

D. L. EVANS BANK FAX TRANSMISSION
P. O. BOX 517
ALBION, IDAHO 83311

FAX 208/673-6242
TELE 208/673-5301

TO: Idaho Dept of Water Resources
FAX NO. Attn: Alan P Terry

FROM: Earl Warthen

DATE: 5/30/01

NUMBER OF PAGES: 4

RECEIVED
MAY 30 2001
Department of Water Resource
Southern Region



D.L. EVANS BANK

You Got A Permit For That Rain?

by Kevin J. Beaton

It may come as a surprise that in an arid state like Idaho pollution from stormwater is a concern warranting federal permitting. However, most industrial facilities, certain sized construction sites and certain sized municipal stormwater systems in Idaho are required to obtain a permit from the federal government to lawfully discharge "stormwater"^{1,2} from a facility into surface waters. Stormwater permitting is required under the Federal Water Pollution Control Act ("Clean Water Act") 33 U.S.C. §§ 1251 et. seq. and through implementing rules and general permits issued by the United States Environmental Protection Agency ("EPA").³ This article discusses a recent Stormwater General Permit for Industrial Activities reissued by EPA. See 65 Fed. Reg. 64746 (October 30, 2000).

Background

In 1987, Congress amended the Clean Water Act, 33 U.S.C. 1251, et. seq., to require implementation of a national permitting program to address storm water discharges from "industrial activities" and municipal storm sewer systems. See, 33 U.S.C. § 1342(p). The concern addressed in the stormwater permitting program is to control stormwater runoff which may be contaminated by contact with industrial materials, waste products, roads and construction sites which thereafter discharges to surface waters causing water pollution. EPA's implementing regulations require that stormwater discharges to surface waters associated with "industrial activity," "construction activity," and municipal stormwater system discharges be covered by a National Pollutant Discharge Elimination System ("NPDES") permit. 40 CFR § 122.26.

In order to be subject to the NPDES permitting requirements under the Clean Water Act, a facility must discharge a "pollutant" from a "point source" to "waters of the United States." See, *Committee to Save MokeLumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993) (setting forth requirements for a NPDES permit under the Clean Water Act). Judicial cases have interpreted these terms very broadly so as to implement the ultimate remedial goal of the Clean Water Act to reduce or eliminate pollution of surface water throughout the United States. See, e.g., *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) ("point source" under the Clean Water Act must be interpreted broadly to implement the goals of the Act and therefore, discharges from a mine wastewater collection system that overflows because snow melt was a "point source.")

The jurisdictional scope of the term "waters of the United States" continues to be a controversial and unresolved issue. EPA defines the term very broadly to include any surface water which eventually drains to a lake stream, creek or river. See, 40 CFR § 122.2. See also, *U.S. v. Edison*, 108 F.3d 1336 (11th Cir. 1997) (The term "waters of the United States" should be interpreted as

broadly as Congress' power to regulate interstate commerce and therefore, the term includes a stormwater drain which runs into a canal which eventually discharges to Tampa Bay). Until recently EPA and other federal agencies interpreted the term "waters of the United States" to also include isolated ponds that provided habitat for migratory birds. However, the Supreme Court recently struck down a federal agency's assertion of jurisdiction under the Clean Water Act over isolated man-made ponds. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S.Ct. 675 (2001).

Likewise, whether pollution of groundwater is subject to federal jurisdiction under the Clean Water Act is a controversial and unresolved issue. See, *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp 983 (E.D. Wash. 1994) (discharges of pollutants to groundwater which is hydrologically connected to surface water are subject to NPDES permit requirements); *But see, Umatilla Water Quality Protective Association, Inc. v. Smith Frozen Foods*, 962 F.Supp 1312 (D. Oregon, 1997) (Pollution of groundwater that is hydrologically connected to surface water is not subject to NPDES permitting). *United States v. ConAgra*, Case No. CV96-0134-S (D. Idaho 1997) (Discharges to groundwater are not regulated by the Clean Water Act). In a recent proposed rule regarding the regulation of feedlots, dairies, and other concentrated animal feedlot operations ("CAFOs"), EPA sets forth the Agency's most recent position that pollutants which are discharged to groundwater that is hydrologically connected to surface waters are subject to permitting under the Clean Water Act. See 66 Fed. Reg. 2960, 3015-3020 (January 12, 2001).

A facility that discharges stormwater without a NPDES permit, or a facility which does not comply with NPDES permit conditions faces potential severe sanctions including a civil or criminal enforcement brought by the EPA. See, 33 U.S.C. § 1319 (setting forth the civil and criminal violations for violations of the Clean Water Act). Also, unpermitted discharges may be subject to a citizen suit brought by a third party under the Clean Water Act. See, 33 U.S.C. § 1365. Although stormwater permitting issues have not been a high enforcement priority in the past, EPA has identified unpermitted stormwater discharges from industrial facilities as an enforcement priority. See, EPA 2000 Industrial Storm Water Discharge Enforcement Strategy (EPA Office of Regulatory Enforcement, January 18, 2000). Therefore, if there is any question concerning an industrial facility identified in 40 CFR § 122.26 that is discharging stormwater to surface water, it is wise to seek coverage under EPA's general NPDES stormwater permit.

EPA's recently reissued NPDES multi-sector general permit ("MSGP") authorizing stormwater discharges from industrial activities sets forth requirements that industrial facilities must follow to obtain and maintain NPDES permit coverage. See,

736-3637

Final Reissuance of National Pollutant Discharge Elimination System Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64746 (Monday, October 30, 2000). Similar requirements apply to discharges from construction sites. See e.g., *EPA General Permit for Stormwater Discharges from Construction Activities*, 63 Fed. Reg. 7858 (February 17, 1998). The definition of "storm water discharge associated with industrial activity" is very broad and includes stormwater discharges from most industrial sectors including active and inactive mines, landfills, and land application sites. See, 40 CFR 22.26(b)(14). The 2000 version of the MSGP became effective on October 30, 2000 and replaces the MSGP previously issued by EPA in 1995. Consistent with other recent EPA water protection efforts, the 2000 MSGP places increasing emphasis on protection of water quality and endangered species.

The industrial MSGP is intended to cover all major categories of industrial facilities which may discharge stormwater. Twenty-nine (29) major industrial sectors (and various subsectors) are identified in the MSGP. See, Section 1.2.1 of the MSGP, 65 Fed. Reg. at 64804. Each industrial sector must comply with the general provisions of the MSGP and each sector may be subject to sector-specific requirements. Section 6. of the MSGP identifies specific requirements that are applicable to each industrial sector/subsector. Unlike most NPDES permits issued by EPA, most of the industrial sectors covered by the MSGP are not required to meet "effluent limits" for stormwater discharges leaving a facility. Rather, the MSGP requires pollution prevention efforts and implementation of best management practices ("BMPs"). EPA's general pollution prevention approach to stormwater permitting in lieu of numerical effluent limits was recently upheld by a federal court. See, *Defenders of Wildlife v. EPA*, 191 F.2d 1159 (9th Cir. 1999).

Non-stormwater discharges (with some limited exceptions) and construction related stormwater discharges are not covered by the MSGP. If a facility is not eligible for coverage under the MSGP, an individual permit application must be submitted to EPA. In finalizing the new version of the MSGP on October 30, 2000, EPA has retained the same monitoring requirements as set forth in the 1995 MSGP (e.g., analytical monitoring, visual monitoring and alternative certification in lieu of analytical monitoring), but has included additional requirements based on new information obtained since the original MSGP issuance. The MSGP is a lengthy and complicated permit that requires careful consideration by any facility seeking coverage. Some of the major new MSGP requirements and applicable deadlines that may apply to Idaho facilities follow.

A. Deadlines

To obtain coverage under the new MSGP, an owner or operator must submit a notice of intent ("NOI"). Facilities covered by the 1995 MSGP must submit an NOI by January 29, 2001. 65 Fed. Reg. 64758. A copy of the NOI can be obtained from the Federal Register notice, or EPA's Website. To obtain coverage for new discharges or previously unpermitted discharges, an NOI must be submitted two (2) days before commencing operation of the facility where the storm water discharges are to occur.

B. Storm Water Pollution Prevention Plans

The key element in the MSGP is the Stormwater Water Pollution Prevention Plan ("SWPPP"). The SWPPP identifies how the facility will monitor stormwater water discharges, implement BMPs to reduce contaminated stormwater discharges and inspect for compliance. The new MSGP now requires that a copy of the permit be retained in the Storm Water Pollution SWPPP. 65 Fed. Reg. 64765. Although the SWPPP is not required to be filed with EPA, a copy of the SWPPP must be made available to EPA during inspections. Also, other federal agencies charged with protecting endangered species are entitled to review a copy of the SWPPP upon request and a copy of the SWPPP must be submitted to the public upon request.

C. Compliance with Water Quality Standards

The new MSGP excludes from coverage any discharges which

No matter what you want to achieve, Merrill Lynch can help.

With more ways to make your financial plan work, including:

- Financial Planning
- Mutual Funds
- Insured CDs
- Trust Services
- Stocks
- Annuities/Life Insurance
- Money Market Funds
- Tax-Free Bonds
- Business Financial Services
- IRAs/SEPs and IRA Rollovers
- Estate Planning
- Mortgages and Credit/Financing

For more information on how to achieve your financial goals, call us today.
Because no matter what you want to achieve, Merrill Lynch can help.

Randy Anderson, CFP

Randy Anderson is a Certified Financial Planner and a member of the Idaho State Bar.

208-338-3196 or 1-800-964-4011
225 North 9th Street Boise, ID 83702



Merrill Lynch

© 2001 Merrill Lynch, Pierce, Fenner & Smith Incorporated. Member of SIPC.

cause or have the reasonable potential to cause an exceedance of state water quality standards.³ This prohibition is consistent with EPA's obligation under the Clean Water Act to issue NPDES permits with conditions necessary to comply with state water quality standards. *See*, 33 USC § 1311(b)(1)(C). The MSGP also provides that if an authorized discharge is later discovered to cause or potentially cause a water quality standard violation, the permitting authority will notify the permittee of the violation. The permittee must then take all steps to ensure compliance and document these actions in the storm water coverage under SWPPP. The permitting authority may terminate coverage if violations continue. EPA specifically noted that stormwater discharges which cause or contribute to an exceedance of water quality standards may be subject to enforcement actions. *Id.* at 64761.

D. Discharges to Water Quality Impaired/ Limited Waterbodies

The 2000 MSGP contains a new provision which sets forth eligibility conditions with respect to discharges to "water quality-limited" and water quality impaired waterbodies.⁴ A new or existing discharger seeking to discharge to a waterbody for which there is an approved pollution control plan known as a Total Maximum Daily Load (TMDL) must confirm that the TMDL allocated a portion of the load for storm water point source discharges. For new dischargers to "water quality impaired waters," a new discharger must show that: (1) there are sufficient remaining pollutant load allocations to allow for the discharge; and (2) the existing discharges into that water body are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. *Id.* At 64756 and 40 CFR § 122.4(i). These provisions related to new dischargers to water quality impaired waters and all dischargers to water quality limited waters apply only to the pollutants for which the waterbody is impaired or the TMDL developed. 65 Fed. Reg. 64746, 64756.

E. Endangered Species

The new MSGP contains new requirements related to compliance with the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, et. seq., that a permit applicant must comply with to be eligible for coverage. Permit coverage is only available if a permit applicant can certify in the NOI that its proposed stormwater and

allowable non-storm water discharges are not likely to jeopardize the continued existence of any listed species or result in adverse modification or destruction of critical habitat to listed species. Since many new species have been listed under the ESA which can be found in Idaho and since many waterbodies have been designated as critical habitat in Idaho, permit applicants should carefully evaluate the affect of stormwater discharges on endangered species and their critical habitat before signing the certification in the NOI.

In Addendum A to the MSGP, EPA requires permit applicants to document that they followed a specific process before certifying that the discharge will be in compliance with the ESA. The documentation process which must be included in the SWPPP, can include 1) a determination that no endangered species or critical habitat is located in the county where the facility is located (an updated list of endangered species is set forth at Addendum II to the MSGP; critical habitat designations can be found at 40 CFR Parts 17 and 226); 2) documentation that in the course of a separate federal action involving the facility, the stormwater discharge was evaluated in connection with a formal or informal consultation under the ESA, or was otherwise specifically authorized under § 10 of the ESA (habitat conservation plans); or 3) using "best judgment," the applicant concludes that stormwater discharges (and discharge related activities) will not adversely affect listed species and critical habitat. The "best judgment" criteria applies when a permit applicant initially concludes that stormwater discharges are in the "proximity" of listed species or critical habitat (e.g., listed species are located in the same waterbody to which the facility discharges). It may be necessary to consult with a professional or even with the appropriate federal agency before certifying through "best judgment" that there will be no adverse affect under the ESA. The MSGP does not, however, immunize facilities from liability under the ESA. Stormwater discharges which result in a "take" of an endangered species may subject a facility to a civil/criminal enforcement action under the ESA. Sec. 16 U.S.C. § 1538 and 1540. Also, EPA may notify a facility that it is not eligible for coverage under the MSGP because of potential impacts to protected species.

F. Exemptions from Coverage

Under the Clean Water Act, certain stormwater discharges associated with industrial activities are not required to obtain a NPDES Permit. Discharges composed entirely of return flows from irrigated agriculture are not required to obtain a permit. *See*, 33 U.S.C. § 1342(l)(1). Similarly, certain uncontaminated stormwater discharges from mining operations also are not required to obtain a permit. 33 U.S.C. § 1342(l)(2). Finally, the EPA rules exempt certain stormwater discharges from office buildings and parking lots that are separate from industrial activities. *See*, 40 CFR § 122.26(14).

The new MSGP also contains a provision which allows a facility to discontinue permit coverage if the facility certifies that it is eligible for the "no exposure" permit exemption. This exemption from permitting is conditional, however. Under the permit, discharges composed entirely of storm water are not considered to be storm water discharges associated with industrial

Private Law Office of Idaho Senior Judge

D. Duff McKee

Practice limited to alternative dispute resolution services

Post Office Box 941
Boise, Idaho 83701

Telephone: (208) 381-0060
Facsimile: (208) 381-0083
Email: ddmckee@rmci.net

activity if there is "no exposure" of industrial materials and activities to precipitation. 65 Fed. Reg. 64810, 64877 (Addendum F). "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. *Id.* Industrial materials or activities include material handling equipment or activities, industrial machinery, raw materials, intermediate products, or waste products. Material handling activities include the storage, loading, and unloading of any raw material, intermediate product, final product or waste product.

To qualify for the exclusion, certain conditions must be satisfied. First, the operator must provide a storm resistant shelter to shield industrial materials and activities from stormwater exposure. Second, although a notice of termination is not required, the operator must certify that there are no stormwater discharges contaminated by exposure to industrial materials and activities from the entire facility. The certification must be submitted to the permitting authority once every five years. Next, the operator must allow the permitting authority to inspect the facility to determine compliance and to make inspection reports available to the public upon request.

As is clear from the foregoing, many facilities in Idaho are required to obtain a permit for runoff from rain and snow melt. The MSGP requirements may impact operations at many Idaho facilities. Eligibility for coverage under the MSGP should be carefully evaluated if stormwater from the facility discharges to water quality-limited waters or waters potentially containing species protected under the ESA. The MSGP only applies to states in which EPA administers the NPDES permit program (e.g., Idaho, Alaska, New Mexico, and Arizona), and to "Indian country" lands throughout the United States.



KEVIN J. BEATON practices in the areas of environmental, administrative, and natural resources law with an emphasis on water quality and hazardous waste regulation and permitting. He received his J.D. with honors from National Law Center, George Washington University in 1983, and was admitted to the Idaho State Bar that same year.

Endnotes

- 1, 2 Stormwater means "stormwater runoff, snow melt runoff, and surface runoff and drainage. See 40 CFR § 122.26 (b)(13).
- 3 Although a state may obtain authority to issue state NPDES permits, in Idaho, stormwater discharge permits are issued, administered and enforced by the EPA.
- 4 Effluent limits are generally numerical limits on the concentrations of pollutants in wastewater that cannot be exceeded. See, 33 USC § 1362(11).
- 5 In Idaho, the Idaho Department of Environmental Quality ("IDEQ") is responsible for developing and implementing Idaho's water quality standards. See, Idaho Code § 39-105(3)(e) and IDAPA 58.01.02 *Water Quality Standards and Wastewater Treatment Requirements*.
- 6 "Water quality impaired" refers to a water body that is not currently meeting its designated water quality standards for certain pollutants, and which the state has not yet developed a total maximum daily load ("TMDL") for the impaired water. "Water quality-limited waters" refers to water bodies for which a state has developed individual TMDLs for certain pollutants. TMDLs are required to be developed by states and approved by EPA. See, 33 USC § 1313(d). The state of Idaho is subject to a federal court ordered schedule which requires development of over 900 TMDLs over the next five years. How each state develops and implements TMDLs and EPA's review and approval of such TMDLs is the subject of a recent controversial rule published by EPA. See, 65 Fed. Reg. 45386 (July 13, 2000).

Sisson & Sisson, P.C.

Attorneys at Law

Professional Legal Research and Writing
Working With Idaho Lawyers Since 1992

- Appellate briefing
- Preparation of all pleadings, memoranda, discovery
- Legal research on any issue

Contact: Peter C. Sisson, 605 E. Highland View Drive, Boise, Idaho 83702
Boise: (208) 387-0729 • Toll Free: (800) 850-1986
Fax: (208) 331-8009 • E-mail: Sisson123@aol.com



ATTORNEY
EXPERIENCED
STATEWIDE

EXPERT MEDICAL TESTIMONY

BOARD-CERTIFIED EXPERTS IN ALL HEALTHCARE
PROFESSIONS AVAILABLE FOR CASE REVIEW
AND TESTIMONY IN MEDICAL NEGLIGENCE CASES
OVER 25 YEARS AND 5,000 CASES

For Initial Consultation (no fee) or Free Work Product Example,
or an Explanation of our Fee Structure:

Call, Fax or Write:

SEATTLE

1-800-398-7363

FAX 206-842-2177

MedicalLitigation

P.O. Box 10770
Bellevue, WA 98108