

Stormwater Permitting and Management Requirements

A Practical Guidance® Practice Note by Jeff B. Kray and Jack L. Ross, Marten LLP



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This practice note discusses stormwater permitting and management requirements. The core of stormwater permitting comes from the federal Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., which sets out a program dealing with key categories of entities that discharge stormwater, and regulations that the Environmental Protection Agency (EPA) has promulgated to implement this program. Most states have established their own stormwater permitting requirements that are often more expansive than the federal program, and local governments have increasingly developed stormwater management requirements for entities within their jurisdictions that are separate from traditional CWA permits.

Described below is an overview of the federal stormwater program, including the types of dischargers, permitting requirements, and enforcement, with an effort to highlight

areas of local variability. This practice note also identifies areas in which stormwater management is expanding, either within or beyond the scope of federal CWA permitting requirements, with a focus on requirements for the construction and real estate sectors.

For a complete discussion of stormwater, see 4 Environmental Law Practice Guide § 18.01 et seq.

Overview of Federal Stormwater Regulation

Background

What Is Stormwater?

The term “stormwater” generally refers to runoff generated from rain and snowmelt flowing over land or impervious surfaces, such as paved streets, parking lots, and building rooftops. The line between regulated stormwater and unregulated precipitation and meltwater can be difficult to distinguish in some circumstances; indeed, stormwater was initially viewed as beyond the purview of the CWA because it was not as efficiently controllable through traditional end-of-pipe effluent limitations.

Determining whether a stormwater discharge requires a permit involves examining multiple legal terms and regulatory programs. For stormwater to come within the scope of CWA jurisdiction, there must be a discharge from a “point source” to “waters of the United States.” Even where these terms are met, permits are only required if EPA has designated the type of discharge for coverage in the Phase I or Phase II stormwater permitting programs.

Point Sources

CWA Section 502(14) provides a lengthy definition of what constitutes a point source. Generally, a point source is a discrete conveyance including any pipe, ditch, channel, or conduit from which pollutants are or may be discharged. The CWA explicitly excludes “agricultural stormwater discharges and return flows from irrigated agriculture” from the definition of a point source. 33 U.S.C. § 1362(14).

The distinction between a point source and a nonpoint source remains one of the most fundamental and often litigated aspects of the CWA. Given that stormwater is essentially runoff from large areas, evaluating whether stormwater is discharged from a point source has proved thorny in some situations and has generated substantial litigation. Some areas of dispute are highlighted below in “Other Stormwater Dischargers, Areas of Uncertainty,” which is found in the section on Primary Types of Regulated Stormwater Dischargers. The categories of dischargers described in this practice note all constitute point sources under the CWA.

For more on the definition point source and nonpoint source, see 4-18 Environmental Law Practice Guide § 18.01[1][d] & [e].

For more on regulating stormwater as a point source, see 4-18 Environmental Law Practice Guide § 18.02[2] (types of discharges that require NPDES permits) and § 18.03[2] (point source categories and subcategories).

Waters of the United States

The term “waters of the United States” has a broad definition set out in EPA’s regulations at 40 C.F.R. § 230.3(o). Generally, the term includes navigable waters, tributaries to navigable waters, interstate waters, the oceans out to 200 miles, and intrastate waters that are used by interstate travelers for recreation or other purposes, as a source of fish or shellfish sold in interstate commerce, or for industrial purposes by industries engaged in interstate commerce.

Beyond these broad categories, however, the reach of the term “waters of the United States” remains in flux following a plurality decision from the Supreme Court in 2006, *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006), and unsuccessful efforts by the Army Corps of Engineers since that time to generate a regulatory definition capturing the intent of the Supreme Court.

The uncertainty surrounding this term has generally involved wetlands and minor tributaries, as opposed to traditional navigable waters. However, the Supreme

Court’s 2020 decision in *County of Maui v. Hawai’i*, held that point source discharges to navigable waters through groundwater required a permit “if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge.” *County of Maui* may thus signal that the definition of “waters of the United States” may further develop over time to incorporate stormwater discharges that are not currently subject to permitting requirements. Additionally, many states have created their own definitions of state waters, which may require a permit to discharge to waters which do not meet the traditional “waters of the United States” definition.

For more on the definition of waters of the United States, see 4-18 Environmental Law Practice Guide § 18.01[1][c].

Phase I and Phase II Programs

CWA Section 402 sets out the core permitting program of the CWA, known as the National Pollutant Discharge Elimination System (NPDES) program. Amendments to the CWA in 1987 created the backbone of stormwater regulation in Section 402(p) by requiring EPA to develop permits under the NPDES program for “discharges composed entirely of stormwater” in two phases. The CWA initially directed EPA to address the following categories of discharges:

- A discharge that is covered by a permit before February 4, 1987
- A discharge associated with industrial activity
- A discharge from a municipal separate storm sewer (known as an MS4) serving a population of 250,000 or more
- A discharge from an MS4 serving a population of 100,000 or more, but less than 250,000
- A discharge that EPA or the governing state/tribe determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States

EPA promulgated regulations to address these discharges in 1990 in what is known as the Phase I program. Taken together, the Phase I program covers three key categories of discharges:

1. Two categories of MS4s, referred to as “medium” and “large” MS4s
2. “Industrial activities,” defined to include categories of discharges including construction sites that disturb five or more acres
3. Other discharges under what is known as EPA’s “residual authority”

EPA thereafter issued Phase II regulations in 1999. These regulations expanded the stormwater program to include certain “small” MS4s located in “urbanized areas” (along with other types of government-managed facilities) and discharges from “small” construction sites (between one and five acres of total disturbance).

By this point, the distinction between Phase I and Phase II dischargers is largely academic, because entities captured under either classification face nondiscretionary obligations. Described below in the section on Primary Types of Regulated Stormwater Dischargers are the permitting requirements applicable to the primary categories within the Phase I and Phase II programs: MS4s, industrial dischargers (other than construction sites), and construction sites.

For more on Phase I and Phase II regulation, see 4-18 Environmental Law Practice Guide § 18.05[1].

Permitting Program Generally

Who Is the Permitting Authority?

Several entities have authority to issue CWA stormwater permits, depending on where the regulated entity is located. Most practitioners and regulated entities interact with state agencies, because 47 states have delegated authority under the NPDES program. The states without delegated authority, as of the latest update to this note in October 2020, are Massachusetts, New Hampshire, and New Mexico. Regulated entities in these three states, the District of Columbia, territories, or Indian country (defined at 18 U.S.C. § 1151) must obtain permits from EPA. Even where state agencies have delegated authority to issue NPDES permits, EPA retains authority to mandate technology-based performance criteria for point source categories, known as effluent limitations guidelines (ELGs), as well as new source performance standards (NSPSs). These national regulations set a floor for technology-based effluent limits in NPDES permits and are therefore incorporated into state permits. States may set more stringent limitations to protect water quality within their own programs, resulting in state-specific permits that include but are not necessarily limited to national requirements.

For a discussion of EPA’s delegation of permit authority to states and tribes as well as states that do not have delegated authority, see 4-18 Environmental Law Practice Guide § 18.02[1].

What Type of Permit Is Required?

To obtain authority to discharge stormwater, a facility must gain coverage under either a general permit or an individual

permit. General permits are far more common and less cumbersome to acquire. General permits cover classes of discharges. A discharger may often obtain a general permit by merely filing a notice of intent (NOI) to obtain coverage under the relevant general permit. An NOI typically requires submission of basic information regarding the facility and its operations. Site-specific stormwater pollution prevention plans (SWPPPs) that provide information regarding best management practices (BMPs) and facility monitoring may be required under the general permit. The SWPPP typically does not need to be submitted with the NOI, but it must be completed and a copy retained on site before operations begin.

An individual permit, in contrast, requires a more detailed application from the permittee and development of a draft permit with site-specific requirements. Further information regarding the requirements for individual permits is available at 40 C.F.R. Part 122, Subpart B and on forms which are available on EPA’s permit applications and forms webpage, <https://www.epa.gov/npdes/npdes-permit-basics#pane-6>. States that develop their own permit application forms must include the minimum federal requirements.

The permit requirements depend on the class of facility and, especially in the case of individual permits, the specific operations at the facility. Generally, however, stormwater permits limit the type and quantity of pollutants that may be discharged from a point source, and provide effluent limits that restrict the quantities, rates, and concentrations of discharges of chemical, physical, biological, or other constituents. Permits contain categories of requirements, such as water quality-based and/or technology-based standards for effluent discharges, monitoring and sampling requirements, recordkeeping obligations, analytical testing methods, and reporting requirements. Some types of dischargers must submit discharge monitoring reports (DMRs) that record flow measurement, sample collection data, and laboratory test results on a quarterly or monthly basis.

The CWA specifies that a permit term cannot exceed five years. Permit revisions incorporate any required changes from courts, administrative decisions, or regulations applicable to the class of dischargers. The permitting authority also often adjusts permit conditions in response to public feedback and program goals. In recent years, for example, many permitting authorities have revised permits to streamline compliance requirements, including increasing the opportunities for electronic submission of required information.

Compliance with an NPDES permit potentially offers the permittees what is known as a “permit shield,” meaning

that a holder of an NPDES permit “shall be deemed [in] compliance” with sections of the CWA that address effluent limitations. 33 U.S.C. § 1342(k). The permit shield defense has historically provided permit holders with certainty that they will not face CWA challenges regarding pollutants in their wastestreams that were not specifically covered by a permit, even if regulatory changes arise during the lifetime of the permit, so long as a permittee discloses the nature of a wastestream and that the pollutants in that wastestream were within the reasonable contemplation of the permitting authority at the time the permit was issued.

For more on general permits, see 4-18 Environmental Law Practice Guide § 18.02[4] and § 18.05[3].

For more on the permit shield defense, see 4-18 Environmental Law Practice Guide § 18.02[10].

Primary Types of Regulated Stormwater Dischargers

This section sets out the primary categories of regulated stormwater dischargers, the types of permits available, common requirements within the permits, and practical issues associated with those permits. It bears repeating that stormwater permits and stormwater management requirements are highly variable geographically. Many states have gone above and beyond the minimal federal requirements by tailoring the common concepts to particular water quality issues associated with their watersheds. Additionally, many states and local jurisdictions have developed requirements imposing stormwater management protocols that are separate from standard CWA permitting requirements. Trends are highlighted in the discussion below, but practitioners and potentially regulated entities are wise to investigate the permitting programs and stormwater management requirements within their jurisdictions. Most state agencies, for example, have abundant resources available on their websites, including copies of permits, fact sheets, guidelines, and other materials designed to guide stormwater dischargers through the regulatory process.

Municipal Separate Storm Sewer Systems (MS4)

Overview

The Phase I regulations focused on Municipal Separate Storm Sewer Systems (MS4s) from large public entities due to the large volume of stormwater carrying common contaminants from urban areas that MS4s often discharged untreated to local water bodies. Impervious surfaces in urban areas concentrate contaminants in discharges to receiving waters, reduce groundwater recharge, and cause

flooding, infrastructure damage, stream bank erosion, and habitat destruction. The Phase II regulations expanded the scope of regulated entities to systems serving smaller populations. As urbanized areas continue to increase with development, so too will the number of permittees under the MS4 program and the reach of that program.

EPA defines an MS4 as a conveyance or system of conveyances that is:

- Owned by a state, city, town, village, or other public entity that discharges to waters of the United States
- Designed or used to collect or convey stormwater (e.g., storm drains, pipes, or ditches)
- Not a combined sewer –and–
- Not part of a sewage treatment plant, or publicly owned treatment works (POTW)

The federal permitting requirements for MS4s depend largely on the size of the population that the stormwater system serves. EPA has set minimum requirements for the different categories of MS4s and provides streamlined permitting options for small MS4s. However, there is substantial variability across the states regarding how these minimum requirements have been applied and, more importantly, the manner in which states and local jurisdictions have created or expanded stormwater management requirements.

The latter point is likely to be the largest area of growth in stormwater management. As local governments face expanding urbanization, the trend is toward increasingly robust and intricate requirements for managing stormwater from new development or redevelopment. States and local governments have increasingly taken it upon themselves to extend stormwater management requirements to capture development activities that are outside the scope of CWA-regulated MS4s.

Large and Medium MS4s

The Phase I rules cover medium and large MS4s. A large MS4 serves 250,000 or more residents, while a medium MS4 serves between 100,000 and 250,000 residents. EPA estimates that nearly 1,000 MS4s are covered by Phase I MS4 permits.

EPA's Phase I regulations anticipate that medium and large MS4s are covered by individual permits. Large and medium MS4s must supply extensive information in the permit application, classified as Part I and Part II, set out in detail in 40 C.F.R. § 122.26(d). Generally, Part I of the application requires basic information about the MS4, discharge data, and a description of controls to reduce

discharges from the system. Part 2 of the application requires additional data regarding discharges and the proposed stormwater management plan/program (SWMP) to reduce the discharge of pollutants to the maximum extent practicable. Although MS4s need not be subject to technology-based controls, municipal SWMPs are robust, detailed, and cover pollutant controls from a range of sources, such as roads, construction, post-construction, landfills, pesticide applications, and illicit discharges. Permit holders must enforce SWMPs and conduct a fiscal analysis of the resources necessary to accomplish the activities in the program. SWMPs supply the core of MS4 permit requirements and, as such, the source of stormwater management protocols with which dischargers to MS4s must comply.

After EPA issued the Phase I regulations setting minimum requirements for medium and large MS4s, many NPDES-authorized states have streamlined the permitting process by developing regional general permits for Phase I MS4s that take into consideration the water quality impacts in discrete geographical areas.

Small MS4s

Small MS4s captured under the Phase II regulations include those that serve fewer than 100,000 residents located within urbanized areas and other designated small MS4s outside urbanized areas on a case-by-case basis. According to EPA's estimate in 2011, urbanized areas comprise 2% of the United States land area, although that number has grown and is expected to grow at a substantial rate with increasing development. EPA estimates that impervious surfaces from housing developments alone will grow 36% in the next 20 years. In 2014, EPA estimated that approximately 6,700 Phase II MS4s were covered by 150 permits nationally.

Small MS4s must develop SWMPs that address the following six minimum control measures:

1. Public education/outreach on stormwater impacts
2. Public involvement/participation
3. Illicit discharge detection/elimination
4. Construction site stormwater runoff controls
5. Post-construction runoff control –and–
6. Pollution prevention/good housekeeping

The SWMPs must identify BMPs to address these components and have goals for making BMPs effective; select BMPs from federal or state lists; include effluent

limitations that are beyond the above six points; and contain conditions requiring evaluation of how BMPs are working to meet goals, including monitoring, reporting, and recordkeeping.

Small MS4s are largely covered by general permits after submitting an NOI describing the applicable SWMP, including BMPs and measurable goals. EPA's Phase II program also endeavors to reduce the regulatory burdens for small MS4s by incorporating existing permitting obligations of Phase I MS4s. The intent is to allow small MS4s to incorporate permitting obligations that another governmental entity is already responsible for, such as existing permitting obligations for a county covering the area in which a small municipality is situated. The small MS4 then need only comply with the permitting components of the county instead of developing and implementing its own programs. Small MS4s can also elect to obtain individual permits (including jointly with other entities) by following the requirements set out in EPA's Phase II regulation.

State and Local Controls, Emerging Issues

The specific requirements that MS4s must comply with vary widely across states. So, too, do the requirements that MS4s impose on entities that discharge into their systems, even within a given state. Stormwater management requirements also arise under local stormwater control ordinances, regardless of whether the area where a development is planned qualifies for CWA regulation. Many states have created requirements for stormwater control ordinances, and EPA has models to assist local governments developing their ordinance language, including elements of design, routine maintenance, and inspection of stormwater BMPs. The variability of state and local requirements cannot be overstated. In some areas, large developers are required to contractually agree to construct stormwater management/BMP facilities, and agree to inspections, corrective actions, and the like. In others, large developers must post performance guarantees to ensure compliance.

EPA has also considered options for expanding the scope of the Phase II MS4 program or otherwise adjusting requirements for MS4s. For example, EPA has considered increasing stormwater control measures at the design stage in response to development growth outside traditionally regulated areas and the cost savings of implementing stormwater control measures early in development. EPA has also evaluated extending MS4 permitting coverage beyond the current scope of Phase II dischargers to recognize urbanized clusters or watershed/jurisdictional boundaries, waterbody-specific retrofitting requirements to address impacts from sites within those areas, and setting standards

for development and redevelopment that incorporate green infrastructure practices.

Expansions to EPA's Phase II program do not appear likely at this time, but green infrastructure techniques are on the rise in state and local programs. Generally, green infrastructure refers to efforts to divert stormwater into natural areas instead of storm sewers, as low impact development (LID) practices are intended to do on a site-specific scale. LID utilizes design techniques that allow stormwater to infiltrate close to its source to mimic the way water moved through the landscape before it was developed. Traditional approaches to stormwater management typically involve hard infrastructure, such as curbs, gutters, and piping. LID-based designs, in contrast, comprise a set of site design approaches and small-scale stormwater management practices that use natural drainage features, engineered swales, and/or vegetated contours to infiltrate, convey, and treat stormwater runoff. Examples include permeable pavements, bioretentions, rain gardens, and vegetated roofs.

A growing number of states, counties, and cities have worked to implement green infrastructure. In some states, MS4s are required to impose standards in their SWMPs for utilizing LID principles. In others, green infrastructure is or could soon be a guiding principle of standards for development within applicable jurisdictions.

Whatever the techniques a government employs to control and manage stormwater, entities discharging into MS4s, such as developers and industrial dischargers, must be mindful of enforcement actions for noncompliance. In many cases, a citation for failure to comply with a city ordinance is as much a concern as an enforcement action for failure to comply with a CWA permit, described below in the section entitled Enforcement. And for new large developments in areas outside CWA-regulated MS4s, local rules can establish standards and legal obligations beyond traditional permitting requirements.

For further discussion of municipal separate storm sewer systems (MS4s), see 4-18 Environmental Law Practice Guide § 18.05[4][b]. Additional information is also available on EPA's website "Stormwater Discharges from Municipal Sources," <https://www.epa.gov/npdes/stormwater-discharges-municipal-sources>.

Industrial Dischargers

Overview

Industrial dischargers are among the most common types of regulated entities with which practitioners work. As of

2014, EPA estimated that there are approximately 90,000 industrial stormwater permittees nationwide. This owes to the fact that the term "associated with industrial activity," which is not defined in the CWA, is very broad and serves to encompass a large number of entities that conduct operations exposed to rainwater. The vast majority of these entities can obtain coverage under a general permit, which is usually issued by an NPDES-authorized state. EPA also offers a general permit known as the "multi-sector general permit" (MSGP), which illustrates the core components of state-issued general permits. A narrow but worthwhile exemption is available for dischargers that qualify as regulated entities under federal regulations, but whose operations are not exposed to stormwater. For those with a permit, enforcement actions are a looming threat, but some simple steps can mitigate that threat. Industrial dischargers are also increasingly subject to local requirements, apart from the terms of industrial stormwater permits.

Scope of "Associated with Industrial Activity"

Generally, the term "associated with industrial activity" means a discharge from any conveyance used for collecting and conveying stormwater that is directly related to manufacturing, processing, or raw material storage areas at an industrial facility. 40 C.F.R. § 122.26(b)(14). EPA's regulations specify 11 categories that presumptively fall within the definition:

1. Facilities subject to federal stormwater effluent discharge standards, such as ELGs, NSPSs, or certain toxic pollutant effluent standards, per 40 C.F.R. Parts 405–471 (for a table of parts of 40 C.F.R. setting forth effluent guidelines by industrial category, see 4-18 Environmental Law Practice Guide § 18.03[2][b])
2. Heavy manufacturing (e.g., paper mills, chemical plants, petroleum refineries, steel mills, and foundries)
3. Coal and mineral mining and oil and gas exploration and processing
4. Hazardous waste treatment, storage, and disposal facilities
5. Landfills, land application sites, and open dumps with industrial wastes
6. Metal scrapyards, salvage yards, automobile junkyards, and battery reclaimers
7. Steam electric power generating plants
8. Transportation facilities that have vehicle maintenance, equipment cleaning, or airport deicing operations

9. Treatment works treating domestic sewage with a design flow of one million gallons a day or more
10. Construction sites that disturb five acres or more
11. Light manufacturing (e.g., food processing, printing and publishing, electronic and other electrical equipment manufacturing, public warehousing and storage)

The majority of dischargers can be apprised of their presumptive obligations to obtain a permit based on their qualification under Standard Industrial Classification (SIC) codes, which are listed in EPA's regulation. However, note that the North American Industry Classification System (NAICS) codes have largely replaced SIC codes. This shift is purely administrative but may result in discrepancies for other regulations which have not been updated for NAICS codes. For the above-listed categories, EPA specifies that regulated discharges include those from a long list of activities, set out in the regulations. These activities include:

- Industrial plant yards
- Immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility
- Material handling sites
- Refuse sites
- Sites used for the application or disposal of process wastewaters
- Sites used for storage and maintenance of material handling equipment
- Sites used for residual treatment, storage, or disposal
- Shipping and receiving areas
- Manufacturing buildings
- Storage areas for raw materials and intermediate final products –and–
- Areas where industrial activity has taken place in the past and significant materials remain and are exposed to stormwater

The vast majority of industrial dischargers can obtain coverage under a general permit. Where EPA is the issuing authority, industrial dischargers can obtain coverage under the MSGP. Because the core elements of the MSGP are present in state permits, the MSGP is a representative example of what will be required.

MSGP

The current MSGP was issued in 2015 and administratively continued following its March 2, 2020 expiration. A new final MSGP is expected to be completed by November 12,

2020. The current MSGP contains the following nine-part structure:

1. **Permit Coverage.** This includes information regarding facilities covered and methods for how to obtain, terminate, and modify permit coverage.
2. **Control measures and effluent limitations.** This section includes BMPs and other measures to minimize pollutant discharges, including water quality-based effluent limitations applicable when discharging to impaired waters.
3. **Inspections.** Inspections include routine visual observations of the facility focused on identifying sources of leaks, spills, industrial material, or other materials that could come into contact with stormwater. Inspections must be documented. This section also describes required DMRs from each outfall for specified pollutants.
4. **Corrective actions.** This section addresses actions that permittees must take to respond to data obtained in inspections, including DMR data. If DMRs show exceedances of benchmark values for listed pollutants over four quarterly sampling results (as an average), review and evaluation of SWPPPs are necessary
5. **SWPPPs.** Each permittee must develop a SWPPP to capture efforts to select, design, and install control measures to meet the permit's effluent limits.
6. **Monitoring requirements.** Monitoring includes routine sampling at each outfall for particular pollutants documented in DMRs. The permit sets out the procedures for obtaining samples, monitoring schedules, and the types of pollutants that must be sampled depending on the industry sectors.
7. **Reporting and recordkeeping requirements.**
8. **Sector-specific requirements.**
9. **State/tribal specific requirements.**

Appendices include information regarding forms for submitting NOIs, notices of termination, conditional no exposure exclusions, DMRs, annual reports, and procedures for determining eligibility regarding specific elements of the permit.

EPA's 2015 updates to the MSGP were intended to streamline compliance, reduce burdens associated with duplicative obligations to some industry sectors, and increase transparency regarding discharges from specific facilities. These changes included requiring disclosures in

NOIs to obtain coverage in electronic format, increasing the amount of detail regarding stormwater outfalls and receiving waters that a discharger must include in an NOI to receive permit coverage, modifications to effluent limitation requirements, inspections, corrective actions, and other industry-specific requirements.

EPA has indicated that its expected 2020 updates to the MSGP will take full effect on November 12, 2020. These updates largely stem from the August 16, 2016 [Waterkeeper Alliance v. EPA Settlement Agreement \(2d Cir. 15-02091\)](#). Notably, many of the permit recommendations stem from a National Research Council study on potential MSGP improvements. Some of the proposed changes include efforts to streamline and simplify language, eligibility changes for discharges to Superfund sites, eligibility related to application of coal-tar sealcoat, discharge authorization under EPA enforcement actions, public displays of permits, consideration of major storm control enhancements, universal benchmark monitoring for all sectors, impaired waters monitoring, and new benchmark values and criteria for certain pollutants and sectors. For additional information about the 2020 MSGP updates see EPA's website, "Stormwater Discharges from Industrial Activities—Proposed 2020 MSGP," available at <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities-proposed-2020-msgp>.

State-specific requirements for industrial stormwater general permits vary significantly. One key area of variability is what activities are necessary when inspections and/or DMRs show that BMPs are inadequate or discharges contain contaminants of certain levels. Many states follow variations on the benchmark approach in the MSGP, where permittees are obligated to take certain graduated actions when DMRs show contaminants in discharges over limits for certain types of common contaminants, including metals, oil, and turbidity. Another area of variability addresses the steps that dischargers must take depending on the nature and quality of the receiving water bodies.

Conditional No Exposure Exemption

The most broadly applicable exemption for industrial facilities is known as conditional no exposure. Regardless of whether a facility falls within one of the listed categories and is presumptively required to obtain a stormwater permit, EPA regulations exclude discharges composed entirely of stormwater (other than construction sites) where there is no exposure of industrial materials to stormwater. No exposure occurs where all industrial materials and activities are sheltered, except for sealed storage equipment, well-maintained vehicles, and final products. To qualify for this exemption, a facility must certify every

five years that industrial materials are sheltered and allow inspections to corroborate that certification. Once certified, a permit is unnecessary unless the permitting authority determines that the facility contributes to violations of water quality standards or otherwise significantly contributes pollutants.

Qualifying for this exemption can be challenging due to the broad scope of what can qualify as industrial materials and confusion between the statutory guidelines and EPA's guidance, *EPA Guidance Manual for Conditional Exclusion from Storm Water Permitting Based On "No Exposure" of Industrial Activities to Storm Water* (EPA 833-B-00-001, June 2000), which is available at <https://www.epa.gov/npdes/guidance-manual-conditional-exclusion-stormwater-permitting-based-no-exposure-industrial>. For example, uncovered areas where trucks deliver materials can be sufficient to disqualify a facility that otherwise conducts all of its work indoors. For a qualifying facility, the exemption can save the costs of complying with the permit. It can also protect facilities where off-site impacts in industrial areas contribute to stormwater discharges exceeding benchmark levels that the facilities cannot control, such as runoff and air deposition from bridges or elevated highways. Regulated entities are therefore wise to consult with attorneys and qualified consultants to evaluate whether operations can be adjusted to fit within this exemption and avoid the costs associated with obtaining and complying with an industrial discharge permit.

Practical Considerations

In most circumstances, industrial dischargers can obtain and comply with an industrial permit without the need of professional assistance. The NOI process is often well explained by the permitting authority and most permits include clear requirements for specific categories of entities based on their SIC or NAICS codes. Some challenges can arise depending on water-quality limitations applicable to the water body receiving discharges, but usually the permitting authority also provides sufficient information for companies to address these issues.

To avoid enforcement challenges, however, it is essential that facilities develop appropriate SWPPPs and provide sufficient training to ensure that on-site personnel follow the permits to the letter. Industrial permits are a frequent focus of citizen suit challenges, which can be difficult to defend when sloppy recordkeeping and/or facility maintenance have occurred. Many consultants specialize in industrial permit requirements and can be a resource for ensuring that permit obligations are followed, such as routine sampling, DMRs, and SWPPP updates. Even if a company believes that it can handle permit compliance

in-house, a third-party vendor can be a prudent option for double checking that SWPPPs, training, sampling, and paperwork are drafted, designed, and implemented appropriately.

Industrial dischargers often face requirements handed down by cities and counties when their facilities discharge into MS4s. New facilities, for example, may be required to comply with local stormwater management requirements. And even minor facility upgrades, such as projects to repave yards or parking lots, might need to comply with local codes requiring permeable pavement and/or improved stormwater systems. Such nuances to otherwise routine upgrades can be costly to install and maintain.

For further discussion of stormwater discharges associated with industrial facilities, see 4-18 Environmental Law Practice Guide § 18.05[4][a]. Additional information is also available on EPA's website "Stormwater Discharges from Industrial Activities," <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities>.

Construction

Overview

Stormwater permits are required for a range of "construction activity," including projects that disturb land through clearing, grading, excavating, or stockpiling of material in the course of the work. The primary regulatory focus relating to stormwater from construction sites is controlling increased sediment discharges to receiving waters, which can carry other pollutants within the sediment.

As explained above, discharges from construction sites that disturb five acres or more are covered within the category of industrial dischargers. However, the requirements associated with this category of dischargers are sufficiently distinct that EPA and the states have developed permitting programs specific to the category. In the Phase II stormwater regulations, EPA expanded regulation of construction stormwater to sites disturbing at least one acre, including sites that are smaller and part of a common plan. As of 2014, EPA estimated that there are approximately 85,000 construction sites nationwide per year.

The specific permitting obligations that must be followed depend on whether the discharger is within a jurisdiction where EPA is the permitting authority. EPA has a general permit available for permittees within nondelegated jurisdictions. However, EPA has also set mandatory ELGs that must be incorporated into all construction stormwater permits, which states are free to expand on.

Construction General Permit

EPA has issued a Construction General Permit (CGP) available to dischargers in areas where EPA is the permitting authority. The newest CGP took effect in February 2017; however, due to litigation following the issuance of the 2017 CGP, EPA proposed modifications that were finalized in June 2019. The revised CGP does not impact permittees already operating under the original 2017 CGP, and the modified permit will still expire in 2022. More information about the specific changes in the modified 2017 CGP can be found at <https://www.epa.gov/npdes/final-modification-2017-construction-general-permit-cgp>. EPA estimates that approximately 25,000 operators will seek coverage under the 2017 CGP in its five-year life span.

The CGP covers any sites disturbing one or more acres of land or less than one acre but part of a common plan of development or sale, when activities qualify as "construction activity" or "small construction activity" under EPA's regulations at 40 C.F.R. § 122.26(b)(14)(x) and 40 C.F.R. § 122.26(b)(15).

The CGP includes the following structure:

- **Coverage.** This section sets out who is eligible for coverage and how to obtain coverage.
- **Technology-based effluent limitations.** This section describes the design, installation, and maintenance of stormwater controls, erosion and sediment control requirements, pollution prevention requirements, and construction dewatering requirements.
- **Water-quality based effluent limitations.** These are additional requirements when necessary to achieve water quality standards, such as the implementation of corrective actions in response to exceedances of water quality standards and specific conditions required by states, Indian country lands, and territories.
- **Site inspection requirements.** The permit sets out who is responsible for conducting inspections, along with the frequency, areas, types, and recordkeeping of inspections.
- **Corrective actions.** This explains the types of information that trigger corrective actions, the deadlines for doing so, and reporting requirements.
- **Training.**
- **SWPPPs.** The permit explains the general requirements for SWPPPs, including the contents of the plans and standards for modifying SWPPPs.
- **Termination of coverage.**

Appendixes include information regarding the permit, requirements for specific permittees depending on the receiving water bodies, and forms.

For more on EPA's 2017 CGP and related documents, see EPA's website at <https://www.epa.gov/npdes/epas-2017-construction-general-permit-cgp-and-related-documents>.

ELGs

Even where EPA is not the permitting authority, state-issued permits must include core ELGs set out in EPA's construction and development rule. EPA first issued this rule in 2009, which became effective in 2010. EPA later amended the rule in 2014 in response to litigation. Today, all NPDES construction stormwater permits issued by EPA or states must incorporate the requirements in the construction and development rule. The primary components of the construction and development rule are BMPs related to:

- Erosion and sedimentation controls
- Soil stabilization controls
- Management of dewatering activities
- Pollution prevention measures
- Surface water buffers
- Prohibition of certain discharges –and–
- Utilization of surface outlets for discharges from basins and impoundments

These effluent limitations are intended to decrease sediment and pollutants contained in sediment and to reduce the exposure of stormwater to construction materials and other sources of pollutants at construction sites.

The current rule does not contain a numeric effluent limitation for turbidity, which was a focus of litigation over EPA's initial rule. The absence of numeric limitations is reflected in the CGP, which instead relies on BMPs to achieve the requirements of the construction and development rule. However, many states worked to rewrite their permits to incorporate numeric limitations in EPA's initial rule, and some retained those requirements even after EPA's reversal. Some states require sampling and include a benchmark approach where discharges of turbidity measured at various levels triggers a graduated level of response, including review and/or revision of existing procedures, reporting, and adaptive management requirements.

For more on EPA's construction and development rule, see 4-18 Environmental Law Practice Guide § 18.03[6][e].

Additional Requirements

In addition to the stormwater permitting requirements described above, developers may face local requirements set by the city or county where development occurs. As explained above, MS4s must develop SWMPs that include controls for construction and post-construction and enforce those controls. Many local governments also have ordinances and city codes specifying stormwater management controls and procedures regardless of whether the developer is required to obtain a construction stormwater permit. The developer is therefore faced with understanding and complying with a suite of permitting and other regulatory requirements covering various stages of a project, with an array of potential considerations and compliance requirements.

For further discussion of stormwater discharges associated with construction activities, see 4-18 Environmental Law Practice Guide § 18.05[4][c]. For additional pertinent information, see EPA's website "Stormwater Discharges from Construction Activities," <https://www.epa.gov/npdes/stormwater-discharges-construction-activities>.

Other Stormwater Dischargers, Areas of Uncertainty

The categories of stormwater discharges covered above represent the primary types of entities that need to obtain and comply with stormwater discharge permits under current programs. Yet they do not represent the full class of entities that currently grapple with stormwater-related issues or could find themselves faced with permitting obligations in the future.

EPA has authority to require stormwater controls on a case-by-case or categorical basis under what is known as the agency's "residual designation authority." The circumstances in which these controls can be required are set out in EPA's stormwater regulations at 40 C.F.R. § 122.26(a)(9)(i)(C) and (D). Of note is where EPA determines that stormwater controls are necessary in watersheds subject to total maximum daily loads (TMDLs). Generally, the TMDL program requires states to establish a TMDL of pollutants for water bodies that do not meet applicable water quality standards. However, the TMDL program is a complex and rapidly emerging regulatory scheme that is beyond the scope of this practice note. A comprehensive description of the program can be found at 4-18 Environmental Law Practice Guide § 18.11[3][a] and [b]. Practitioners should evaluate whether the waterbodies that their clients discharge to are subject to TMDLs. At the very least, permit requirements may differ and the penalties associated with stormwater noncompliance may be more significant.

The residual designation authority is a potentially powerful tool that may be used to increase the scope of regulated entities. This is in part due to the fact that any person may petition EPA to exercise its authority where data show that discharges present more than a de minimis amount of pollutants to an impaired waterbody. See 40 C.F.R. § 122.26(f). Practitioners and regulated entities should remain aware of petitions in the regions that they practice. In recent years, petitions have increased in frequency, sometimes leading to new permitting requirements and/or litigation.

One primary category of discharge permits not described above is concentrated feeding operations (CAFOs). CAFOs are treated as point source dischargers under the CWA and must comply with a complex suite of permitting requirements depending on the type and size of the facility. Some discharges from these facilities arise from precipitation on their facilities, which has spurred lawsuits and increased regulation in the last decade. More information regarding this issue is available at 4-18 Environmental Law Practice Guide § 18.09[1] and § 18.02[2][i] (types of discharges that require NPDES permits—CAFOs).

Another primary category is stormwater discharges from logging roads. This issue was the focus of high-profile litigation in the Ninth Circuit, eventually rising to the Supreme Court. After years of uncertainty, there is currently no federal requirement to permit stormwater discharges from logging roads within the NPDES scheme, although many states and land managers impose various conditions addressing the issue. More information regarding this issue is available at 4-18 Environmental Law Practice Guide § 18.05[4][i].

Additionally, litigation in the last decade has led to the requirement for permits covering stormwater related to pesticide applications. More information regarding this issue is available at 4-18 Environmental Law Practice Guide § 18.02[2][i]. Litigants have also used the courts to test the boundaries of some of the CWA's exemptions, such as those associated with agriculture, or the meaning of the term "associated with industrial activity."

These developments are likely to continue, most likely in the courts and states, although EPA has in the past earmarked other sectors for potential consideration of coverage.

Enforcement

Overview

As is the case with any CWA violation, stormwater dischargers face enforcement actions from multiple potential plaintiffs for either failing to obtain or comply with a permit. Potential plaintiffs include EPA, delegated states, local governments, or citizens. The CWA is a strict liability statute, which means that good faith efforts to comply with the permit will not constitute a defense at the liability phase (although such efforts may be relevant at the penalty phase). Settling an enforcement action is usually cost effective; taking appropriate steps on the front end to avoid an enforcement action always is the most prudent course of action.

Governmental Enforcement

The bulk of CWA stormwater enforcement actions end in settlement, owing to the strict liability scheme in the CWA and the hammer of substantial penalties that the CWA wields for noncompliance. In rare cases, enforcement actions can result in litigation, but those cases generally do not involve disputes regarding permit compliance in the absence of compelling arguments.

In areas where states are permitting authorities, the relevant state and EPA are equally empowered to enforce the CWA and relevant permits. The penalties associated with noncompliance can be significantly different depending on whether noncompliance draws the attention of the relevant state or EPA, as can the possibility of multiple enforcement actions.

The CWA authorizes penalties for violations of the statute, including discharges into U.S. waters without a permit and, as is usually the case with stormwater dischargers, violations of permit conditions. The civil penalties that the CWA authorizes are substantial. The text of the statute allows penalties of up to \$25,000 per day per violation, but EPA has increased that penalty over time to account for inflation. In 2020, EPA increased the daily penalties to \$55,800 per day for most violations.

Most government stormwater enforcement actions are handled administratively. The CWA establishes procedures governing EPA administrative enforcement actions with maximum penalties. The CWA and EPA's interpretative guidance documents explain how penalties are assessed for different types of alleged violations, described further below. The procedures governing administrative

enforcement actions are discussed in 4-18 Environmental Law Practice Guide § 18.14[6]–[7], and do not differ with respect to stormwater actions.

As with all CWA violations, stormwater violations can carry criminal penalties if the government can show that the defendant acted knowingly or negligently. For further information regarding criminal liabilities under the CWA, see 4-18 Environmental Law Practice Guide § 18.15.

Government enforcement actions generally begin with a notice of violation setting out the regulator's specific grievances, including particular provisions of the applicable permit, statute, and/or regulation that were allegedly violated and the agency's basis for the alleged violations. The parties are then able to discuss the alleged violations and evaluate competing interpretations of the facts, data, and allegations. EPA generally follows a rigid timeline for evaluating whether settlement is feasible and files an administrative (or judicial) action if not.

In most circumstances, settlement is the most cost-effective option for stormwater dischargers. Settlement will require the discharger to come into compliance with applicable permits and potentially provide assurances to the plaintiff that compliance has been achieved. Settlement will also almost always require payment of a penalty. The total penalty amount assessed for a defendant depends on several factors, such as the following:

- Seriousness of the violation
- Economic benefit derived as a result of the violations
- History of violations
- Good faith efforts to achieve compliance
- Economic impacts of the civil penalty on the violator

The maximum amount is rarely sought. EPA follows internal policies for calculating a bottom-line settlement penalty. EPA typically does not share the internal calculation with a defendant and has considerable discretion to develop the penalty amount. The best opportunity to reduce the penalty is to limit the number of distinct violations alleged. For example, EPA's guidance includes factors for determining whether a paperwork violation that spans several years is considered a daily, monthly, or even annual violation.

Citizen Suits

Citizen suits are a common threat to stormwater dischargers. In some areas, citizen groups are more proactive than agencies implementing the permits or even EPA. The CWA broadly empowers citizen suits regarding alleged unpermitted discharges, failure to comply with

permit conditions, or other violations of standards under the CWA.

The citizen suit provision, 33 U.S.C. § 1365, includes several nuances to government enforcement actions. First, citizens cannot file a lawsuit before providing an alleged violator with a 60-day notice letter, which sets out the basis for the forthcoming suit with sufficient detail to allow the recipient to resolve any alleged violations. Second, a citizen suit cannot go forward if EPA or a state is diligently prosecuting an action. Although the intent of this prohibition is to preclude citizens from supplanting agency enforcement, it has generally been interpreted narrowly, such that it only bars citizen suits when an agency has formally instituted an enforcement action seeking penalties that is viewed as comparable to a federal action under the CWA. A notice of violation under state law from a state agency has been viewed by some courts as insufficient to preclude a citizen suit, even if it generates an action for administrative penalties under state law.

In some jurisdictions, it may be possible to bar citizen suits by resolving alleged violations with the regulator before a citizen plaintiff is statutorily entitled to lodge a lawsuit. Permittees should exercise caution in attempting to utilize this approach, however, because some regulators have policies against becoming involved at facilities after citizen groups have issued notices of intent to sue.

In the absence of settlement during the 60-day notice period, the CWA authorizes citizens to file a complaint in federal court, although they must provide the federal government with a copy of the complaint. At that point, a settlement will require consent by the United States. In most circumstances, settling a citizen suit is likely the most cost-effective approach, particularly where the alleged violations are based on noncompliance with established permit requirements. This is due to the fact that prevailing citizens can win injunctive relief, monetary penalties payable to the federal government under the factors described above and in the CWA, and recovery of the plaintiff's attorney fees and costs.

Citizen groups play a dominant role in enforcing CWA stormwater requirements. In many urban areas, public interest groups are named plaintiffs represented by private law firms. Such firms maintain a steady case load fueled by public records act requests to government agencies to monitor permit compliance. The firms' fees are paid by virtue of the fact that the CWA authorizes a prevailing plaintiff to recover reasonable attorney fees. For this reason, resolving a citizen suit before a case proceeds to formal litigation is often economically beneficial, even if the

defendant believes that some of the plaintiff's allegations are unfounded. In many routine cases, such as minor violations of an industrial stormwater general permit, the plaintiffs' attorney fees have the potential to substantially exceed the penalty amount.

For further discussion of citizen suits under the CWA, see 4-18 Environmental Law Practice Guide § 18.16. For additional information, see EPA's "Water Enforcement" website, <https://www.epa.gov/enforcement/water-enforcement>.

Practical Considerations

The existence of multiple types of plaintiffs empowered to enforce the CWA can pose the risk of facing what can be viewed as duplicative enforcement actions. Although the federal government must sign off on any citizen suit resolved in a consent decree, EPA takes the position that it is not estopped from pursuing an enforcement action for the same or similar violations after a citizen suit has been initiated or concluded.

In practice, the best way to avoid serial enforcement actions is to invest in facility upgrades, employee training, and improved housekeeping and recordkeeping measures that show the permittee takes seriously its obligations. A pattern of noncompliance will not only generate increased scrutiny from potential plaintiffs, it will also result in more aggressive penalties assessed for any violations. And in some states, a history of noncompliance may disqualify a discharger from eligibility under a future general permit. Larger companies or governments with sufficient resources are best suited to employ personnel specifically trained in stormwater compliance obligations. Smaller companies are wise to hire technical and legal consultants familiar with federal and state clean water laws applicable to the jurisdiction of each facility. The costs of employing knowledgeable consultants are a worthwhile investment to avoid the legal fees and penalties that arise from correctable errors.

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Jeff Kray is an accomplished, first-chair environment litigator with over 26 years of experience in water quality, water resources, and complex environmental litigation, with particular expertise in Clean Water Act permitting and regulatory compliance, CERCLA (Superfund) site remediation, and emerging contaminants.

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