240.) Any person proposing to discharge waste within any region must file a report of waste discharge with the appropriate regional board. (Wat. Code, § 13260.)
- No discharge may take place until a RWQCB issues waste discharge requirements (“WDRs”) or a waiver of the WDRs. (Wat. Code, § 13264.)
 - WDRs - Comprehensive program under Porter-Cologne Water Quality Act (Wat. Code, § 13264 et seq.) that regulates point and non-point source discharges of waste to state surface and groundwater.
 - “Waste” is broadly defined, and RWQCB’s assertion of regulatory authority to require WDRs is becoming more

expansive; e.g., industrial waste water fully contained in a concrete lined holding tank in the ground is deemed a point source discharge to land. Swimming pools are considered a discharge to lands.

- Some general waivers from WDRs exist.
 - WDRs require reporting and monitoring according to RWQCBs and statutory criteria for constituent limits. (Wat. Code, § 13260 et seq.) WDRs can be refused, thus prohibiting the applicant's necessary discharge.
 - Examples triggering the need for WDRs include erosion from soil disturbance, discharge of process wastewater not discharging to a sewer. (i.e., factories, cooling water, etc.)
 - Porter-Cologne Water Quality Control Act ("Porter-Cologne Act") (Wat. Code, § 13000 et seq.) - 1969
- Under the Porter-Cologne Act, the State Water Resources Control Board ("SWRCB") has the ultimate say over state water quality policy. The State Board also oversees the nine Regional Boards. The Regional Boards issue Waste Discharge Requirements ("WDRs"), initiate enforcement actions against violators, and monitor local water quality.
 - The goal of the Act is to obtain the highest reasonable water quality, while giving consideration to the demands on the waters and the values involved.

II. Storm Water Chess Set: The Players and the Issues

A. Background

- Definition of Storm Water
 - The Environmental Protection Agency defines storm water as "Storm water runoff, snow melt, runoff, and surface runoff and drainage." (40 C.F.R. § 122.26(b)(13).)
- Regulation of Storm Water Overview
 - The CWA requires authorization by a National Pollutant Discharge Elimination System ("NPDES") permit in order

to discharge any pollutant into waters of the United States from a point source.

- Initially, storm water discharges were exempt from the requirements of CWA as determined by EPA.
- The District of Columbia Court of Appeals in *Natural Resources Defense Council, Inc. v. Costle* (1970) 568 F.2d 1369 ruled that EPA could not exempt storm water discharges from the NPDES permitting program.
- In 1987, the following amendments relating to storm water were made to the CWA:
 - A section was added specifically authorizing the regulation of storm water discharges (33 U.S.C. § 1342(p)); and
 - Two different standards were created for the regulation of storm water discharges – one for industries (which includes construction activities) and one for municipalities.
- In California, Best Management Practices (“BMPs”) provide the foundation for storm water regulation. BMPs are defined as “schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce the pollution of waters of the United States. BMPs include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” (40 C.F.R. § 122.2.)
- In 1996, the State Board sanctioned MS4 permit language stating that permittees would not be in violation of the permit if exceeding receiving water limitations are followed up with certain actions.
- In 1998, MS4’s are not required by the CWA and the California Water Code to strictly comply with water quality standards. (SWRCB Order No. WQ 98-01)
- Regional Board water quality control plans (“Basin Plans”) have water quality objectives to ensure reasonable protection of beneficial uses and prevent nuisance. (Water Code, § 13241.) SWRCB Plan or Policy supersedes Basin Plan. Water Quality Orders (“WQOs) can be numeric or narrative.

- Regional Boards issue waste discharge requirements (“WDRs”) after prescribing requirements for nature of the discharge in relation to the condition of the disposal area of receiving water. (Water Code §§ 13263 and 13377.) Water quality control plan should be implemented considering beneficial uses, objectives reasonably required for their protection, other discharges, nuisance and factors in section 13241.
- The following are factors that should be considered when issuing permits and WQOs:
 - Local environmental characteristics including available water quality;
 - Past, present and probable future beneficial uses of waters;
 - Conditions reasonably achieved with coordinated control of all factors affecting area water quality;
 - Economic considerations;
 - Need for housing; and
 - Need to develop and use recycled water. (Water Code, §§ 13262 and 13241.)
- In 2005, California Supreme Court held that section 13241 factors must be considered in NPDES permitting when the State imposes restrictions more stringent than those required under federal law. (*City of Burbank v. SWRCB* (2005) 35 Cal.4th 613.)

B. Operators

- Industrial and Construction Storm Water
 - Construction discharges are one category of industrial discharge. Permitting has been separate for construction due to unique aspects of grading land and temporary nature of projects. EPA’s early coverage threshold of five acre disturbance was considered arbitrary, and now, it is one-half acre disturbance.

- and
- The State Water Resources Control Board adopted State-Wide NPDES General Permits for Industrial Discharges Construction Discharges. (SWRCB Water Quality Order 99-08-DWQ.)
 - A new general permit for construction activities has been proposed and the comment period closed June 11, 2008. The new general permit, if adopted, would include the following revisions:
 - Numeric Action levels and Number Effluent Limitations for pH and turbidity;
 - Four level risk-based permitting approach;
 - Increased number of minimum BMPs and requirements;
 - Monitoring and reporting of soil characteristics, pH and turbidity by dischargers;
 - Establishes new development and re-development storm water performance standards in order to address those sites not covered by Phase I or Phase II MS4 NPDES permits; and
 - Development of a Rain Event Action Plan for each site.
 - Industrial storm water must comply with NPDES permits containing the technology-based effluent limitations. “Technology-based” means the best available technology economically achievable (“BAT”) for toxic pollutants and Best Conventional pollutant control Technology (“BCT”) for conventional pollutants. (33 U.S.C. § 1342(p)(3)(A).)

C. Municipalities

- Municipal Storm Water
 - NPDES permits regulate municipal storm water and are restricted by the following requirements:
 - “may be issued on a system- or jurisdiction-wide basis;
 - shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers; and

- shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.” (33 U.S.C. § 1342(p)(3)(B)(i)-(iii).)

D. Regulators

Act	Regulatory Agency	Purpose
Porter-Cologne Water Quality Control Act	SWRCB and RWQCBs	Comprehensive program to protect California's waters. The RWQCBs are responsible for developing Basin Plans and regulating all pollutant or nuisance discharges that may affect either surface water or groundwater. Any person proposing to discharge waste within any region must file a report of waste discharge with the appropriate regional board.
Clean Water Act Section 401; Federal Action Impact on State Water	SWRCB and RWQCBs	Section 401 of CWA requires each federal agency authorizing an activity that could affect state water quality to obtain state certification that the proposed activity will not violate state and federal water quality standards. Section 401 is triggered by any activity that requires the need for a permit from a federal agency for a project that could affect state water quality, including section 404/section 10 permits from USACE.
Clean Water Act Section 402; NPDES Program	SWRCB and RWQCBs	Section 402 of the Clean Water Act authorizes states to develop an NPDES program to permit “point source” discharges of pollutants into surface waters of the United States. Discharge from any point source is unlawful unless the discharge is in compliance with a NPDES permit.

Clean Water Act Section 303(d); TMDLs	SWRCB and RWQCBs; federal EPA	Requires each state to identify waters that will not meet applicable water quality standards after implementation of technology-based point source controls, and to rank the identified waters, taking into account the severity of pollution and designated beneficial uses of the waters. Also establishes a process to set TMDLs for these waters to provide for more stringent water quality-based controls when required federal, state, or local controls are inadequate to achieve water quality standards.
Clean Water Act Section 404; Wetland Regulation	EPA and USACE	Requires a permit to dispose of dredge or fill material in the nation's waters. The permit program is run by the Army Corps of Engineers ("USACE") in conjunction with environmental guidelines created by EPA. Two types of permits are generally issued: standard (individual) and general (nationwide).

Citizen Enforcement Actions

I. CWA Enforcement Mechanisms

A. Sources of Enforcement Actions

1. Federal - Enforcement by EPA through civil or criminal actions;
2. State - Enforcement by RWQCB through criminal and civil actions;
3. Local Government - Enforcement and further regulation by local municipalities; and
4. Citizen Enforcement - Enforcement by the private citizen and groups pursuant to enforcement section of the CWA.

B. Citizen Enforcement

1. 33 USC §1365 provides:

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf -

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the

Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

- After 60 days notice, any citizen or citizens group may file an action under the CWA. (33 U.S.C. § 1365(b))
- If the RWQCB has brought suit against the polluter, then citizens are prohibited from bringing a suit on the same matter. However, citizens may bring suit if the RWQCB has issued a notice and imposed fines but not brought suit. (33 U.S.C. § 1365)
- Relief sought in citizen suits takes the form of civil penalties and injunctions to force compliance with the regulations. Although damages are not available, the CWA specifically authorizes attorney's fees. However, awarding attorney's fees is in the discretion of the district court. (33 U.S.C. § 1365(d))
- Citizen suits for violations of stormwater regulations have taken on importance in the enforcement of these regulations. Over 100 lawsuits have been filed against industrial facilities over the past 6 years. Given that there are approximately 40,000 facilities that have failed to file Notices of Intent (“**NOI**”), environmental groups will be able to name a large number of facilities in a citizen suit for failure to meet these regulations.

2. Environmental Groups that Could Bring Enforcement Actions - Examples

- California Sportfishing Protection Alliance (“**CSPA**”) (very active in Northern California)
- League of Conservation Voters
- Sierra Club
- Natural Resources Defense Council, Inc.
- Ecological Right Foundation

- San Francisco Coastkeeper
 - Surfrider Foundation
 - Northern California River Watch
3. What Do Environmental Activists Look for in an Annual Report?
- Exceedances of Effluent limitations; and
 - Exceedances of Benchmark Limitations
 - Benchmark limitations are not effluent limitations, but are levels which EPA has used to determine if a stormwater discharge from any given facility merits further monitoring to ensure that the facility has been successful in implementing a SWPPP.

II. Components of CWA Litigation

- A. 60-Day Notice – Citizen-plaintiff (generally an environmental group) must send a Notice of Intent to File Suit to the entity-defendant and a copy to the regulatory agency, which triggers a 60-day period in which the entity-defendant may come into compliance prior to the citizen-plaintiff filing suit. These notices generally include specific components, which you can see in attached **Exhibit 1**.
- B. Site Visit and Negotiations – Citizen-plaintiff will most likely request a site visit by a biologist and begin negotiations to settle the potential lawsuit. What are they looking for at the site visit?
1. Sources and Effects of Sediment – Total Suspended Solids (TSS)
 - Sources of Sediment
 - Sand and gravel piles
 - Cement silo loading
 - Truck loadout
 - Run-off and dust from unpaved roads
 - Broken cement bags
 - Truck wash down/wash out
 - Erosion
 - Effects of Sediment
 - Causes cloudy water

- Suffocates vegetation and blocks light
- Fills in gaps in rocks where fish need to lay eggs
- Suffocates fish and corrodes fish gills

2. Sources and Effects of pH – Acidity & Alkalinity

- Sources of pH
 - Cement (dust collectors/spills)
 - Come back concrete
 - Acid wash
 - Natural Soils/Water Background
- Effects of pH
 - Changes the water environment

3. Sources and Effects Petroleum (TOC)

- Sources of Petroleum
 - Diesel and gasoline storage and dispensing
 - Lube oil storage and dispensing
 - Waste oil filters and waste oil storage
 - Leaking trucks/equipment
 - Truck & Equipment maintenance
- Effects of Petroleum
 - Poison/kill fish
 - Coat fish gills and cause suffocation
 - Coat birds' feathers
 - Makes drinking water unusable
 - Sheen

4. Sources and Effects of Nutrients (Nitrates/Nitrites)

- Sources of Nutrients
 - Decaying vegetation
 - Fertilizers
 - Garbage
- Effects of Nutrients
 - Causes excessive algae
 - Toxic to infants when in drinking water

5. Sources and Effects of Iron (Fe)

- Sources
 - Equipment
 - Cement and flyash
 - Residuals in soil
 - Color additive
- Effects on the Environment
 - Changes the water environment

6. Electrical Conductivity (EC)

- Sources
 - Sediment
 - Amount of salt present in water
- Effects on the Environment
 - Changes the water environment

7. Sources and Effects of Toxics

- Sources of toxics
 - Solvents
 - Paints
 - Antifreeze
 - Hazardous waste
 - Battery acid
 - Admixtures
- Effects of toxics
 - Can cause immediate death or long term sickness to fish and other organisms
 - Can cause toxicity in humans from consumption of fish and/or water

III. Prepare for Site Visit as you would for any Regulatory Agency

- A. Have a written comprehensive Regulatory Response Policy ("RRP") in place. Procedures for an RRP can include the following:
- Routine inspections (if any) and unannounced inspections, with or without a warrant
 - Written information requests and regulators
 - Identify personnel for lead contact and backup for regulatory responses and site visits

- Document and data marshaling, control and retention during investigation
- A blackout policy on employee discussion of anything at work including regulatory visit. (this includes use of social media)
- What employees should do if approached by a regulator, either at work or outside of work, or if a regulator ask manager to interview employees
- Documenting or recording the regulatory personnel's site visit
- Understanding what "obstruction of justice" means (mostly relevant to search warrant scenario)
- Notification of facility or landowner's third party consultants
- Establishment of recurring Regulatory Response training

B. Designate an environmental representative for each site:

- Requires thorough familiarity with all environmental aspects.
- Representative to be principal contact and spokesman for inspections or investigations.
- Representative maintains written record of all inspections and investigations.

C. Technical Report

The advocacy group's engineer who conducted the site visit will produce a technical report stating in what ways entity-defendant is not in compliance. These reports vary in terms of their detail, organization and scope. (See attached **Exhibit 2** for example.)

D. Proposed Settlement Agreement

The technical report precedes the Proposed Settlement Agreement from the citizen-plaintiff. Most Settlement Agreements include the following four components (see attached **Exhibit 3** for example):

- BMPs;
- Ongoing mitigation;
- Payment to Rose Foundation for Communities and the Environment (www.rosefdn.org); and

- Attorney's Fees. (33 U.S.C. § 1365)

IV. **Settlement Issues**

- Most entities settle as soon as possible, with or without the assistance of a judicial mediator.
- Try to extend payments if necessary, with no interest.
- Mandate return of money if notice of fund placement is not timely received in writing.
- Request written notice for any additional site visit.
- Eliminate or limit costs for their consultants in any subsequent investigation.

V. **Recent Cases**

1. ***Northwest Environmental Defense Center v. Brown* (9th Cir. 2011) 640 F.3d 1063**

The Ninth Circuit Court of Appeals denied a petition for rehearing en banc of a decision that logging road operators are required to apply for NPDES permits. An environmental group sued various timber companies along with the Oregon State Forester and the individual members of the Oregon Board of Forestry for violations of the Clean Water Act on the grounds they did not obtain permits from the Environmental Protection Agency ("EPA") for stormwater runoff that flows from logging roads into systems of ditches, culverts, and channels, which is eventually discharged into forest streams and rivers. The Ninth Circuit Court of Appeals concluded that such runoff from logging roads is a point source discharge and thus, an NPDES permit is required. Several industry groups and businesses have filed petitions for writ of certiorari with the U.S. Supreme Court. Also, bipartisan bills are pending in Congress to overturn the Ninth Circuit's decision, and restore the 30-year practice of exempting stormwater from forest roads from NPDES permitting. Among the critics of the Ninth Circuit's decision is Oregon Governor John Kitzhaber, who stated that "we are at a point in the history of our management of forests where we need to develop stability, consensus and collaboration, not management by lawsuit." Democratic Senator Ron Wyden of Oregon stated that the decision "would shut down forestry on private, state and tribal lands by subjecting it to the same endless cycle of litigation."

2. ***Ecological Rights Foundation v. PG&E* (N.D.Cal. 2011, No. C 10-0121)**

A non-profit environmental group brought an action under the Clean Water Act on the grounds that PG&E's 31 "corporation yards and service centers" in Northern California, at which it allegedly stores vehicles, equipment, materials and supplies, and carried out various activities in support of its primary business as a provider of electricity and natural gas, were allegedly contaminating storm

water without an NPDES permit. Even though PG&E's enterprise as a whole did not need an NPDES permit, the court denied PG&E's motion to dismiss because it could not be conclusively established that those yards and centers were "auxiliaries" of PG&E's enterprise and not facilities engaging in "industrial activity."

3. *Northern California River Watch v. Oakland Maritime Support Services, Inc.* (N.D.Cal. 2011, No. C10-03912)

A corporation operated a maritime transportation support facility near the Port of Oakland, where pollutants were allegedly exposed to rainfall and flow unobstructed to storm drains that discharge into the San Francisco Bay. The District Court held that plaintiffs' pre-lawsuit 60-day notice prior to filing a Clean Water Act citizen suit was sufficient because the notice described "continuous" and "ongoing" violations for which more specific dates are not required, and because the allegations of unlawful discharge of polluted storm waters were accompanied by lists specifying the rain dates in that area.

4. *Ecological Rights Foundation v. PG&E* (N.D.Cal. 2011, No. C 09-03704)

In a citizen suit that alleged that wooden utility and telephone poles are discharging toxic chemical preservatives into the environment, the plaintiff's 60-day pre-lawsuit notice under the Clean Water Act, as well as the plaintiff's 90-day pre-lawsuit notice under the Resource Conservation and Recovery Act, were sufficiently specific to comply with the notice regulations promulgated by the Environmental Protection Agency, even though the notices did not include the location of each pole allegedly leaking chemical contaminants that was at issue in the case.

5. *California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.* (E.D.Cal. 2011, No. 2:10-cv-01207)

In 2007, the State of California commenced criminal actions against individuals who were violating various state environmental laws when operating their scrap metal facilities under NPDES permits issued by the State. In October 2008, the defendants entered into a global plea agreement that placed defendants on "probation," which required, among other things, compliance with consent orders that mandated compliance with the NPDES permits. In December 2009, state agencies found that storm water runoff from the scrap metal facilities violated the NPDES permits; and in June 2010, defendants were issued a "Notice of Violation." In June 2011, the State filed a "Petition for Violation of Probation" that alleged violation of the probation terms due to the violations of the NPDES permits. Meanwhile, plaintiff California Sportfishing Protection Alliance filed a civil citizen enforcement action in U.S. District Court in May 2010 regarding the defendants' Clean Water Act ("CWA") violations occurring at the scrap metal facilities. The court held plaintiff's civil CWA claims are barred and dismissed

for lack of jurisdiction. 33 U.S.C. § 1365(b)(1)(B) prescribes that a federal court is without jurisdiction over a CWA citizen enforcement action if the State has commenced and is diligently prosecuting a criminal action in state court to require compliance with an effluent standard or limitation. That provision applied here even though some of the defendants in this federal civil lawsuit were not on state probation in the state criminal cases.

6. *California Sportfishing Protection Alliance v. Shamrock Materials, Inc.* (N.D.Cal., 2011, No. C11-2565)

Non-profit environmental and health organizations brought a citizen suit enforcement action under the Clean Water Act against owners of a facility engaged in off-loading, storage, distribution and transportation of gravel and sand along the Petaluma River. The materials are stored at the facility and then loaded and distributed from the facility in diesel-fueled trucks, which distribute the materials to off-site ready mix concrete plants. Defendants own both the facility and the concrete plants. The facility therefore provides support services for the ready-mix concrete plants. Plaintiffs argued that the facility is an “auxiliary” establishment for a single “industrial facility” enterprise for which an NPDES permit is required. Defendants respond that the facility is a distinct and separate establishment that should be characterized based on its own operations. Defendants filed a motion to dismiss. Due to the fact-based determination at issue here, the U.S. District Court denied the motion, and held that it was unable to determine at that stage of the litigation whether or not the facility is or is not an “industrial facility.”

7. *Northern California River Watch v. Honeywell Aerospace, Honeywell International, Inc.* (N.D.Cal. 2011, No. C11-03723)

The court held that an intent-to-sue letter from plaintiff was sufficient to give notice to defendant operator of a solvent sales and recycling facility of alleged unlawful discharge of volatile organic compounds in the groundwater under the Clean Water Act, where the letter “identified point sources, how the point sources were allegedly discharging into the waters, defendant’s lack of [an NPDES] permit, the regulation defendant supposedly violated, and a range of dates for the allegedly ‘continuous’ violations.”

8. *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499

The Central Coast Regional Water Quality Control Board (“Regional Board”) issued an NPDES permit that authorized the Moss Landing Power Plant (then owned by Duke Energy, now owned by Dynegy) to draw cooling water from Moss Landing Harbor and Elkhorn Slough. Plaintiff Voices of the Wetlands challenged the permit raising a number of legal issues, including whether the trial

court improperly ordered an interlocutory remand. The appellate court affirmed and the trial court denied the writ.

9. *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538

Where the project did not discharge anything into the groundwater, the city was not required to analyze the project's contribution to cumulative groundwater impact. Additionally, a legal challenge to project's construction impacts on hydrology and water was moot because the construction had been completed. CEQA dispute with respect to other issues were not moot.

For more information, see <http://blog.aklandlaw.com>

10. *Courts Examine Applicability of Diligent Prosecution Limitation To CWA Citizen Suits. Starlink Logistics, Inc. v. ACC, LLC, slip opinion, 2012 U.S. Dist. LEXIS 87532 (M.D.Tenn. 2012); Louisiana Environmental Action Network v. City of Baton Rouge, 677 F.3d 737 (5th Cir. 2012).*

The Clean Water Act ("CWA") contains a citizen suit provision, which authorizes any citizen to file a civil action to enforce an effluent standard in a discharge permit issued under the National Pollutant Discharge Elimination System. However, there are two limitations to such citizen suits. The first limitation is that the citizen must give notice to an alleged violator of the alleged violation at least 60 days before commencing the action. The second limitation is that a citizen suit is barred if the U.S. Environmental Protection Agency or the State "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." (33 U.S.C. §1365(b)(1)(B).) This latter "diligent prosecution" bar is based on the premise that citizen suits are meant to "supplement rather than to supplant governmental action." (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)» In *Starlink Logistics, Inc. v. ACC, LLC*, slip opinion, 2012 U.S. Dist. LEXIS 87532 (M.D.Tenn. 2012), the U.S. District Court for the Middle District of Tennessee held that a defendant's voluntarily filing a petition in the State court seeking entry of a consent judgment pursuant to the terms contained in an administrative consent order entered into with the State does not constitute a civil or criminal enforcement action commenced by the State, so as to come within the "diligent prosecution" limitation. In *Louisiana Environmental Action Network v. City of Baton Rouge*, 677 F.3d 737 (5th Cir. 2012), the United States Court of Appeals for the Fifth Circuit held that the "diligent prosecution" bar is a "claim-processing rule" and is not a "jurisdictional" limitation, such that well-pleaded facts in the citizen suit complaint must be accepted as true if the defendant brings a motion to dismiss the complaint under Federal Rule of Civil Procedure section 12(b)(6).

11. *U.S. Army Corps of Engineers Announces Updated National Wetland Plant List For Wetland Determinations Under The Clean Water Act.*

The U.S. Army Corps of Engineers, as part of an interagency effort with the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service and the U.S. Department of Agriculture Natural Resources Conservation Service, announced the availability of the final 2012 National Wetland Plant List ("NWPL"). The NWPL is a list of wetland plants by species and their wetland ratings provides botanical information about wetland plants. The NWPL plays a critical role in wetland determinations under the Clean Water Act and the Wetland Conservation Provisions of the Food Security Act. Other applications of the NWPL include wetland restoration, establishment, monitoring and enhancement projects. The list became effective on June 1, 2012 and will be used in any wetland delineations performed after that date. The 2012 NWPL may be used in delineations /determinations conducted prior to that date and, for the purpose of clarity and accurate interpretation, should be referenced in delineation reports or regional supplement determination forms. The 2012 NWPL may be found at: <http://wetlandplants.usace.army.mil>.

For more information, see

<http://www.usace.army.mil/Media/NewsReleases/tabid/203/Article/1185/updated/2012-national-wetland-plant-list-is-available.aspx>

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-09/pdf/2012-11176.pdf>;

<http://www.spk.usace.army.mil/Media/RegulatoryPublicNotices/tabid/1035/Page3/Default.aspx>

12. State Water Resources Control Board Amends Construction General Permit To Remove Numeric Effluent Limitations

On September 2, 2009, the California State Water Board ("Board") adopted the statewide Construction Stormwater General Permit for regulation of storm water discharges associated with construction and land disturbance activities. Under the General Permit, traditional project sites are categorized into Risk Levels (1, 2 & 3) and linear underground/overhead projects (LUPs) are categorized into LUP Types (I, 2, & 3) based on overall risk to water quality. Risk Level 3 and LUP Type 3 projects were subject to Numeric Effluent Limitations (NELs) for turbidity and pH. In addition, Risk Level 3 and LUP Type 3 projects were required to conduct receiving water monitoring if they violated the NELs. On December 27, 2011, the Superior Court for the County of Sacramento issued a judgment and peremptory writ of mandate in *California Building Industry Assn. et al. v. State Water Resources Control Board* (case no. 34-2009-80000338) that held that the Board's adoption of the NELs relied on studies that were characterized by the court as inconclusive and therefore lacking in substantial evidentiary support. Consistent with the writ of mandate issued by the court, the Board adopted amendments to the Construction General Permit on July 17, 2012, that removed the NELs for pH and turbidity at Risk Level 3 and LUP Type 3 construction sites, and replaced the NELs with receiving water monitoring triggers.

For additional information, see

http://www.swrcb.ca.gov/waterissues/programs/stormwater/docs/construction/2009_0009_dwg_nel_amend062512.pdf

http://www.swrcb.ca.gov/waterissues/programs/stormwater/docs/construction/completewqo_2009_0009_NEL_06252012.pdf

13. *California Sportfishing Protection Alliance v. All Star Auto Wrecking, Inc., slip opinion, (E.D.Ca. 2012) 860 F.Supp.2d 1144.*

A non-profit public benefit corporation, whose mission is to preserve and protect the environment, wildlife and natural resources of the water of California, brought a civil citizen suit enforcement action under the Clean Water Act ("CWA") on the ground that defendant auto salvage yard facility discharges pollutants into the surface waters of Rice Creek in violation of, among other things, a CWA permit. The District Court denied defendants' Rule 12(b)(1) motion to dismiss the complaint that challenged, among other things, plaintiff's standing to bring the action. The court held that, under *Ecological Rights Foundation v. Pacific Lumber Company*, 230 F.3d 1141, 1151, 1152 (9th Cir. 2000), the threshold question of standing under the CWA is whether an individual can show that she has been injured in her use of a particular area because of concerns about violation of environmental laws, not whether the plaintiff can show there has been actual environmental harm. The causal connection put forward by the plaintiff for standing purposes "cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits." The motion to dismiss failed as a facial attack because the allegations of the complaint, when taken as true, sufficiently alleged standing to bring the suit. The motion also failed as a factual attack because defendants failed to demonstrate that the standing allegations in the complaint were untrue. The court found that plaintiff sufficiently claimed its individual members' use and enjoyment of the waters at issue, those members' concerns about alleged pollution from defendants' facility, and how these concerns are impeding their use and enjoyment of those waters. Contrary to defendants' argument that plaintiff had to show traceable injury, the court held that "Plaintiff does not need to prove to a scientific certainty that Defendants have in fact discharged pollutants in violation of its permits, in order to obtain standing." Defendants improperly "confuse[d] the jurisdictional inquiry with the merits inquiry, as Plaintiff need not prove the merits of the case at this early stage of the pleadings."