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HOT TOPICS AND ENFORCEMENT ISSUES UNDER THE STORMWATER REGULATIONS

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A. Common Compliance Pitfalls with Stormwater Permits

One of the most common pitfalls regarding stormwater permits occurs in the initial determination of whether a stormwater permit is needed. Industrial dischargers may erroneously conclude or neglect to realize that their facility has a stormwater discharge "associated with an industrial activity." Section 122.26(a)(1)(ii) requires a stormwater permit for the discharge of stormwater associated with an industrial activity. Generally, this includes industrial activities exposed to stormwater that result in a discharge from the facility. Performing a thorough inspection of the facility to identify the locations of exposed materials related to industrial activities (*e.g.*, raw materials, fuels and process chemicals) is one of the critical steps in making a proper determination as to whether an industrial stormwater permit is required. Particular attention needs to be paid to high-risk activities common on industrial sites, such as fueling areas, loading and unloading areas, outdoor storage of raw materials or by-products. Also, another area sometimes overlooked by industrial facilities is past spills and leaks. If stormwater is coming into contact with these spilled materials, it can trigger the need for a stormwater permit. After inventorying all of the "sources" of stormwater associated with an industrial activity, they should all be listed in the stormwater permit application to ensure that the permit's coverage of the facility's industrial activities is complete.

Other potential pitfalls in determining whether a stormwater permit is needed is found in the less than clear language regarding both the physical nature of the discharge that may constitute a "point source" stormwater discharge requiring a permit and whether the discharge goes to a water body that triggers the need for a permit. Stormwater discharge associated with industrial activity is defined in 40 CFR § 122.26(b)(14), as:

> the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant…. For the categories of industries identified in this section, the term includes, but is not limited to, stormwater discharges from . . . areas where industrial activity has taken place in the past and significant materials remain and are exposed to stormwater.

A key term in this definition, "conveyance" is not defined in this section nor in § 122.2, the definitions section for the stormwater rules. *Webster's Collegiate Dictionary*, 10th ed., defines "conveyance," in the context most appropriate for these purposes, as a means of transport, a vehicle. The definition of "municipal separate storm sewer" is "a conveyance or

system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains). . . .[d]esigned or used for collecting or conveying stormwater. . . ." 40 CFR § 122.26(b)(8)(ii), in part. (Emphasis added.) One can extrapolate, then, that the "conveyance" that is a prerequisite for the requirement that a source obtain an NPDES permit for stormwater is some sort of channeling. Non-point source runoff does not appear to be included in the term "conveyance," although the term "stormwater" includes runoff. *See* 40 CFR § 122.26(b)(13), the definition of "stormwater," where the word "runoff" is used in three of the four definitional terms.

Some further insight into the line between an "outfall" requiring a stormwater permit and "runoff" that does not is found in the description of the information to be provided in the application for a permit for the stormwater discharge. In its permit application, the U.S. EPA requires quantitative data of samples collected during storm events at each outfall containing stormwater associated with the industrial activity. 40 CFR § 122.26(c)(1)(i)(E). "Outfall" is defined as a point source as defined at § 122.2. 40 CFR § 122.26(b)(9). "Point source" means:

> any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff. 40 CFR § 122.2.

Based on the regulatory guidance, it appears that general stormwater runoff which is neither captured nor conveyed to an "outfall" does not trigger the stormwater permitting requirement. Arguably, however, because the definition of "municipal separate storm sewer" includes ditches and because runoff specifically from agricultural sources is excluded, in a case where the stormwater at a facility runs off into a ditch, this may qualify it as requiring a stormwater permit. However, where is the outfall? Where is the discrete point at which sampling can be done and which can be described as the point of discharge? In such cases, it is understandable that dischargers are uncertain whether a stormwater permit is required. Similarly, a discharger needs to be constantly aware of changing conditions at the industrial facility. A concrete trough may have been constructed to catch any stormwater and prevent its discharge from the facility. However, over time, erosion around that concrete trough may have caused some of the stormwater to get passed the trough and to discharge off-site. Such situations have the potential to create stormwater discharges that trigger the need for a permit where none existed before and may be overlooked once the initial evaluation of the adequacy of the concrete trough has been performed. Therefore, it is prudent to periodically review the facility's grounds during and immediately after wet weather events to ensure that no "new" storm discharges have developed due to changes in the facility operations or in any physical structures originally installed to address stormwater containment.

It is also prudent to consider whether a facility can eliminate "sources" of stormwater discharges. For example, a facility may engage in fuel transfer activities for a power generator that has a reasonable potential for a fuel release. Stormwater that comes into contact with the release area could carry residuals (*e.g.*, fuel oil and heavy metals) to the stormwater drainage system. However, it may be feasible to place a roof over the area and thereby prevent

stormwater from coming into contact with this "industrial activity." Installing such protection from exposure to stormwater can eliminate the discharge that would otherwise trigger the need for a permit.

There also are potential pitfalls in the analysis of whether the stormwater discharge reaches a "water of the United States" triggering the jurisdiction of the stormwater regulations. It is imperative that a stormwater discharger fully evaluate where its stormwater discharge "goes." For example, a discharge to a combined sewer system that flows to a POTW does not trigger the need for an industrial activity stormwater permit. A combined sewer system is one that is designed and constructed to receive both runoff and waste water to be treated at the POTW. In this situation, the stormwater runoff does not go directly to protected waters but rather is first treated by the POTW. However, you must be certain that all of the discharge is captured by the combined sewer system. If any part of the discharge goes directly to "waters of the United States," the federal stormwater permit requirements will apply.

In those instances where the discharge is not to a combined sewer system, the analysis can become even more complex to determine if the stormwater permitting requirements are triggered. The discharge may be to a drainage ditch that is dry except for the stormwater runoff from the industrial facility. The drainage ditch may traverse a long distance and the discharger may not be aware of where the ultimate discharge point is for the water entering the ditch. In normal rainfall events, the water in the ditch may simply evaporate. However, in heavy rainfall events, such as the 100-year storm, it may travel to a more distant creek, making it subject to the stormwater permitting requirements.

To make the "pitfall" potential even more troublesome, there is a conflict of authority on the issue of whether a stormwater discharge to groundwater triggers the stormwater permitting requirements. Case law addressing the issue of the authority of the U.S. EPA to regulate stormwater or waste water discharges to the ground and thus to groundwater that is hydrologically connected to surface waters, is divided.[1] However, in Illinois, we are governed

[1] *Kelley v. U.S.*, 618 F.Supp. 1103 (W.D. Mich. 1985) (dismissed claim that groundwater hydrologically connected to navigable waters is regulated under the Clean Water Act); *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, 24 F.3d 962 (7th Cir. 1994), *cert. denied* 1994 U.S. LEXIS 7134 (October 11, 1994) (found that the Clean Water Act does not extend to groundwater, even if it is hydrologically connected to navigable waters); *Patterson Farm, Inc., v. The City of Britton, South Dakota*, 22 F.Supp. 2d 1085 (N.D. S.D. 1998) (follows *Village of Oconomowoc Lake* – groundwater migrating to surface water is not covered by the Clean Water Act); *Friends of the Coast Fork v. Turner*, 1996 U.S. Dist. Lexis 22083 (D. Ore. 1996) (discharges to groundwater can constitute violations of the Clean Water Act; specifically takes issue with *Village of Oconomowoc Lake*); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F.Supp. 1182 (E.D. Cal. 1988) (NPDES permit not required for groundwater discharges but allows further discovery to determine whether there is a hydrological connection to navigable waters and then must show impact); *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312 (D. Ore. 1997) (groundwater is not subject to NPDES permitting, even if hydrologically connected to surface water); *Amigos Bravos v. Molycorp.*, 1998 U.S. App. LEXIS 28567 (10th Cir. 1998), *rptd. in EPA Water Enforcement Bulletin*, EPA 300-R-9-007 (September 1999), pp. 10-11 (groundwater seepage is not considered a point source under the Clean Water Act but rather is regulated by the state); *Sierra Club v.*

by the decisions of the Seventh Circuit Court of Appeals. The Seventh Circuit has decided that a discharge into groundwater, even from a point source and even if the groundwater is hydrologically connected to surface water, does not require an NPDES permit under the Clean Water Act. *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, 24 F.3d 962 (7th Cir. 1994), *cert. denied* 1994 U.S. LEXIS 7134 (October 11, 1994)

In *Village of Oconomowoc Lake*, the Village sought to prevent Dayton Hudson, owners of the Target stores, from building a warehouse in the City of Oconomowoc. Among various theories as to why the warehouse should be prohibited was that it required an NPDES permit for a stormwater retention pond designed to collect runoff from the parking lot for the facility. The 7th Circuit determined that while the stormwater retention pond is a point source, the discharges from that pond would be to groundwater, and "[n]either the Clean Water Act nor the EPA's definition [of *waters of the United States*] asserts authority over ground waters, just because these may be hydrologically connected with surface waters."[2] The court recognizes the possibility of a hydrological connection but concludes that "neither the statute nor the regulations makes [SIC] such a possibility a sufficient ground of regulation."[3]

On several occasions the EPA has noted the potential connection between ground waters and surface waters, but it has left the regulatory definition alone. *E.g.*, Preamble to NPDES Permit Application Regulations for Stormwater Discharges, 55 Fed.Reg. 47990, 47997 (Nov. 16, 1990)("This rulemaking only addresses discharges to waters of the United States, consequently discharges to groundwaters are not covered by this rulemaking (unless there is a hydrological connection between the groundwater and a nearby surface water body.")[SIC] Collateral reference to a problem is not a satisfactory substitute for focused attention in rulemaking or adjudication.[4]

Village of Oconomowoc Lake is the case on point in the Seventh Circuit. It directly addresses the question of whether groundwater is within the permitting authority granted in the Clean Water Act. *Village of Oconomowoc Lake* says it is not.

As the brief review set forth above shows, there are many questions which need to be answered both in determining whether the stormwater permitting requirements apply and in identifying all of the stormwater discharges that need to be covered by the permit. Further, because facility operations and conditions may change over time, it is also important to develop a system that ensures that periodic re-assessments of the need for, and the scope of coverage afforded by, a stormwater permit for an industrial facility are performed.

Colorado Refining Company, 838 F.Supp. 1428 (D. Col. 1993) (discharges to groundwater reaching navigable waters is prohibited by the Clean Water Act); *U.S. v. ConAgra, Inc.*, 1997 U.S. Dist. LEXIS 21401 (D. Id. 1997) (found that the court had no jurisdiction over a claim of violation of the Clean Water Act for contamination of groundwater, even if hydrologically connected to navigable waters).

[2] *Village of Oconomowoc Lake* at 965.

[3] *Id.*

[4] *Village of Oconomowoc Lake* at 965-966.

B. Enforcement Actions

A significant area of stormwater enforcement actions is in connection with stormwater construction permits. The pitfalls tend to come in one of two ways. First, the owner or developer delegates the responsibility for obtaining any required "permits" to the third-party contractor hired to construct the development or construction project. What often happens is that the contractor fails to obtain the necessary stormwater construction permit for the project or if it does, it fails to comply with one or more permit requirements.

In the past few years, the U.S. EPA has brought significant enforcement cases stemming from this scenario. In an enforcement action against Wal-Mart and ten of its store's contractors, the U.S. EPA brought its first national enforcement action for multi-state violations of stormwater regulations. The complaint alleged violations at 17 Wal-Mart store construction sites in Texas, New Mexico, Oklahoma and Massachusetts for the failure to obtain stormwater permits and where the permits were obtained, the failure to comply with their terms. The alleged violations included the failure to develop pollution prevention plans to minimize the discharge of pollutants into stormwater runoff. In the June 2001 settlement of the Wal-Mart enforcement action, Wal-Mart agreed to develop a comprehensive environmental management plan (valued at $4.5 million) to include compliance nationwide through additional inspections of construction sites, conducting sampling to monitor the level of pollutants in the stormwater discharges, and training and recordkeeping. Wal-Mart also agreed to pay a $1 million civil penalty.

In a similar action, the U.S. EPA also brought an enforcement action against Amtrak for its failure to develop and implement appropriate stormwater controls at nine Amtrak sites in the New England area. In that case, the settlement also included the defendant's agreement to develop an environmental management system (valued at $11 million) and to pay a $500,000 civil penalty along with a supplemental environmental project valued at $900,000.

Although these two examples represent the most significant enforcement actions brought to date in the stormwater area, the Illinois EPA also has been active in the enforcement of stormwater permit requirements. This is particularly true in the construction sites arena where the failure to implement appropriate soil erosion control measures can lead to visible discharges of soil and sediments to adjacent surface waters. Whether observed by an adjacent property owner and reported to the Illinois EPA, or by spot inspections by Illinois EPA field personnel, these readily detectible failures to comply with permit requirements have been enforced against in Illinois. They in turn also lead to the discovery of additional violations, as the contractor's failure to provide appropriate soil erosion control often stems from the failure to conduct site inspections and to submit required reports. Civil penalties in the $50,000 to $100,000 are typical for these types of readily avoidable violations. Property owners must be vigilant in monitoring their contractors' compliance with stormwater permit violations. It is not enough to include the general provision in the construction contract that the contractor is responsible for obtaining and complying with all required permits. That passive approach to compliance is very risky and can lead to the types of enforcement actions described above.

C. Potential Future Changes to Stormwater Permitting Procedures In The Wake of *Environmental Defense Center, Inc. v. U.S. EPA*

The Ninth Circuit's 2003 decision in *Environmental Defense Center, Inc. v. U.S. EPA* may lead to changes in the procedure by which general permits are issued. At least, the impact

of the court's decision should affect the process of obtaining coverage for MS4s under the Phase II general permits. What is less clear is whether the U.S. EPA and State NPDES permitting authorities will read the Ninth Circuit's decision more broadly and apply it to all general permits issued under the stormwater regulatory program. If so, even industrial dischargers covered by general permits for stormwater associated with industrial activity and construction site general permit holders could face changes in the NOI process to incorporate more public participation in the issuance of these permits.

The U.S. EPA already has made a partial response to the Ninth Circuit's decision. In March 2004, the U.S. EPA issued an update on the Phase II Rule recommending that in response to the court's decision, States should publicly notice the availability of MS4 NOIs on their websites or in a newspaper, accompanied by either electronic posting of NOIs or information on how they can be accessed. On the public hearing requirement, the U.S. EPA recommended that this could be accomplished through periodic public meetings where comments on all pending NOIs are accepted. It does not believe that individual, formal public hearings are required. Finally, on the requirement that permitting authorities review NOIs to ensure consistency with the general permit, the U.S. EPA recommends that general permits specify when authorization to discharge is to occur, such as 30 days after the NOI is filed. The U.S. EPA stated that it is still evaluating whether a formal rulemaking is necessary to respond to the Ninth Circuit's decision.

As of March 2004, 42 states plan to issue MS4 general permits with 31 of those issued, five noticed and six outstanding. Three states plan to issue MS4 individual permits. All but two U.S. EPA regions plan to issue general permits for MS4s.

D. Are Tougher State Stormwater Laws on the Horizon?

While the Bush Administration has not shown it will get tougher on stormwater requirements, the same cannot be said at the state level. In January 2004, the State of New Jersey enacted new stormwater rules that are the strictest controls adopted by any state. Leading the way in this area, New Jersey has introduced new concepts into stormwater permit requirements, particularly in the area of stormwater construction permits. Among the novel requirements included in the New Jersey stormwater rules are a 300 foot buffer between any new development and a drinking water source. In addition, the New Jersey rules contain a "no net loss" of recharge to underground aquifers requirement. This new requirement will require new developments to employ water reclamation measures, such as wet gardens, dry wells and buffers, to funnel as much water as is generated by a 1.5 year storm back into the ground, rather than sending it off-site as a stormwater discharge. The New Jersey rules have evoked strong criticisms from developers and builders who claim that these stricter requirements will have the effect of limiting construction of both low- and middle-income housing. Whether other states will follow New Jersey's lead is uncertain but its new rules are perhaps an advance look at what additional constraints on stormwater discharges may be on the horizon.