

## NEW GENERAL PERMIT FOR STORMWATER DISCHARGES FROM CONSTRUCTION SITES AND RECENT CASE LAW INVOLVING INDUSTRIAL SITES IMPOSE EFFLUENT LIMITS ON STORMWATER DISCHARGES

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Beginning July 1, 2010, certain construction and other land-disturbing activities that impact one or more acres (or less in certain cases) will be subject to a new General Permit issued by the California State Water Resources Control Board regulating stormwater discharges. To obtain coverage under the General Permit and thus avoid discharging without a permit, all dischargers, including those currently covered under the existing general stormwater permit, must electronically file Permit Registration Documents (PRDs). It is important to note that, because Notices of Intent filed under the existing general permit will terminate on June 30, 2010, all existing dischargers must submit PRDs by July 1, 2010.

Although dischargers subject to the existing general permit must file PRDs, the new General permit includes a grandfather provision that exempts existing dischargers from the risk-determination requirements of the new General Permit for two years. The new General permit requires that current dischargers comply with "Risk Level 1" requirements, although it authorizes a Regional Board to require a risk-determination for an existing site under certain conditions.

While the General permit includes a number of new provisions that should be reviewed, the risk-determination process is the key change. Under the General Permit, every site must complete a risk determination to calculate the site's



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"sediment risk and receiving water risk." Based on that risk, the General Permit imposes specific requirements. For example, "Risk Level 3" sites (the highest risk level) must meet new numeric effluent limits (NELs) for pH and turbidity. An exceedance of an NEL is considered a violation of the General Permit, and could be enforced by the Regional Board or in a citizens' suit.

In addition, both Risk Level 2 and 3 sites must meet numeric action levels (NALs) for pH and turbidity. While an exceedance of the NAL is not a violation *per se*, it does require that the discharger assess its BMPs for the site, determine if additional BMPs are necessary, and document that decision in the stormwater pollution prevention plan. The General Permit also may require active treatment systems at sites where traditional BMP controls do not effectively control discharges, and it includes new "post construction" requirements to reduce runoff, forcing project's to be designed to

include low-impact development features.

For those non-construction (industrial) industries not covered by the new construction General Permit, the inclusion of risk-determination requirements and effluent limits may be a portent of what will be included in any new general permit for industrial activities. If so, that would reflect two recent federal court decisions that resulted in significant fines for two industrial facilities. In those cases, the court effectively imposed effluent limits for metals based on California Toxics Rule (CTR) standards that are significantly more stringent than the EPA "benchmark" levels in the existing industrial permit. The court imposed those limits even though EPA and the State Board have stated that the EPA benchmarks are not intended to be effluent limits, and it ruled that the permit is violated if the CTR limits are exceeded, and additional BMPs are not implemented in response. *Santa Monica Bay Keeper v. International Metals Ekco, Ltd.*, 619 F.Supp.2d 936 (C.D. Cal. 2009); *Santa Monica Bay Keeper v. Kramer Metals, Inc.*, 619 F.Supp.2d 914 (C.D. Cal. 2009).

Both construction and industrial dischargers need to be aware of the significant changes caused by the issuance of the new construction General Permit and these recent court decisions. Because of the impending deadline for the new General Permit to take effect, planning for upcoming projects must include consideration of these new rules.

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