

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.

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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.