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Who'll Stop The Rain?

Stormwater Regulation, Management, and Survival for California's Transportation Industry

by *Jason M. Booth and Timothy S. Simpson*¹

Back in 1970, the aptly named rock band, Creedence Clearwater Revival, asked the question "Who'll stop the rain?" Clearly, the answer, then as now, is "no one" — rain just falls. The more important question, especially today, is how are you going to deal with it when it falls on your property? Under California law, if you operate under the authority of the General Industrial Stormwater Permit ("the General Permit"), you must make sure that your operations do not unduly impact the rain water (or "stormwater") before it leaves your yard. Unfortunately, for many industrial operations, stormwater creates only clouds of mystery and leaves confusion on the ground.²

Stormwater regulation is not new. It has been an environmental concern since at least the 1980s when Congress added a provision to the Clean Water Act ("CWA") that established a plan for the Environmental Protection Agency ("EPA") to identify new sources of pollution and to issue guidelines for stormwater discharges and new source performance standards. The regulatory framework imposed by Congress and followed in California requires that companies operating under the General Permit use the Best Available Technology ("BAT"), Best Conventional Pollutant Control Technology ("BCT"), and employ Best Management Practices ("BMPs") to prevent their operations from polluting stormwater before it leaves their property. By analogy, this is equivalent to setting a speed limit as "no faster than is safe under the circumstances," rather than as a specific number of miles per hour. However, that does not mean that you can simply set up your stormwater management system and forget about it. In fact, it means just the opposite.

The Iterative Approach: Test, Improve, Repeat

The overall statutory plan for stormwater management and enforcement requires what is referred to as an "iterative" (or phased) approach in which water quality is improved through repeated tests and subsequent efforts to improve on the results. The Regional Water Quality Control Boards ("RWQCB"), as well as non-governmental organizations ("NGOs") and/or private enforcement groups such as the Waterkeepers (such as the Santa Monica Baykeeper, the Orange County Coastkeeper, or the Delta Keeper in Sacramento) or the California Sportfishing Protection Alliance ("CSPA"), look for industry members to employ this phased approach to stormwater management and improvement at their facilities, and to do so without having to be told to do so.

The iterative approach is designed for industrial operations to regulate themselves. You are supposed to monitor and test your stormwater runoff during certain qualifying rain events (during each rainy season from October through the following

May each year).³ You should then review the results of the stormwater testing with an appropriate environmental consultant to determine whether excess amounts of pollutants have been discharged with the rain water. These test results should be compared to certain "Benchmarks" set by the EPA for a variety of potential stormwater contaminants such as oil and grease, total suspended solids ("TSS"), various metals (such as iron, copper, lead, and zinc) and other factors (such as total conductivity and pH). Thereafter, depending on the results, you may need to improve your stormwater management methods to implement additional BMPs, upgrade or expand the practices already employed, and/or remove potential pollutant sources from exposure to stormwater.

This method of testing, evaluating, and improving should continue until an operation's stormwater discharge is sufficiently clean or further improvement is no longer economically feasible. You cannot wait for the RWQCB or the Waterkeepers to come to you to tell you that you have a problem -- you must determine that for yourself. If you wait until an NGO shows up and initiates a suit against you, it may be too late to resolve it quickly or avoid liability.

Enforcement Actions Based on the Clean Water Act

There is no hard and fast rule for when an enforcement action will be initiated. If you are operating under the General Permit, you are required to have an up-to-date, signed Stormwater Prevention Pollution Plan or "SWPPP" (pronounced "swip"). If you do not know whether you are subject to the General Permit, you should check with the CTA Stormwater Monitoring Group or other qualified stormwater professional to determine whether your operations require you to file a Notice of Intent ("NOI"), prepare a SWPPP, and meet California's stormwater monitoring and reporting requirements.

The potential ramifications of failing to abide by the stormwater requirements are potentially very serious. You can be subject to fines up to \$32,500/per day, per violation, as well as enforcement orders and/or injunctions. Equally as dangerous, if not more so, are private enforcement actions brought by NGOs (such as the various Waterkeeper groups). Such private suits allege violations of the Clean Water Act based on alleged exceedences of the EPA Benchmarks and seek prohibition against the alleged polluting activities, payment to an environmental fund in lieu of a fine for prior violations, and recovery of attorneys' fees.

The Benchmarks are not enforceable numeric limits in and of themselves. They are concentrations meant for comparison, with the idea that if you are exceeding those amounts, you should review your stormwater management methods to see if you can improve upon them. However, the NGOs tend to claim that the defendant has either (1) failed to meet its obligations under the Clean Water Act (i.e. by failing to perform the necessary tests or file the required reports), or (2) provided test results which show

that its water quality is so far in exceedence the EPA Benchmarks as to establish a violation. While it is difficult for the NGOs to establish a per se violation as a matter of law, it is equally difficult for a defendant to establish conclusively that it has not violated the Clean Water Act, making such litigation lengthy, costly, and potentially devastating.

Assuming that your operation is covered under the General Permit, you must have a SWPPP (a Stormwater Pollution Prevention Plan), which you should treat like as contract with the State. Thus, while there is no requirement that you provide weekly training as to stormwater safety to your employees, if your SWPPP says you provide such training, then you should do so. Note that your SWPPP must be signed by a current employee, must have an up-to-date site map of your facility that shows all current outfalls - - i.e. places where stormwater leaves your facility - - and must be readily available for inspection if an appropriate representative of a governmental agency requests it.

How Do I Comply with the Clean Water Act

a) Monitoring, Sampling, and Testing

Under the General Permit, you are required to regularly observe and document the appearance and other characteristics of your rainwater as it leaves your premises.⁴ You are also required to sample stormwater several times each season, submit those samples for testing, and then submit the test results to the State, along with your annual report and monitoring reports. These reports are public records and can be reviewed by NGOs. The NGOs tend to look for test results that show significant exceedences of one or more Benchmarks, and choose their targets on that basis.

Whoever does your stormwater sampling should be trained as to when, how, how frequently the sampling must be performed, and what qualifies as a “qualifying storm event.” More than one industrial operator has found themselves in trouble with a state agency or NGO by accidentally violating the CWA.

b) Best Management Practices And Best Available Technologies

At the center of any stormwater management plan should be Best Management Practices and Best Available Technology (BMPs and BATs). While these terms sound technical and exotic, they are often just common sense methods of trying to assure that the rain water that falls on your premises is as clean when it leaves your property as it was when it got there. Each facility is different, and a BMP perfect for one facility may not work for another, or may require additional BMPs to control water quality effectively. An appropriate BMP can be as simple as placing hay bales near an outfall to promote settling of suspended solids and to help filter off oil and grease. Other facilities require more expensive/elaborate methods such as sand filters or infiltration basins.

For Example - A Case Study

To help you put all this information in context, we provide the following example of a stormwater case, its cause, and its resolution: WXYZ Trucking Company⁵ was operating pursuant to the General Industrial Stormwater Permit (because they conducted operations at their facility which could impact

stormwater, such as refueling, truck maintenance, and truck washing). WXYZ had an appropriate SWPPP and took samples as required. However, because the majority of their facility was unpaved, and perhaps, because sediment (i.e. mud) was scooped up at the time several water samples were taken, the facility’s test results were extremely high for suspended solids.⁶

As a result, an NGO served a Notice of Intent to Sue upon WXYZ, giving WXYZ 60 days within which to cure the violation. WXYZ contacted the CTA, which in turn put WXYZ in touch with attorneys familiar with stormwater-based litigation.⁷ Because the violation was unintentional and relatively minor, and litigation would have been expensive and could have ultimately resulted in liability and an obligation to pay the NGO’s attorneys’ fees, WXYZ wisely chose to begin negotiations immediately to resolve the matter with the NGO. The NGO was receptive, particularly because the violations appeared to be isolated events, and because WXYZ was willing to make appropriate changes to its operations to improve water quality.

WXYZ agreed to put in an infiltration system at its outfall point, as well as take other measures to direct stormwater into the infiltration basin (which is a big hole full of gravel built near the primary stormwater discharge point). The system allows stormwater which has otherwise not infiltrated into the unpaved portions of WXYZ’s yard to be collected and infiltrated before ever discharging. Significantly, the pit was designed and built to avoid, or at least limit, disruption of the facility’s day-to-day operations.

Other measures were also employed, including use of straw wattles and bales to direct the water flow toward the infiltration basins, as well as to serve as additional filters for oil and grease floating on top of the stormwater. Thus, a relatively inexpensive and simple series of management practices were employed to dramatically reduce the contaminants discharged from WXYZ’s facility. For example, oil and grease and zinc, which had been far in excess of the Benchmarks, were reduced to well below the Benchmark levels, and total suspended solids discharged from the site were reduced by approximately 97%.

WXYZ was able to settle with payment to the NGO for their attorney’s fees and an equal amount was paid to an environmental fund in lieu of penalty to address the alleged violation of the Clean Water Act. While the end results were relatively favorable, given the alternatives, the lesson learned is that taking action before you draw attention of a regulatory agency or a non-governmental organization, and making sure that your stormwater management activities and sampling methods are appropriate and effective, is a far preferable, and far less expensive approach.

Other Management Practices Methods

There are a number of relatively simple and inexpensive devices available for use by trucking operations to prevent stormwater problems. Berms or curbs can be built around areas with industrial activity so that stormwater falling on other portions of a facility is not impacted by flowing across the area of industrial activity. Water can be captured within the bermed area

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and evaporated, infiltrated, or disposed of separately. Similarly, absorbent socks (i.e. long, porous cloth tubes filled with water-permeable material) and wattles (long, thin mesh tubes filled with straw) can be used to divert water flow, detain water to allow it to settle, as well as to filter it. Rocker plates can be used to knock dirt off of truck tires before they leave the yard and track mud from an unpaved area onto a city street. Tarps and/or lean-tos can be used to cover potential sources of pollutants. High impact activities such as engine repair, dismantling of engines, or storage of scrap metal or batteries should be, if possible, moved under cover so that the materials never come into contact with the stormwater at all. Such methods are quite effective and favored by enforcement agencies and NGOs.

Most importantly, you should get stormwater guidance from stormwater professionals such as the CTA Stormwater Monitoring Group, with specific experience in addressing industrial activities and in working with regulatory agency representatives and representatives of Non-Government Organizations/private enforcement groups. Knowledge of what the enforcement agents are looking for, and how they would view your facility and test results, will greatly assist you in avoiding potential litigation/enforcement activity. Consultation with a stormwater professional may cost a few hundred dollars, but it could literally save you thousands. Here, an ounce of prevention is worth a gallon of cure.

What To Do if it Happens to You

If, despite your efforts, you are served with a Notice of Violation by the Regional Water Quality Control Board or a local agency, or if you are served with a 60-day Notice of Intent to Sue by an NGO, you should contact an attorney trained in handling stormwater litigation to assess your exposure and evaluate an appropriate course of action depending on the nature and extent of the alleged violation. Litigation of such actions can be time-consuming and expensive, and could later result in substantial liability and an obligation to pay for the other side's attorneys' fees as well. Finding a way to get out of the litigation as quickly and efficiently as possible is advisable.

To summarize, therefore, we return to the words of Creedence Clearwater Revival. Long before the current flood of stormwater enforcement actions began to flow, Creedence Clearwater Revival astutely noted that "there's a calm before the storm, [and] it's been comin' for some time." Accordingly, before that storm hits you, you should review and, if necessary, improve your present stormwater management methods. Operating under California's General Industrial Permit is like living next to a river. The question is not whether it will overflow its banks; it is whether you will be properly prepared when it does.

Endnotes

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1989, while also serving as the Editor in Chief of the Law Review. Mr. Booth's legal practice focuses on civil litigation and regulatory representation of industry clients, with an emphasis on defense in environmental and toxic tort matters. He serves as legal counsel to stormwater monitoring groups and has successfully litigated and resolved stormwater based enforcement actions by the EPA, Regional Water Quality Control Boards, and non-governmental organizations.

Timothy S. Simpson is a Vice President/Principal Engineer with AMEC Geomatrix. He is a registered civil engineer and geotechnical engineer, having received his Bachelor of Science in Civil Engineering from Gonzaga University in 1983 and a Masters of Science from the University of California, Irvine in 1984. Mr. Simpson has more than 22 years of experience conducting environmental studies for a wide variety of multidisciplinary projects involving local, regional, and state regulatory oversight. Mr. Simpson has been extensively involved in establishing and implementing MPDES stormwater compliance and monitoring programs, and has assisted hundreds of clients with all aspects of stormwater compliance and defense.

2 The CTA has a Stormwater Monitoring Group operated by Jacob Settelmeyer (916-371-7346). Stormwater monitoring groups are allowed under the California Stormwater Regulations and allow members of the same industry to effectively pool their resources and conduct certain aspects of their stormwater compliance activities on a group-wide basis, allowing for more limited monitoring and group-wide training. Accordingly, the authors recommend contacting the CTA and Jacob Settelmeyer about possible membership in the CTA Stormwater Monitoring program.

3 There are specific requirements for each operation subject to the General Industrial Permit requiring that a specific schedule of stormwater monitoring and testing be implemented each year and an annual report be filed in July after the end of each rainy season, although members of stormwater monitoring groups only need to test in 2 out of every 5 years. If you have particular questions about whether you are subject to a General Industrial Permit, how to sample, monitor, or report regarding stormwater, you should contact the CTA or another qualified stormwater professional.

4 The CTA Stormwater Monitoring Group or other stormwater professional can help you obtain the sampling kits, apply the proper testing protocol and related activities, and can train your employees as to how to follow by the stormwater regulations.

5 WXYZ is a fictitious name but the incident described is taken from a real case recently resolved by a CTA member.

6 Benchmark for total suspended solids is 100. WXYZ's numbers were above 4,000 in several tests.

7 Not all environmental lawyers are familiar with stormwater laws. Therefore, in the event that you need legal counsel, it is advisable to find an attorney who is particularly familiar with stormwater regulation and litigation. A standard litigation approach can be needlessly expensive and ineffective.