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**FEATURES**

**Are you prepared?**

GENERAL BUSINESS

Protecting your business from a citizen action lawsuit related to stormwater at your facility involves paying attention to the details.

MARCH 5, 2014

Operating a small or medium-size business in California can be challenging. The state is often described as the flagship for environmental regulations, leading the nation in efforts to reduce air and water pollution. This innovation translates into a wide array of regulatory requirements from state and local agencies that businesses must work to comply with. Even after doing everything the state and local regulators ask owners and managers to do, a business may still be targeted with a Clean Water Act (CWA) lawsuit.



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Under federal law, private individuals, usually working through environmental groups, are permitted to file lawsuits against private businesses for alleged violations of the CWA. The lawsuits often include allegations that the particular stormwater management practices employed at a facility are deficient and cause water pollution downstream.

These lawsuits are no small matter. Violations of the CWA, if proven in court, can result in daily fines to a company totaling thousands of dollars. Businesses often are asked to pay thousands of dollars in settlements as well as to sign agreements to make costly site changes, which can be monitored for one to two years by the environmental group.

The question is: Are you ready for that letter in the mail and the resulting site inspections by lawyers and consultants who will be looking in all the nooks and corners of your site for possible violations?

**Stormwater management duty**

Many California businesses operate outdoors, where industrial activities are exposed to winter storm events. That rain water, which lands on their industrial activities, may flow off site and into channels (ditches, drains, culverts) that feed into creeks and rivers. These waterways are called "navigable waters" and are protected by law from the cumulative effects of industrial stormwater that can transport pollutants to rivers and oceans.

When a business discharges stormwater that has been exposed to outdoor industrial activity, and that stormwater connects, through natural or manmade channels, to navigable waters, the business typically

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operates under a National Pollution Discharge Elimination System (NPDES) stormwater discharge permit. This is often referred to as the Industrial General Permit. Some businesses operate under specially written permits, which are a different matter and not the subject of this discussion.

Under the Industrial General Permit, businesses must:

- prepare and regularly update a Storm Water Pollution Prevention Plan (SWPPP);
- sample and test stormwater discharges during rain events, which require a special sampling kit and a qualified laboratory to test the samples;
- submit their stormwater data in annual reports to a designated state regulatory agency—one of several Regional Water Quality Control Boards; and
- implement what often are called best management practices (BMPs) to improve the outcome of the stormwater discharge samples in an effort to reduce or eliminate pollutants from stormwater discharge.

Each year, business owners, managers and often a team of stormwater management consultants review the data, note concerns and design improvements for the following year. For example, if the test results show an elevation in one of the pollutants a business is required to test for, the business owner and manager would consider past data, think about what changed at the site over the past year and decide how to correct that potential problem. This is called the “iterative” process, which simply means that the business must make a good faith effort to prevent, correct and improve stormwater results each year. Generally speaking, absent complaints from California regulatory agencies, most companies believe this effort fulfills their obligations under the Industrial General Permit.

### Private citizens’ enforcement

The CWA and related regulations require businesses to reduce and prevent pollution by effective management of stormwater discharges. State agencies can, and often do, commence administrative enforcement proceedings under the CWA. In addition, the citizen suit provisions under the CWA give environmental groups, as private citizens, the right to file lawsuits against businesses to enforce these laws, and they have the right to collect substantial penalties and legal fees for their efforts.

Many California businesses assume they are protected from a private citizen lawsuit if they complete the stormwater management tasks under the Industrial General Permit each year and they receive no complaints from the responsible state agency. Unfortunately, the absence of any state agency enforcement activity, among other factors (discussed below), can actually trigger action by a private citizen. The intent of the law permitting citizen suits is to allow environmental groups to step in when it is appears that regulatory agencies, through lack of resources, are not adequately enforcing the CWA.

How does the process start? Often, the environmental group’s members, lawyers or consultants drive around commercial areas, observing facilities from street locations, taking photographs and making note of places that appear to be engaged in poor housekeeping and careless work habits (such as workers failing to attend to oil and grease spills on site). They review the files, especially the annual reports, on each business maintained at the state regulatory agencies. The records, which are part of public record and can be easily obtained, often disclose which businesses are paying attention to the rules and which ones dedicate as little time as possible to compliance.

The next step in the process is that the environmental group sends a formal letter, which is required by the CWA, giving notice to the business of alleged violations of the CWA and 60 days to cure the alleged problems noted in the letter. These letters are not to be ignored or tossed on that pile of “get to it later” tasks. The business owners or managers should seek assistance—from stormwater consultants or legal counsel, and reply to the letter in a timely manner. In some cases, the environmental group accepts the explanation and moves on. In others, the next step might be a citizen enforcement lawsuit. Either way, a well-stated response by the business or its consultants conveys the message that the business in question is focused on stormwater management issues and engaged in a good faith effort to comply with the Industrial General Permit.

The environmental group has the legal right, after the 60-day notice period, to file a CWA citizen enforcement action in the federal district court. In this setting, the environmental groups and their lawyers have two distinct advantages: decades of experience and the high cost of litigation. And most small businesses simply do not have sufficient cash flow to hire lawyers and spend years in costly litigation. The question then is how can a business avoid litigation or at least be prepared when that day arrives.

### Targeting industries

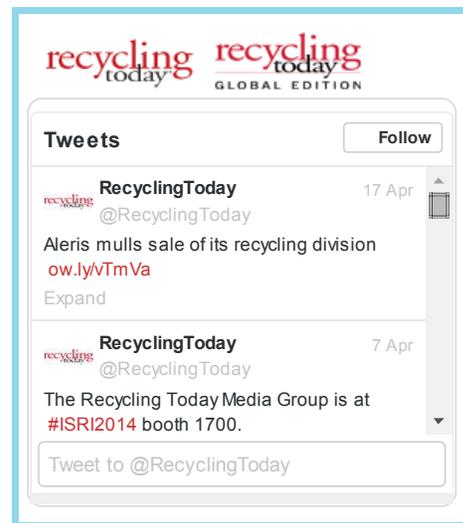


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Environmental groups often focus on particular types of private businesses. The trendy list, among small businesses, currently includes cement mixer plants, marinas, boat repair yards, scrap metal recycling facilities, lumber yards and automobile dismantling facilities. These businesses are often targets because they tend to have large operations that are exposed to stormwater, they work with heavy machinery that sits outdoors during the rain and they also process metals that can get into the soil at the site and be carried by stormwater. However, many of these metals are naturally present in native soils. Native California soils typically contain iron, aluminum and chromium concentrations, which make it difficult for businesses to control these metals from entering the stormwater discharge for which they are responsible. Marinas and boat yards are sometimes targeted because of the prevailing presence of lead and copper in boat maintenance materials.

### The best defenses

What can you do to protect your business? The best defense is site specific and involves paying attention to the details. Housekeeping is the most important element. Look around your site. How do you store equipment, materials, debris and products (e.g., scrap metal or auto parts)? How often does your crew sweep the site? What is your crew required to do after completing work each day? What is your crew required to do on the eve of a major storm event?

Now, turn to your stormwater documentation. Have you updated the company's SWPPP? When you prepared your annual report for the preceding year, what did you say about the results and, most importantly, what was your response to the results? Did you advise the Water Board of your intent to implement BMPs designed to improve or correct stormwater test results? Did you report recent site improvements? Did you explain what happened in that year that might have caused your stormwater results to have elevated metals or other problems and how you intended to correct that problem? The point is to carefully and fully document your business's efforts to reduce and eliminate pollutants in stormwater discharge.

Also, think about and consult with professionals about the problems you have not been able to solve. Stormwater management often is like a riddle. The assumed cause of the problem turns out to be a false lead and it may take additional effort to nail down the true cause of the problem. Consider whether your site is the victim of "run-on," meaning water from another site comes onto your site and pollutes your stormwater.



Several techniques exist that can help prevent a facility from being cited for stormwater violations, including storing inventory elevated away from bare ground, ensuring drain openings are protected from spills and runoff and making solid waste bins readily available.

courtesy of SCS Engineers.

Environmental groups typically seek to identify chronic EPA (Environmental Protection Agency) benchmark pollutant exceedances and then cite the inadequacy of target facilities' SWPPPs and their efforts to correct or improve BMPs in a timely fashion. The start of a good defense for a scrap yard is to actively analyze and make good faith efforts in solving chronic problems at your site.

Businesses can prevent environmental groups from targeting them as polluters (or discourage the group from filing a lawsuit) by adopting a five-step defense:

**1. Reduce or eliminate discharge points; retain water, if feasible; and prevent run-on.** Reducing

or eliminating discharge points will not only reduce consultant and laboratory costs, it also will focus efforts and resources on fewer points of discharge. Stormwater runoff can be redirected using curbs or berms to a single discharge point or, where feasible, can be retained and allowed to infiltrate on site in a retention pond. Promoting infiltration is effective at eliminating discharge if the facility has sufficient capital and on-site water storage capacity. Since many facilities cannot retain all stormwater discharge because of site restrictions, such as size or geometry, bioswales or soft-scaping can be effective at slowing stormwater runoff and supporting infiltration. Additionally, it is imperative that stormwater run-on be prevented using berms, walls or other means as nonfacility pollutants may have substantial negative impacts on facility stormwater results. Run-on causes commingling of stormwater that can skew analytical results and short-circuit the iterative BMP improvement process.

**2. Control mobilization of sediment at its source.** That is, prevent pollutants from being present in areas that could be subject to erosion or entrainment by stormwater runoff. Typically, heavy equipment operating over unpaved surfaces will dislodge soil particles, which are then easily mobilized into stormwater. Areas of high equipment use should be tightly controlled with respect to equipment type and employment. Consider requiring tracked versus rubber-tired equipment. Track tires tend to place less pressure on ground surfaces. In addition, use well-staked straw wattles or other suitable BMPs around the perimeter of the immediate area where equipment will be used, restrict equipment use during or immediately following rain events, regularly reseed areas that are subject to heavy equipment traffic and eliminate erosive materials in high-traffic areas. Consider using green pavers that will allow vegetative anchoring while at the same time reducing the potential for pollutants to be tracked beyond containment areas.

**3. Good housekeeping.** A detailed evaluation of housekeeping measures should be routinely and frequently conducted using a facility-specific checklist that focuses attention on uncovered process areas. Such an evaluation is particularly important prior to the first storm event of the season when pollutant buildup is greatest on facility surfaces. Facility operators should prevent potential pollutants from contacting stormwater to the greatest extent feasible. Prior to a storm event, equipment and work products should be placed inside a facility building, secured beneath tarps or covered beneath a shed roof. Handling of hazardous chemicals (e.g., draining engine fluids) during storm events should be avoided altogether. Junk piles, miscellaneous debris, unsecured or overflowing trash bins and disorganized work product stockpiles may contribute pollutants to facility discharge and give the appearance that a facility is poorly maintained. Poor facility appearances fuel the perception that an operator is polluting. The unmaintained appearance of a facility often attracts unwanted attention from regulatory agencies and easily can be spotted by private citizen groups conducting routine windshield surveys of industrial areas. Poor housekeeping also frequently leads to greater scrutiny of SWPPPs, BMPs and annual reporting to determine if a facility is in compliance with the Industrial General Permit.

**4. Sweep and sweep often.** The simple act of targeted sweeping is an often overlooked yet effective way to reduce pollutants entering stormwater discharge. Increasing the sweeping frequency of paved surfaces can positively affect concentrations of metals and total suspended sediment (TSS) in stormwater. Since metals typically adhere to soil particles or are contained within the minerals that comprise the soil, controlling TSS often produces the added benefit of controlling metals such as iron and aluminum, the third and fourth most abundant elements in the Earth's crust, respectively. If you cannot sweep your facility because you work on a soil or compacted soil surface, make a point before each rain season to upgrade the surface area by applying more gravel or base rock to prevent soil from becoming mobilized during rain storms.

**5. Frequently update SWPPPs and BMPs and retain documentation.** In addition to regularly updating these key defense documents, businesses should retain all old versions (in paper and electronic format, if possible) to show a pattern of continuous effort and improvement. A company's documentation of BMP improvements or plan updates can be critical when defending against a lawsuit. New versions of SWPPPs, including SWPPP maps, and BMPs should be issued with a new date each time revisions are made.

### **An ounce of prevention**

These CWA lawsuits impose a huge financial burden on small business owners and often cause disruptions to business operations. However, do not fall prey to the "penny wise, pound foolish" problem. Dedicate staff time to good housekeeping all year long, learn about effective stormwater management

and engage stormwater consultants to assist you and your manager when the circumstances merit.

If the notification letter or threat of a lawsuit arrives in the mail, hire a lawyer to help you understand the claims and respond to the environmental group rather than trying to handle it yourself.

No business in California or elsewhere is immune from lawsuits by the citizen enforcers. If not your business this year, you may hear that your neighbor just received a letter from an environmental group, and then the next year, the same group may be on your doorstep. But you can be prepared for that fateful day, and if faced with the threat of litigation, your well-placed BMPs, good housekeeping and focused attention on documentation will be there to defend you.

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