

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

ALM

Stormwater Management in Pennsylvania

A Changing, Challenging Permitting Environment

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Special to the Legal, PLW

Those desiring to disturb ground, whether to build a commercial office building, a retail center, a residential subdivision or a municipal facility such as a bridge, road or town hall, have always faced the difficult task of obtaining all of the required permits and other entitlements necessary to begin construction in a timely fashion. For many projects that disturb as little as one acre of ground, a National Pollution Discharge Elimination System (NPDES) permit for the discharge of stormwater is becoming an increasingly more difficult permit to obtain. More sophisticated analysis required in the permit application draws upon the assistance of not only civil engineers, but also of competent counsel.

This article describes the NPDES stormwater permitting program in Pennsylvania and offers some suggestions on permit compliance to avoid the increasingly more aggressive and serious enforcement actions by the regulating authorities.

PERMITTING IN PA

A NPDES permit is required for any construction activity that will result in the disturbance of five acres or more of ground, or activities that are part of a larger common plan of development or sale that is equal to or greater than five acres of ground. The permit is also required for construction activities that have a point source discharge to surface waters of the commonwealth that disturb between one and five acres of



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ground, or that are less than one acre but are part of a larger common plan of development or sale that involves between one and five acres of disturbance. A point source is defined as any discernible, confined and discreet conveyance, including but not limited to any pipe, ditch, channel, tunnel, well, discrete fissure or container from which pollutants are or may be discharged. Discharges from sedimentation basins are typically a point source.

In Pennsylvania, the Pennsylvania Department of Environmental Protection (PaDEP) has the authority to issue NPDES permits. If the construction activity requires a NPDES permit, the PaDEP can issue either a general permit or an individual permit. General NPDES permits, also known as PAG-2, are generally issued for construction activities that are not within a watershed that is classified as a special protection watershed, which do not affect threatened or endangered species or habitats or do not have the potential for toxic discharges. For all other projects, an individual NPDES per-

mit is required. For several counties in southeastern Pennsylvania, the PaDEP has, by agreement, delegated the responsibility for the issuance of the general NPDES permit to the county conservation district.

The preparation of a NPDES permit application includes various calculations and engineered drawings prepared by civil engineers. In addition to measures designed to minimize erosion and sedimentation during construction, the application must also include a Preparedness, Prevention and Contingency (PPC) Plan, and a Post Construction Stormwater Management Plan. The PPC Plan is developed and implemented to minimize the likelihood of an accidental release of hazardous wastes and materials, fuels, chemicals or solvents, if any of these materials are present on-site during construction, and address such a release if it does occur.

The Post Construction Stormwater Management Plan identifies best management practices (BMPs) - to be installed during construction - that manage and treat the stormwater discharged following the completion of construction activities and stabilization of the site. The PaDEP seeks to require BMPs that manage the rate, volume and water quality of the stormwater discharged following construction.

To assist applicants for a NPDES stormwater permit, the PaDEP has prepared a Stormwater Best Management Practices Manual, currently in draft form, that includes, inter alia, a description of a whole suite of BMPs.

The PaDEP promotes both structural and non-structural BMPs to manage stormwater.

Non-structural BMPs are preventative measures incorporated into the design of a construction activity that minimize stormwater generated and reduce the adverse effects of stormwater. Non-structural BMPs include protecting sensitive resources such as riparian corridors and wetlands, minimizing the total area to be disturbed and reducing the amount of impervious coverage.

Engineers and developers are typically well-acquainted with some of the traditional, structural BMPs that could be employed to manage the rate of stormwater released from a site, but they are perhaps less knowledgeable about some of the volume control BMPs. In its draft of the Stormwater Best Management Practices Manual, the PaDEP lists a number of structural BMPs to be considered by the project designer to reduce the volume of stormwater runoff following construction, including but not limited to the use of porous pavements, rain/recharge gardens, subsurface infiltration beds, vegetated swales and vegetated roofs. In the instructions for the NPDES permit application, the PaDEP states that in the absence of certain recently adopted local ordinances, the Post Construction Stormwater Management Plan should provide design features and BMPs that will manage any net increase in stormwater runoff volume after completion of the project from a two-year/24-hour frequency storm. Managing such volume of stormwater runoff can consume land or financial resources in a manner that can be a challenge for project developers to meet.

PERMIT COMPLIANCE

Once a NPDES stormwater permit is issued, the permittee should exercise due care to ensure that it stays in compliance with the conditions of the permit. One issue frequently presented is the need to add the operator or contractor that is responsible for the earth moving and implementation of the erosion and control measures as a permittee or co-permittee to the NPDES permit. When the contractor and owner or developer of the facility or activity are not the same, the permit must either be transferred to the contractor, or that person must be made a co-permittee. By adding the contractor to the permit, the owner of the facility allows the PaDEP to maintain direct enforcement actions for permit violations against the contractors.

Permittees should also be mindful of the self-inspection and recordkeeping require-

ments included as standard conditions of NPDES stormwater permits. Typically, a stormwater permit includes a requirement that the permittee inspect the construction site and the erosion and sedimentation control measures on a weekly or biweekly basis, as well as after each measurable rainfall. In addition, the standard conditions of a NPDES permit require that a written report of each self-inspection be maintained and available for review by governmental officials. Permittees would be well-served to develop a standard inspection form for their construction projects, on which should be noted any discrepancies from the permit or the approved plans. Any discrepancies should be scheduled for correction as soon as possible, so that the next inspection report can note that the correction has been made. Some larger and more sophisticated developers and contractors with rigorous erosion and sedimentation control compliance programs might also include digital photographs and an up-the-chain reporting function as part of the self-inspection reporting program.

More sophisticated developers of larger projects have also begun to hire on-site environmental coordinators, whose primary responsibility is to ensure that the requirements of any environmental permits obtained for the project, including but not limited to the NPDES stormwater permit, are observed. In some instances, the on-site environmental coordinator is an outside consultant and an employee of the firm that designed the erosion and sedimentation control measures for the project. If this is done, the on-site environmental coordinator will have a background with the project and the measures to be employed, which will benefit that specific project when field situations need to be addressed. It will also benefit future projects to be designed by that consulting firm, in that information developed when real field problems are encountered can be channeled back into future designs.

PERMIT ENFORCEMENT

There are a variety of agencies that enforce NPDES permits for the discharge of stormwater from construction activities. The most frequent inspector of construction sites is typically a representative of the county conservation district. Generally, the county conservation district representative makes periodic, unannounced visits to construction sites to determine if the erosion and sedi-

mentation control measures have been implemented and properly maintained. Oftentimes, the representatives will also want to review the most recent self-inspection reports. The representative will prepare a field report noting the conditions at the time of the inspection and detailing any discrepancies with the approved plan. A copy of the field report will be left with on-site personnel, or sent to them later by mail.

Penalties for violations based on these field inspections have been increasing in amount in recent years. In the past, violations of the erosion and sedimentation control plan component of the NPDES permit were generally in a \$5,000 to \$50,000 range, depending, of course, on factors such as the number of violations and their severity. More recently, penalties based on alleged violations of erosion and sedimentation control measures found during field inspection have been greater than \$50,000. A permittee who has implemented a good self-reporting program and timely corrects any self-discovered discrepancies can expect that any penalties incurred will be in the lower ranges.

The U.S. Environmental Protection Agency (EPA), exercising its oversight role pursuant to the federal Clean Water Act, has also gotten involved in the enforcement of NPDES stormwater permits. According to its 2003 Stormwater Compliance and Enforcement Strategy, the EPA believes that compliance with the stormwater permitting requirements is still poor, despite the fact that many requirements have been in place for a number of years.

Rather than trying to address the thousands of contractors operating each day, the EPA stated that it plans to focus its enforcement efforts on commercial, big box stores and their associated developers, and large national and residential developers. As a first step in this strategy, the EPA states that it will be issuing information requests under Section 308 of the Clean Water Act to obtain information from potential dischargers. The EPA intends to analyze the responses and determine the appropriate enforcement response.

One such big box retailer that recently found itself within the enforcement crosshairs of the EPA is Wal-Mart. On May 12, 2004, the Department of Justice, the EPA and several states reached a Clean Water Act settlement for stormwater violations at Wal-Mart store construction sites across the coun-

try. Pursuant to the settlement, Wal-Mart agreed to pay \$3.1 million in civil penalties, perform an environmental project costing \$250,000 and employ a rigorous oversight program of its site developers, which includes, but is not limited to, training, inspections and reporting to EPA. The annual costs to comply with the oversight program is said to exceed the civil penalties paid.

CONCLUSION

Although the stormwater permitting program in Pennsylvania has always been focused on the maintenance or improvement of water quality of the receiving watercourse, the program has evolved from one concerned with erosion and sedimentation control during construction and the control of the rate of stormwater discharged following construction to a more sophisticated pro-

gram now also focused on managing the volume of stormwater and reducing the potential of toxins reaching the stream.

In this evolution, the stormwater permitting program has also consumed significantly more regulatory oversight, from application reviews to enforcement efforts. Those seeking to obtain a NPDES permit for the discharge of stormwater from construction activities should take heed of these develop-