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Storm Water Permit Fee Hike, Draft Rules: New Economic Liability for Employers

Fee hikes coupled with excessive new proposed requirements could boost costs significantly for any facility required to have a storm water permit. Entities that will feel the impact include small employers, schools, ports, large industrial operations, restaurants, parks, farmers markets, even groups that hold car wash fundraisers.

Storm water fees will rise in all categories, putting more economic pressure on businesses struggling to recover from years of recession. The increased costs (as much as a 10-fold price hike for some permit holders) could range from tens of thousands of dollars at small businesses and schools to hundreds of millions of dollars at large facilities owned by ports and industrial facilities.

The new proposed draft storm water permit requirements expand the types of facilities that must obtain the permits, thereby increasing enforcement costs for local governments, which already are financially strapped.

Background

The federal Clean Water Act was amended in 1987 to establish a framework for regulating storm water discharges.

In 1990, the U.S. Environmental Protection Agency (EPA) promulgated Phase I regulations for granting storm water discharge permits to industrial operations (including construction sites that disturb five acres or more) and municipal separate storm sewer systems serving a population of 100,000 people or more.

In late December 1999, EPA issued Phase II regulations requiring permits for storm water discharges from small municipal storm sewer systems (serving fewer than 100,000 people) and from construction sites disturbing between one and five acres of land.

Although early program efforts focused on controlling pollutants and implementing good management practices, the new program emphasizes "holistic strategies." The strategies aim to prevent problems and provide community benefits, but fail to balance costs and economic considerations.

Construction

On September 2, 2009, the State Water Resources Control Board adopted a new general permit for construction activities. The permit moved beyond the historical approach of mitigating storm water runoff through Best Management Practices (BMPs).

Instead, the permit established numeric effluent limits for turbidity, pH and debris. It also contained a variety of other requirements, such as numeric action levels (which if exceeded would require corrective action to lower the amount of permissible discharge) that significantly increase construction industry costs.

Not evaluated were the social and economic costs the permit placed on the housing industry. In addition, the permit contained post-construction mitigation and monitoring/maintenance requirements.

The California Building Industry Association sued, arguing that the permit lacks social economic balancing; fails to maintain the natural integrity of receiving water; imposes unjustifiable numeric effluent levels; and does not allow for due process. The association also contended that the post-construction measures are beyond the water board's jurisdiction. The lawsuit is pending.

Industrial Storm Water Permit

In January, the state water board issued a draft proposal to regulate manufacturing facilities, mining operations, disposal sites, recycling yards and transportation facilities, including school bus facilities. There are approximately 10,000 active permittees in the program.

The draft regulations go above and beyond what the federal EPA mandates and will result in hundreds of millions of dollars in additional costs with no proven environmental benefits.

The water board held a hearing on the draft permit and set a final comment deadline even though the notice for the rule states that it is "currently not in its complete form," thus violating California and federal due process laws.

A key change from the current permit is that group monitoring will not be allowed in the new program. Numeric limits are being imposed, contrary to advice from a panel of experts convened by the water board.

The experts suggested that before even considering the imposition of numeric limits, the water board needed to re-examine the existing data sources and collect new data.

The California Chamber of Commerce was part of a coalition of business, taxpayers and local governments that asked the water board not to go forward with the permit in its present form. A bipartisan group of legislators also wrote the water board, asking that it "go back to the drawing board and meet and engage with all stakeholders before proceeding any further with this permit."

[Updated from print **Alert**] A new draft of the permit is to be released by September 1 along with a hearing notice, according to the water board staff. The staff expects the board will be scheduling a hearing on the new draft permit in October or November.

Small Municipal Systems

The Phase II draft permit for small municipal separate storm sewer systems significantly expands existing requirements and adds six new major programs.

Key new duties for local governments:

- A retroactive requirement to inventory, select, install, implement and maintain storm water BMPs at commercial and industrial properties.
- Detailed inspection program for industrial and commercial facilities, including evaluation of appropriateness and effectiveness of BMPs.
- Develop a trash abatement plan and require 20% of zoned areas to install trash capture structural controls (retrofitting). It is likely this element of the plan will cause a rent increase for commercial renters.

The draft permit includes a list of 32 types of facilities at minimum that will be regulated—compost facilities, golf courses, parks, charitable car wash areas, restaurants, farmers markets, pool and fountain cleaning, veterinary facilities, car repair facilities, and building material storage areas, just to name a few.

This draft permit will have a dramatic and costly impact on municipalities and industry that will make it even more costly to do business in California. Local government representatives say that enforcing these provisions could triple or quadruple current program costs.

Again, these new permit requirements are unfunded mandates beyond what EPA requires. Proposition 218 limits local government's ability to raise dedicated revenues to fund the permit, so it is unclear how revenues will be obtained. If local governments are unable to comply, they will be open to state fines and third-party lawsuits.

A coalition of 80 local governments and a bipartisan group of legislators made verbal and written requests to extend the comment period by 60 days. The water board granted a 30-day extension until September 8.

Caltrans Permit

The California Department of Transportation (Caltrans) is subject to the municipal separate storm sewer systems permit. Caltrans is responsible for the design, construction, management and maintenance of the state highway system and therefore storm water and non-storm water discharges from state-owned right-of-ways.

In its comment letter, Caltrans estimates that the new proposed permit could cost up to \$2.2 billion annually. Compliance costs would be paid out of the State Highway Account, which means less funding for maintenance and new road construction transportation projects.

The California Transportation Commission estimates the permit would substantially increase the state's transportation shortfall, currently projected to be \$7.4 billion.

A coalition of transportation allies voiced its concerns to the water board in mid-July. The coalition pointed out that the draft permit:

- Exceeds requirements of federal law.
- Puts Caltrans at risk of being in a permanent state of non-compliance by setting standards and control measures that can't be met.
- Opens the door for third-party lawsuits to stop new road construction projects.
- Shifts Caltrans priorities from improving roadways to monitoring water quality and retrofitting most storm water infrastructure built in the last 20 years. The funding shift would result in layoffs of thousands of workers in construction—an economic sector already suffering 25% unemployment.

The water board expects to have another workshop in September. The proposed permit is scheduled for adoption at the October water board hearing.

Action Needed

The CalChamber is encouraging members to contact the State Water Resources Control Board to ask that the storm water permits be sent back to staff for further consideration.

There is no justification for California to exceed federal Clean Water Act requirements. Economic recovery has a fragile hold in this state. The aggressive draft storm water permit proposals add another burdensome layer of regulations that will harm the state's business and employer community, taxpayers and local governments.

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