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Stormwater Discharge Permits and Clean Water Act Compliance

Navigating New EPA Permitting Requirements and Case Law on State Agency Permitting

THURSDAY, APRIL 26, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Stormwater Discharge Permits and Clean Water Act Compliance

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Outline

- **Intro to Stormwater Problem**
- **MS4s and NPDES Permits**
- **What is a SWPPP?**
- **What is an Illicit Discharge?**
- **NRDC, et al. v. NYSDEC**
- **Implications Moving Forward**

What is Stormwater?

- *Stormwater is water from rain or melting snow that does not soak into the ground. It runs off the surface of the “land” into storm sewers and ditches*
- “Land” includes:
 - Pervious surfaces (grassed or landscaped areas, woodlands) –some water soaks into soil, some runs off
 - Impervious surfaces (roads, parking lots, concrete, rooftops) –almost all water runs off, almost none soaks in

Why is Stormwater a Problem?



Why is Stormwater a Problem?

- Rain and snowmelt wash pollutants such as pesticide, motor oil, bacteria, fertilizer, soil and litter into storm sewers and ditches. Ultimately, storm sewers and ditches empty to a lake, river or stream
- Although stormwater runoff is a natural process, increases in impervious surfaces and changes in land use increase the quantity of runoff, leading to:
 - Erosion of soil from the land surface
 - Streambank erosion
 - Flooding and drainage problems
 - Damage to aquatic habitat
 - Damage to infrastructure and property

Federal and State Regulations

- Mandatory Permitting Program for Point-Source Discharges to Surface Waters under Clean Water Act
 - Part of the National Pollutant Discharge Elimination System (NPDES)
- In New York State, the Department of Environmental Conservation (NYSDEC) is the executive agency that has been delegated responsibility for the program
 - State Pollutant Discharge Elimination System (SPDES)

EPA Stormwater Program

- Phased approach to mitigating high levels of pollution in urban stormflow required by the 1987 Amendments to the Clean Water Act
- Phase I addressed
 - Certain industrial activities
 - Construction activities disturbing 5 acres or more
 - Medium and large municipal MS4s

What is an MS4?

- **MS4 = Municipal Separate Storm Sewer System**

- Any system of open or closed pipes or ditches that carry runoff from rainwater or snowmelt (*not sanitary sewer discharge*)
- Owned and operated by a government entity (City, Town, Village, State, County, etc.) OR a publicly funded entity (school district, prison, hospital, etc.)

What is a Regulated MS4?

- “Regulated MS4” is the term used to describe a government entity that owns and operates an MS4 and is subject to the Phase II Stormwater regulations due to the following:
 - It is part of an urbanized area of more than 50,000 total population
 - It has a population density of greater than 1000 people per square mile
- Regulated MS4s in New York State must obtain coverage under SPDES General Permit GP-0-08-002

MS4 Permits

- Requires regulated MS4s to implement a Stormwater Management Program consisting of Six Minimum Control Measures (MCMs):
 - Public Education and Outreach
 - Public Involvement and Participation
 - Illicit Discharge Detection and Elimination
 - Construction Site Runoff Control
 - Post-Construction Stormwater Management
 - Pollution Prevention and Good Housekeeping of Municipal Operations

Stormwater Construction Permit

- Developers of projects that disturb greater than one acre of land must obtain coverage from New York State under this permit
- In regulated MS4s, the municipality is given regulatory responsibility for this permit (State has delegated to the local level)
 - Municipality responsible for reviewing SWPPPs at design stage –SWPPP Acceptance Form
 - Municipality also performs inspections and takes enforcement action during construction
 - However, the developer still must obtain permit coverage from NYSDEC

What is a SWPPP?

- *A Stormwater Pollution Prevention Plan (SWPPP) is a document that describes the practices (actions and structures) to be implemented on a site to prevent polluted runoff from leaving the site to enter a body of water, wetland, or drainage system.*
- Required for all development projects and other land-disturbing activities where greater than one acre of soil disturbance occurs

SWPPP Contents

- Notice of Intent (form used to apply for coverage under General Permit)
- Erosion and Sediment Control Plan (required for all SWPPPs)
Non-structural practices (application of mulch, establishment of vegetation, soil treatments to minimize erosion, etc.)
- Structural practices (e.g. silt fence, stone check dams, stabilized construction entrances, sediment trapping devices, etc.)



SWPPP Contents

- Post-Construction Stormwater Management Plan
 - Required for most projects where impervious surface is created
 - Common exceptions:
 - Developments consisting of single family homes disturbing less than 5 acres, in which <25% of finished project is impervious
 - USDA-approved agricultural best management practices
- Components include:
 - Water Quality Treatment (Water Quality Volume)
 - Water Quantity Control (Attenuation of 1-year storm runoff volume and peak discharge from 10-year and 100-year storms)
- Accomplished through standard stormwater management practices (ponds, swales, filtration systems, etc.) and site design

SWPPP Contents

- Construction Site Waste Management Plan
 - Spill prevention and cleanup procedures
 - Storage and handling of materials and debris at the site
- Certification Statements
 - Owner/Operator (i.e. the developer)
 - Contractors and Subcontractors
- Procedures for maintenance of all erosion and sediment control and stormwater management practices
- Forms for documentation of site inspections

What is an Illicit Discharge?

- The term *“Illicit Discharge”* encompasses most types of flow entering an MS4 that are not comprised solely of stormwater runoff. Examples:
 - *Septic system discharges*
 - Sanitary sewer cross-connections
 - Floor drains
 - Industrial waste
 - Dumping into catch basins
- The intent of the permit is to eliminate these discharges
- A few exceptions exist for flows that are generally clean water (fire hydrant flushing, foundation drains, etc.)
 - These types of discharges are legal if not contaminated

Role of Municipal Officials

- Planning Boards:
 - Construction Site Runoff Control and Post-Construction Stormwater Management (MCM #4 and MCM #5)
 - Review Stormwater Pollution Prevention Plans (SWPPPs) submitted by developers for construction projects
 - Can rely upon PE's to approve technical aspects
 - Issue approvals for compliant SWPPPs
 - Developer submits acceptance forms to NYSDEC
- Public Involvement and Participation (MCM #2)
 - Citizens have opportunity to comment on development proposals
 - Planning Boards take public input into account in their review

Role of Municipal Officials

- Code Enforcement Officers
 - Construction Site Runoff Control and Post-Construction Stormwater Management (MCM #4 and MCM #5)
 - ❑ Site inspections during construction
 - ❑ Issue violation notices, enforcement actions
- Illicit Discharge Detection and Elimination (MCM #3)
 - Identify illicit connections to the drainage system and eliminate through voluntary compliance or enforcement action
- Public Involvement and Participation (MCM #2)
 - Response to complaints regarding polluted runoff or discharges, flooding and drainage concerns

Role of Municipal Officials

- Highway Departments
 - Illicit Discharge Detection and Elimination (MCM #3)
 - Monitor dry-weather flows from stormwater outfalls
- Pollution Prevention and Good Housekeeping (MCM #6)
 - Conduct day-to-day operations so as to minimize pollution
 - Document and quantify activities such as street sweeping, catch basin cleaning, deicer application, fleet maintenance
 - Train all staff in pollution prevention
- Post-Construction Stormwater Management (MCM #5)
 - Maintenance of ponds and other stormwater practices
- Public Involvement and Participation (MCM #2)
 - Response to resident complaints (flooding, drainage, etc.)

Role of Municipal Officials

- What about MCM #1 (Public Education and Outreach)?
 - Responsibility of departments varies between municipalities (often shared)
 - Distribute information, respond to questions from citizens, develop education and outreach program
- Annual Report and Public Presentation (MCM #2 –Public Involvement Participation)
 - Responsible department or individual may vary
 - Report is prepared and made available for public review



Stormwater Discharge Permits and Clean Water Act Compliance

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EPA's New Construction General Permit (CGP) for Stormwater

- Effective February 1, 2012
- Applies in Massachusetts, New Hampshire, New Mexico and the District of Columbia
- Will affect ongoing permit development in states with delegated programs covering construction sites
- Fact sheet link
http://www.epa.gov/npdes/pubs/cgp2012_finalfactsheet.pdf



Major Changes in the New CGP

- Emergency related construction activities, such as for natural disasters, are allowed if the operator files the Notice of Intent (NOI) within 30 days. CGP 1.2.1
- Existing projects must file NOI by May 16, 2012.
- Requirements for discharge into impaired waters CGP 1.2.2 and 3.2
- Ineligibility for sites that use cationic chemicals CGP 1.2.4

Major Changes in the New CGP

- Endangered Species CGP Appendix D and Historic Properties CGP Appendix E
- Waiting period for new projects increased from 7 to 14 days. CGP 1.4.2



Major Changes in the New CGP

- New or expanded sediment and erosion control requirements
 - Controls before construction. CGP 2.1.1.3
 - Initiate work to fix problems on the day they are discovered, and complete the work by the next day. CGP 2.1.1.4b
 - 50 feet of natural buffer, or equivalent controls CGP 2.1.2.1
- More detailed stabilization requirements CGP 2.2



Major Changes in the New CGP

- More detailed pollution prevention requirements CGP 2.3
- Increased site inspections CGP 4.1
- More specific corrective action requirements CGP 5
- More specific SWPPP (Stormwater Pollution Prevention Plan) requirements CGP 7
- Additional requirements in order to terminate CGP coverage CGP 8.2



Endangered Species Act (ESA) Requirements

- CGP 1.1e states that projects are only eligible for CGP coverage if they meet one of the criteria in Appendix D relating to endangered species.
- Appendix D criteria:
 - A. No federally-listed threatened or endangered species or their designated critical habitats are likely to occur in the “action area.”
 - B. Coverage via another operator’s valid certification



- Appendix Criteria (cont'd)
 - C. No likely harm to species or habitat (must identify any species or designated habitat located in the “action area” and provide the distance between the site and any species or habitat)
 - D. Written agreement from relevant Services
 - E. Written biological opinion to a federal agency
 - F. Permit under section 10 of ESA



Suggested ESA Related Steps

- See EPA's guidance for determining which ESA criterion applies. CGP Appendix D
- Did another operator, such as a general contractor or developer, already comply?
- Contact local U.S. Fish & Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) for list of endangered or threatened species; list is often on the web site of the local office.
- 50 CFR 17 and 226 for identification of critical habitat



Suggested ESA Related Steps

- If species or habitat are listed, inspect or survey the construction site and determine if the construction activity's discharges are likely to adversely affect species or habitat.
- Local offices of FWS or NMFS may help.
- May need to identify additional controls in order to meet criterion C, such as re-routing discharge or changing the “footprint.”
- If A,B, or C are not applicable, must formally coordinate with FWS or NMFS and try to get D-F.

NRDC v. NYSDEC

- Declaratory Judgment Action filed in NY Supreme Court in by NY Not-for-profits
- Heard by Justice Joan Lefkowitz of special NY Supreme Court's Environmental Claims Part
- Challenged DEC's issuance of MS4's SPDES General Permit in April 2010

NRDC v. NYSDEC

- 4 Causes of Action:
 - First, suit claimed DEC's General Permit unlawfully authorized MS4s to avoid utilizing all available measures to control pollution "to the maximum extent practicable" as required by the CWA
 - Second, suit claimed MS4 Permit failed to ensure compliance with water quality standards
 - Third, MS4 Permit failed to require municipalities to monitor stormwater discharges
 - Fourth, MS4 Permit violated public participation requirements

NRDC v. NYSDEC

- 4 Causes of Action:

- First, suit claimed DEC's General Permit unlawfully authorized MS4s to avoid utilizing all available measures to control pollution "to the maximum extent practicable" as required by the CWA
 - ❑ Essentially allowed municipalities to obtain immediate authorization to discharge based upon a Notice of Intent certification that they would prepare a Stormwater Management Plan ("SWMP") in the future
 - ❑ Court ruled that this created an impermissible "self-certification" system, stating that a permit can not authorize a discharge before the agency ensured the practices, techniques and methods of any given operator will in fact reduce the discharge of pollutants
 - ❑ DEC's failure to conduct a substantive examination of a "complete" NOI would be patently inadequate and did not satisfy DEC's mandate
 - ❑ Would not prevent a newly authorized MS4 from "misunderstanding, misrepresenting or misapplying the terms of the general permit or its own situation, and proposing a set of control measures that were inadequate to reduce pollutant discharges
 - ❑ Judge struck down the "permit now, come up with a plan later" approach...

NRDC v. NYSDEC

- 4 Causes of Action:

- Second, suit claimed MS4 Permit failed to ensure compliance with water quality standards
 - ❑ For some water bodies, for which DEC has already established water quality requirements, the Court ruled that the Permit did not mandate MS4 compliance within the 9 month timeframe required by law, and did not establish “compliance schedules” to reduce runoff

NRDC v. NYSDEC

- 4 Causes of Action:
 - Third, MS4 Permit failed to require municipalities to monitor stormwater discharges
 - ❑ Court denied this claim ruling that the inclusion in s SPDES permit for entities to self-monitor their discharges is discretionary
 - ❑ DEC satisfied its mandate through other means, including recording and reporting requirements , ambient monitoring and computer modeling

NRDC v. NYSDEC

- 4 Causes of Action:
 - Fourth, MS4 Permit violated public participation requirements
 - ❑ Court agreed that Permit violated the CWA's public participation requirement
 - ❑ DEC may only issue a SPDES permit after there has been an opportunity for public hearing

NRDC v. NYSDEC

➤ Practical Considerations

- ❑ More upfront work will need to be done to comply with SWMPs
- ❑ Spillover into Construction Permits and Multi-Sector General Permits

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Thank You for Attending

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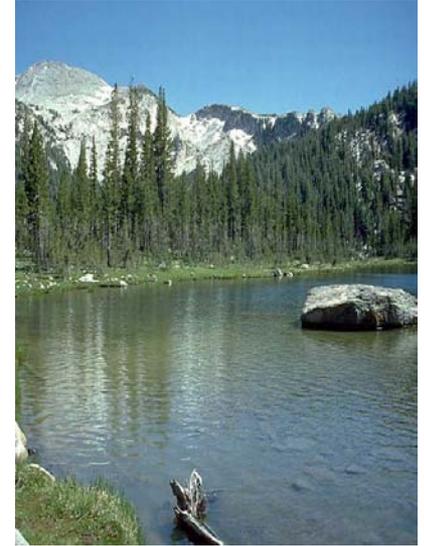


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Suggestions for Industrial Stormwater Dischargers-MSGP or State Version

- Typical facility has no general industrial water discharge (tied into publicly owned treatment works (POTW) or no process waste water) and no National Pollutant Discharge Elimination System (NPDES) permit, but is subject to stormwater discharge requirements.
- These facilities often have minimal environmental expertise on site.
- Facility management may not be experienced in monitoring, submitting reports, and other permit compliance.



Suggestions for Industrial Stormwater Dischargers-MSGP or State Version

- Permit requirements can be challenging and unfamiliar.
- Ramifications not well understood
- For example, many such permits have benchmarks, which although not effluent limitations, exceeding them generally requires action by facility management to investigate, document, and update the SWPPP by a certain date.



Suggestions for Industrial Stormwater Dischargers-MSGP or State Version

- Failure to take the required actions, timely, means that exceeding the benchmark is a permit violation.
- Failure to document taking of required actions may make exceeding a benchmark a permit violation.
- SWPP updates may be required even if no limit or benchmark is ever exceeded.
- State and local requirements are in addition to permit requirements.

For Questions or Comments

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