

## **Construction Activities On One Acre or More of Land Now Subject to Permitting and Enforcement Under Clean Water Act**

Beginning March 10, 2003, a permit will be required before discharging storm water from any construction activity that disturbs one acre or more of land. This includes runoff on sites of less than one acre that are part of a larger project that disturbs a total one to five acres. Real estate developers and other businesses that periodically undertake construction projects on more than one acre of land should heed these new requirements, which could delay existing projects or create enforcement liability under federal law for construction proceeding without a required permit.

These storm water permitting requirements are imposed under Phase II of the Environmental Protection Agency's ("EPA") storm water regulations, which were issued in December of 1999. Those regulations reduced the threshold for construction activities requiring a discharge permit from five acres to one acre in all states and, established March 10, 2003 as the deadline for permit applications for these small construction activities. Small construction activities are defined under the regulations as construction activities, including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than 5 acres.

Many storm water discharges are prohibited under the Clean Water Act unless the discharger obtains a National Pollutant Discharge Elimination System Permit ("NPDES") from the EPA or a state authorized to administer the EPA program. Since 1987, the Clean Water Act has allowed EPA and the states to phase in the NPDES permitting requirements for storm water discharges. Through this phased approach, EPA first targeted industrial sites, larger construction activities, and municipal storm water systems. In Phase II of its storm water program, the EPA reduced the size of the construction activities and municipal storm sewer systems that must obtain NPDES permits. The EPA regulations do not reach more benign storm water dischargers, such as runoff from office parking lots, but this storm water is often regulated under state law and becomes subject to the Federal program when discharged by a municipality from its storm sewers.

The EPA has recently increased its compliance inspection and enforcement activities for construction sites regulated under the storm water program. In the last two years, the Agency has extracted seven-figure and six-figure penalties from two well-known retail chains for failure to comply with the NPDES storm water permitting requirements for construction projects disturbing more than five acres when they built several new stores. As of March 10, 2003, projects that disturb only one acre can now be included in this effort, but EPA has indicated that this will be a low enforcement priority until all states have general permits in place.

EPA and the states have chosen in most instances to address the large number of regulated storm water discharges through simplified general permits. General permits are essentially regulations that authorize entire categories of storm water discharges if individual dischargers comply with the conditions of the general permit. These permits do not typically impose numeric effluent limitations, but do require use of storm water management practices such as silt fences and retention ponds. Appropriate best management practices must be identified in a storm water pollution prevention plan maintained by sources covered by a general permit. For sources that qualify, coverage under general permits is available simply by submitting a Notice of Intent and then complying with the conditions of the permit. If these requirements are satisfied, permit coverage is automatic and a source does not go through a public comment period or wait for agency approval to proceed with a construction project. However, permitting agencies still have the discretion to require more onerous individual permits that are subject to approval and public comment in instances where a discharge, including discharges from construction activity on less than one acre, creates a risk of water quality impairment.

EPA and several states have yet to issue general permits for small construction activities. States typically use EPA's general permit as a model and adopt substantially similar permits. EPA proposed a new general permit covering small construction activities on December 20, 2002 but has yet to finalize the permit. 65 Fed. Reg. 78115 (Dec. 20, 2002). The Agency extended the deadline for comments on this general permit, and the comment period recently closed on February 13, 2003. Although taking comments is the last formal step required before finalizing the permit, issuance of the general permit may still take some time because the EPA must process and review the comments before making its final decision.

In states that may have general permits in place, these permits could be undermined by a recent ruling by the Ninth Circuit that overturns an EPA Phase II regulation authorizing general permits for small municipal storm sewer systems. *Environmental Defense Center v. EPA*, Case No. 00-70014 (9th Cir. Jan. 14, 2003). The court held that this Phase II regulation amounted to unauthorized self-regulation because it imposed substantive requirements that municipalities reduce pollution to the maximum extent practicable but allowed the municipality to decide how to meet that standard without any review or approval of the Notice of Intent by a regulatory agency. The court also ruled that the Notice of Intent scheme violated provisions of the Clean Water Act requiring public comment on proposed NPDES permits. The impact of the opinion is arguably limited to general permits for small municipal storm sewers, but environmental activists are arguing it should be extended to require public comment under other general permits. The overall concept of a general permit was approved by another court several years ago, but the court did not address specific aspects of the current scheme involving Notices of Intent. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1380-83 (D.C. Cir. 1977).

At the same time that it proposed the general permit covering small construction activities, EPA also proposed a two-year exemption for oil and gas exploration activities from the Phase II requirements for construction activities on one to five acres. On March 10, EPA finalized the exemption and established March 10, 2005 as the compliance date for oil and gas construction activity. 68 Fed. Reg. 11325 (Mar. 10, 2003). No other industrial activities have received the benefit of such an exemption. To justify the extension, EPA explained that it had

originally concluded that the Phase II regulations would not impact oil and gas sites but that it now had information indicating that close to 30,000 oil and gas sites could be affected by the rules. Citing President Bush's executive order requiring agencies to consider the impact their actions may have on energy-related production activities, EPA felt that the extension was warranted to allow time for such an evaluation. Other industry sectors that are in a similar situation may wish to advocate an exemption for their activities as well.

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