Pardon Me Your SWPPP is Showing

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It was a dark and stormy night. You bolted upright in bed wondering if your SWPPP, under the supervision of the PM using BMP's, would protect the BSA and ESA from the SAP the next day by the RWQCB and the SWRCB. You slept no more.

If you recognize the acronyms above, you understand that "dark and stormy nights" are a significant concern when you are immersed in the world of **Storm Water Pollution Prevention Plans (SWPPP)**. Having a plan in place on a construction project is no guarantee against disasters, runaway costs, fines and potential work stoppages. Neither Mother Nature nor state and local SWPPP officials are predictable. The purpose of this article is not to offer technical advice on what a recent court decision called a "complicated web of federal and state laws and regulations concerning water pollution."[1] Indeed, that would be impossible in the few paragraphs allowed.

As you read this article simply remember this theme: "Effluent flows down hill." Storm water and effluent do not always follow the same complicated web that the laws and regulations follow. Municipal handbooks on the subject are lengthy. For example, the Caltrans "Storm Water Quality Handbooks" are several hundred pages long and filled with diagrams and statutory references delving into minutiae; e.g. "…. proper composition and dimensions of wood stakes made of quality lumber and free from decay splits or cracks longer than the thickness of the stake…"zzzzzzzzz. Analysis of SWPPP laws and references could only excite those with a passion for reading tax regulations or whose hobbies include discussing the benefits of plastic versus vinyl pocket protectors.

The point of this short article is twofold: (i) to provide design professionals, owners, developers, and contractors with a broad overview of the "complicated web" of SWPPP; and (ii) to emphasize the importance of contractually allocating risk and responsibility for compliance with the applicable laws and regulations prior to filing for a permit.

The following anecdote illustrates the potential pitfalls and dangers of SWPPP. Only names and inconsequential facts have been changed to protect the innocent.

Recently, a moderate-sized contractor began a project in Central California where the number of acres of soil to be exposed in the winter was significantly less than could be exposed in the summer.

The contractor obtained all permits and had a SWPPP applicable to a ten year rain incident as required by local agencies. Unfortunately, the project was delayed and large portions of the soil remained exposed to winter conditions. Unbeknownst to the contractor, the site had substantial colloidal clay soil. The type of clay was not detailed in the soils report because it was not relevant to compaction requirements.

As you guessed, there was a storm which exceeded the capacities of the project BMPs (Best Management Practices). The retention basin constructed to catch storm water overflowed and cloudy water reached a nearby drain inlet. The contractor properly contacted its SWPPP consultant, who recommended draining the basin manually using a filter bag over the end of the drain outlet. That was done, but a governmental inspector "happened" by and noticed the cloudy discharge.

The inspector performed some rough arithmetic and concluded 18,000 gallons of cloudy water had been diverted into the creek. He also calculated a fine of $10 per gallon ($180,000) plus a $10,000 single day fine. Whereupon, the contractor nearly released some "effluent" of his own. What should the contractor have done? The contractor filed and followed a proper SWPPP and had the proper permit. The storm magnitude exceeded the SWPPP. A consultant was called for advice. That advice was followed. Nonetheless, the contractor or owner faced a potentially crushing $190,000 fine because of an unpredictable storm.

The problems did not end there. Colloidal clays are not uncommon in California and generally require chemical treatment for settlement to avoid cloudy runoff. On this project, chemical treatment would have had an initial cost of $30,000 - $50,000 and a monthly charge well into the thousands of dollars. Understandably, the principals did not anticipate the problem (or the fines) as the project was supposed to have been started in the summer.

The story had a somewhat happily-ever-after ending: Ultimately, the agency significantly reduced the fine based upon the Contractor's efforts and a commitment by the Contractor to provide for additional SWPPP training of its supervisors—kind of like an environmental re-education camp.

Overview of SWPPP

Currently in California's larger urban locations, construction sites with an area of one acre or greater must comply with the Federal CleanWater Act and other storm water runoff regulations. Smaller sites can also be included. The authority to issue permits for these projects, like effluent, flows downhill. The Federal Government requires California to comply with the Clean Water Act. The State enacts its own laws and grants its compliance authority to the various RWQCB's, which then require compliance with the Federal and State laws by county and city governments. The local political entity, not wanting to be left out, enacts even more regulations and requires a project owner to comply with **all** of the laws and regulations for permitting. Each lower entity answers to the higher authority. Compliance starts at the local level, when the owner applies for a building permit. To obtain a building permit the owner must submit a SWPPP to the local agency.

The SWPPP is generally a collection of BMPs, specifications and other plans, all of which seek to avoid pollution and/or improper sediment release in storm water runoff. Generally, the SWPPP is designed to do three things:

1. Prevent water from contacting polluted work areas (e.g. oily wastes near a dock);
2. Keep pollutants off surfaces that contact water (e.g. avoid exposing contaminants near streams); and
3. Manage/clean storm water before it leaves the site and is discharged to the public storm drain (e.g. using filters or treatments to remove pollutants).

Many governmental entities produce publications identifying "standard" BMPs which can be adopted to help satisfy the SWPPP requirement and obtain a permit. These BMP's are usually available through government websites.

To actually create the SWPPP, the owner contracts with one of three entities: a SWPPP consultant/ engineer, the architect, or the general contractor. Ultimately, it is the owner who is responsible for non-compliance. Therefore, it is important and prudent that the contracts clearly designate and allocate responsibility for both SWPPP preparation and compliance. In addition, other burdens are placed on the parties, such as training of employees in SWPPP compliance. Remember, the life's work of 100 geniuses can be undone in minutes by one person's failure to pay attention to detail.

Avoiding violations of the SWPPP is crucial as penalties and sanctions can be costly. For example, the City of Sacramento can issue citations and fines of $5,000-$25,000 per day, and higher for per gallon violations. Not long ago a prominent local developer was hit with a fine of nearly $600,000 for dirt and chemical runoff by the Central Valley RWQCB. Depending on the severity of the violation, the enforcement can be as severe as a stop work notice.

Allocation of Risk for SWPPP Compliance

Many contractors and design professionals have horror stories of overly zealous inspectors. The story discussed at the outset of this article created several dilemmas. Who should pay the fine? Who should pay for chemical treatment? What happens if the fault is shared? Can the project be shut down and if so then what happens? How can the parties protest the fine, but keep the project on schedule? Answers to these questions are elusive and become difficult to find when parties are under the stress of substantial fines and shut down orders.

Plan for the worst, and never assume the project will be confined to the dry season. There are multiple lessons to be taken from this article. First, always plan to have soil exposed in the dry season. Second, ignore the first point. Third, use experts in the field, know the regulations, make sure the involved parties are trained in pollution prevention, and do your best to cooperate with the inspectors.

Fourth, have a clear agreement on responsibility for SWPPP compliance, and an established chain of command for emergency/storm conditions. Know how to reach the SWPPP consultant on weekends and "dark and stormy nights". Fifth, have a well established procedure in place for the prompt payment of fines and a post-citation strategy to determine final responsibility. For example, a contractor or small design professional may not have the cash on hand to pay a $25,000 fine. What happens then?!

Sixth, create a plan for cooperation between the involved parties to get the citation resolved or reduced; pay the fine (if levied) and keep the project moving forward. In the earlier example, the contractor did nothing wrong. Should the contractor have to pay the huge fine or should the owner (or should someone else)? It is imperative to know these answers before you are standing knee deep in "effluent". Seventh, the parties should contractually agree to a method for meeting unexpected conditions requiring expenditures of money for new or additional SWPPP requirements. It does no good to have the project stalled while the parties argue about responsibility for the pending problems.

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The contractor and owner in the anecdote were fortunate that the local agency was "reasonable" in reducing the fine (even though the contractor had followed the SWPPP). The reduction made it possible to continue the project. However, it is not reasonable to assume that all governmental agencies or individual inspectors will handle the issues as that agency did.

It is a fair assumption that SWPPP requirements are here to stay. The requirements, however laudable, should be expected to become even more burdensome. Knowing SWPPP responsibilities ahead of time will help keep the inevitable disputes to a manageable level. Compliance with the permit requirements, as well as all governmental regulations, is a must. However, because compliance relies in part on Mother Nature, noncompliance is the rule not the exception.

Remember the important maxim of construction projects: "effluent" flows downhill. Plan ahead. Use experts. Know the regulations. Contractually allocate risk. Stay on time.

We hope this short article has been helpful. If you have additional topics you would like to see addressed in future articles or need experienced construction counsel, please contact one of the undersigned.

John Broghammer, Scott Cofer, and Gary Vinson are attorneys and partners with Greve Clifford Wengel & Paras LLP in Sacramento, California. Greve Clifford has represented clients in the construction and design professional industries for more than three decades. Please see our firm's display ad on page 15, or visit our website at www.greveclifford.com.

1. City of Rancho Cucamonga v. RWQCB, 135 Cal App 4th 1377, 1380 (2006).
2. The RWQCB (Regional Water Quality Control Board) does not have the authority to shut down a project. However, because local governments must answer to the RWQCB, the RWQCB can require that the local governments stop the work on a project. It rarely happens that a project receives a shut down order. Instead, they typically fine you into submission. It is the equivalent of professional wrestling's "sleeper hold"; fighting only makes it worse.