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Although this article was prepared in 2000, it still summarizes the crux of the issue. JR

### **HOW AND WHY LOCAL MUNICIPALITIES' STORMWATER PERMIT, TMDLs AND ENFORCEMENT WILL AFFECT SMALL BUSINESSES.**

The winds of change are blowing into San Diego. A decade ago, few foresaw that regulation of *storm water runoff* would precipitate such change. But, with the difficulty of government in attaining clean water goals, and the public's impatience with closures of contaminated coastal waters, the incoming storm was inevitable. In truth, the more we learn about the pollution of our waters, the more we understand the cause lies with all of us. Industrial dischargers of hazardous waste contribute a relatively small amount of the overall storm water runoff pollution. Although scientific support is lacking for precise measurements, the Environmental Protection Agency (*EPA*) estimates roughly 80% of the pollution in San Diego Bay is due to urban runoff. Most industries already have been subject to permit requirements for some storm water control measures. Now residents and, particularly, small businesses are the targets and should prepare to batten down the hatches.

#### **FROM POINT TO NONPOINT REGULATION.**

Historically, the EPA sought to control pollution of our waters by "*point source*" controls in which the discharge from *pipes* is regulated by a National Pollution Discharge Elimination System (*NPDES*) permit. Hence, industrial operations bore the brunt of the country's efforts to attain cleaner waters. While the EPA was content to implement its clean water goals by squeezing industry, over time the returns shifted from dramatic to marginal, while cleaner water remained elusive. Nonetheless, NPDES-permitted industries discharge large quantities of hazardous wastes into the bay and remain significant players in shaping the storm water runoff debate.

Because the EPA initially ignored storm water issues, environmental organizations sued the EPA. The result: in the mid-1980s, a court ordered the EPA to implement a dormant section of the federal Clean Water Act. Now, where point source controls have failed, the EPA must take a "*water-quality*" approach, so as to protect "*impaired*" waters (those listed under section 303(d) of the Federal Clean Water Act) from a continuing overload of pollutants from uncontrolled areas, or "*nonpoint sources*", in the *watershed*. Nonpoint storm water runoff from the watershed funnels right into bays, oceans and other waters through the storm water drainage system.

Contrary to the belief of some, storm water is *not* directed to a sewage treatment plant. There is, however, an attempt underway in San Diego to reroute some runoff during the *dry* season to the sewer due to high bacterial levels. During rains, however, there is no way to handle the sheer volume of runoff, so it all goes to the rivers, bays and ocean.

To try to gain control of such runoff, EPA, through the state, began regulating storm water outlets as if they were point sources. As a result, since 1990, many industries and larger grading activities, along with municipalities which own the storm drains, have been required to secure storm water permits or otherwise comply with storm water regulations as part of their NPDES permits. To comply with these state and federal laws, many municipalities enacted ordinances in the early 1990s banning the discharge of anything but rainwater into the storm drain system. That meant little to smaller businesses until now.

### **TOTAL MAXIMUM DAILY LOADS---TMDLs.**

Significantly, the EPA is also now requiring states to enact “*Total Maximum Daily Load*”, or *TMDL*, limitations on pollutants entering *impaired* water bodies. Therefore, storm water and NPDES permits will now be limited by TMDLs as they are enacted. Virtually every U.S. water body will be subjected to TMDL regulations. There are over 500 impaired water bodies in California, and formulation of several TMDLs for San Diego alone is expected to take about 10-15 years.

The EPA is forcing implementation of TMDLs by underfunded delegation to the states (or will take over the process itself). Local agencies, such as the Regional Water Quality Control Board (*RWQCB*), design and implement the TMDLs through the permitting process. The *RWQCBs* must prioritize the most impaired waters. The *RWQCB* must then show how a pollutant impairs a water body, a daunting task with today’s limited understanding of such complex systems. The lack of funding to consolidate and interpret reams of existing, often discordant data, and the rigorous time frame in which to develop TMDLs, greatly complicate the effort. The *RWQCB* must then make an educated guess as to how much pollution an impaired water body can assimilate. Determining the proper level for a TMDL requires adding all point and nonpoint source waste loads, plus a margin of safety.

### **TMDLs---COMING SOON TO SAN DIEGO.**

Chollas Creek, which leads into San Diego Bay, and Rainbow Creek in North County, will be the first focus of our *RWQCB* for the *TMDLs*. *DIAZINON*, a commonly used pesticide identified as adversely impacting Chollas Creek and San Diego Bay, will receive the first *TMDL*. Additional TMDLs will be added over time as the *RWQCB* evaluates other pollutant overloads, such as copper, lead, cadmium and zinc, in Chollas Creek. The *RWQCB* must submit the first TMDL for Chollas Creek to the EPA by April, 2000. Nutrient overload will be the focus of the *TMDL* for Rainbow Creek.

TMDLs will automatically limit all existing NPDES or storm water permits, including the County, Port District and each municipality in the County---as joint permittees---for their collective NPDES permit (over 200 storm drain outlets enter San Diego Bay alone).

### **THE EFFECT OF TMDLs ON ALL OF US.**

Business and lifestyles will be altered in San Diego. They have to change. Why? Because in order for the municipal co-permittees of the NPDES permit to lawfully comply with their permit, and not be fined by the *RWQCB* or EPA, or sued by others, they must enforce TMDLs *on everyone in their jurisdiction---including you and me---*since *all our wastes* go down storm drains. Think only others must be responsible for pollutants going down our storm drains? *WRONG!* We all contribute pollution into our storm drains. Home products such as

pesticides, herbicides and fertilizers wash into storm drains through excessive irrigation and, of course, rain. Diazinon is a serious problem in San Diego Bay, thanks to our lack of understanding that poisons applied at home and work frequently spill over the curb to the storm drain and into the water. Also, many people assume *others*---often businesses---must have caused ***most or all*** of the pollution.

To further illustrate the problem, according to the San Diego Union-Tribune, the EPA has estimated ***each person*** on average ***spills more than a quart of petroleum product per year*** which can wind its way into our waters. The EPA says oil can hurt fish eggs and larvae, add to deformities in fry, and decrease adult survival.

Moreover, think those cars we drive---especially the gas guzzling sports utility vehicles---contribute to the problem? Substantially. Petrochemicals from car exhaust settle back to the ground and are carried to the storm drain. Mix in copper from brakes, improperly disposed oil changes, oil and grease from restaurants and lead from old paint and you have a toxic stew. All of this will begin to change over the next decade.

### **THE IMPACT OF “BEST MANAGEMENT PRACTICES.”**

How will municipalities force us to stop passive or active discharge of pollution into the storm drains? They (as well as industry and certain grading activities already required to secure storm water permits) must implement “**best management practices**” to prevent *everything but rain water* from washing off their properties, construction sites, etc., into storm drains. As a storm water permit condition, the State has required municipalities to implement ordinances requiring them and citizens in their jurisdiction to implement “**best management practices**” to control runoff. Each business will need to decide how to implement *its* best management practices, which takes into consideration both cost and water quality benefit, and involves a site- and business-specific inquiry.

Citizens’ suits have been on the rise challenging what constitutes the “best” storm water management. A prevailing party may recovery attorneys’ fees. If your business is given the required 60-day notice of a group’s intent to sue (which must list alleged violations), quickly assess how to implement or improve your practices and cure any deficiency. A suit cannot proceed unless a violation is ongoing.

### **FIRST, INDUSTRY AND MOST GRADING SITES---NOW EVERYONE ELSE.**

While most industrial operations and grading at construction sites over 5 acres are already subject to permit requirements, San Diego businesses and individuals are generally unaware that since 1993 they, too, have been subject to best management practices requirements by municipal ordinance, as required by the state.

The new driving force is that our local co-permittees will instantly be unable to comply with TMDL limitations when they are issued. Therefore, the days of *only* educating the public, or targeting the *most* egregious infractor, are over. We can now expect greater enforcement of existing **ordinances**. We will see greater use of existing laws and increased fines, much like a traffic fine, to get your attention, which in turn may capture the attention of your neighbors, if not the media. How about shutting down recalcitrant businesses which ignore Notices of Violation? Civil and criminal prosecutions may be the tool of the future. *Municipalities will now have to target businesses and individuals more aggressively to comply with best management practices or risk consequences.*

## TYPES OF SMALL BUSINESSES MOST LIKELY TARGETED AND WHAT THEY CAN DO TO IMPROVE THEIR LEGAL EXPOSURE.

Let's take a brief look at the types of businesses likely to first appear on the radar screen. First, those businesses which already are subject to county permits for food establishments and hazardous wastes will be inspected by the county for storm water issues. Other businesses which are less accustomed to regulation may be in for a surprise. Here is a list of small businesses which can anticipate storm water enforcement and some practical tips toward compliance:

- 1) **Restaurants**: stop washing outside and/or disposing of wastewater outside; dispose to sewer (may require grease trap).
- 2) **Painters, contractors, concrete layers and cutters**: stop allowing discharge from power washing from entering storm drain; stop washing equipment, painting utensils along the curb and into the drain; collect wastewater; avoid loss of paint chips, particularly those containing lead.
- 3) Businesses with **loading stations**: block storm drains located next to loading ramps to prevent oils and other materials, including emergency releases of hazardous materials, from entering; improve location and storage of chemicals.
- 4) **Auto detailers**: when washing cars, prevent all waste water from going offsite; use portable berms and vacuum up or evaporate water.
- 5) **Gas stations**: do not hose spills off pavement; use an absorbent.
- 6) **Fabricators and welders**: sweep up sawdust and metal shavings.
- 6) Businesses with **vehicles**: prevent employees from changing oil and discarding contents improperly, washing cars onsite, or allowing oil leaks; promote car washes that recycle water.
- 7) Businesses with **dumpsters**: use waterproof dumpsters with lids.
- 8) **Parking lots**: absorb leaking oil (Municipal Code already requires property owners to clean their lots regularly and to absorb oil leaks).
- 9) **Printers**: avoid dumping ink and other materials in alleys and parking lots.
- 10) **Pool companies**: avoid dumping filter material or hydrochloric acid (used for acid washes) into the street.
- 11) **Pesticide use**: change to nontoxic or less toxic pesticides and other poisons on your property. Chemicals such as diazinon degrade when exposed to the sun. Once irrigation or rain washes diazinon away, however, it dissolves easily in water and is difficult to degrade---thus long-lasting as a toxin in the water body.
- 12) **Landscaping**: reduce overfertilization of landscaping and overirrigation; do not apply before rain; do not apply on hard surfaces; prevent dirt from leaving property during rain by revegetating land or using other methods to stop siltation from entering the storm drain; dirt in water blocks sunlight from killing bacteria in the water and contributes to beach closures.
- 13) **Animal wastes**: clean up wastes which may contain harmful bacteria from your premises.
- 14) **Farmers**: previously unregulated for runoff, expect municipalities to seek ways to control pesticide, nutrient and silt from entering storm drains.

Municipalities will not tell you how to implement best management practices. That choice is yours. In many cases, businesses can do it with improved maintenance, such as regular sweeping and employee education; some businesses will require structural controls or modified landscaping so as to divert or capture runoff in a drainage basin. Failure to select a bona fide "best" practice exposes you to infractions by the municipalities or possibly a citizens' group lawsuit. Most importantly, taking measures to stop pollution of the storm water will help our environment, protect our children who contact or drink storm water in our bays and ocean, and

save us all money in the long run. The restoration of healthy water depends on our efforts.

**THINK BLUE.**

Now is the time to plan ways to help the environment and reduce your legal exposure. Consider the environmental and marketing benefits derived from participating in the “THINK BLUE” program created by the City and partnered by the County and Port of San Diego, CalTrans, Channel 10 and San Diego Chamber of Commerce, among others. Join THINK BLUE and display a decal at your business. Consider what your business can do to reduce the use of toxins and reduce or stop runoff from entering storm drains and let others know how they might help, too.

There are also nontoxic alternatives or methods to reduce the amount of toxins we use and release into the environment. The storm water and TMDL issues present us the opportunity to establish new patterns of behavior on a broad level which can greatly enhance the quality of life, appropriate for a new millennium.

If you think the problem remains with everyone else, are you prepared to weather the storm?