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New York State's Implementation of the Federal Storm Water Discharge Regulations

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I. INTRODUCTION

On November 16, 1990, the United States Environmental Protection Agency (EPA) published a final National Pollutant Discharge Elimination System (NPDES) storm water regulation.[1] The result of a mandate contained in the 1987 revisions to the Clean Water Act[2] (CWA or Act), this regulation required that certain discharges of storm water to surface waters be conducted only pursuant to a NPDES Permit. As is the case with all NPDES discharges, in order for a discharge of storm water to be regulated, it must be discharged from a point source[3] to the waters of the United States or, in New York, to "waters of the State."[4] In addition, since not all discharges of storm water currently require a permit, a discharge must be of the type specifically listed in the regulations at 40 C.F.R. Section 122.26.

Since 1975, New York has been a "delegated state," i.e., authorized by EPA pursuant to Section 402 of the CWA to implement the Act's NPDES provisions through New York's State Pollutant Discharge Elimination System (SPDES).[5] In 1988, New York's legislature followed the enactment of the 1987 CWA Amendments on the federal level by amending the Environmental Conservation Law (ECL) to provide the authority for the Department of Environmental Conservation (DEC) to regulate industrial and municipal storm water discharges in a manner consistent with the Act.[6] These amendments also granted the authority for DEC to issue general permits in the SPDES program.[7]

After the promulgation of the NPDES Storm Water Regulations in 1990, New York sought and received from EPA expanded approval of its SPDES program and approval for the issuance of general permits for storm water discharges. This approval was received in 1992, and the general permits implementing the storm water regulations in New York became effective on August 1, 1993. Each was set to expire on August 1, 1998.[8]

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David Sive & Lemuel M. Srolovic, "Environmental Justice Issues Develop: Facility Permits and Civil Rights," *New York Law Journal*, Oct. 26, 1998, at S1.

Brian W. Swinn, "Canada Geese: Population Explosion," *New York State Conservationist*, Vol. 53, No. 2, Oct. 1998, at 14.

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II. THE NEED FOR STORM WATER REGULATION

The justification for the regulation of certain categories of storm water discharges is couched in the realization that storm water discharges may convey pollutants to receiving waters in concentrations and volumes which rival or exceed the discharges from industrial or municipal wastewater treatment plants. Evolving treatment technologies and new or increasingly stringent effluent limitations designed to protect water quality have combined in large measure to mitigate the historically significant impairment to water quality caused by the discharge of untreated or partially treated municipal and industrial wastewater. The resulting improvement in the effluent being discharged from modern municipal and industrial treatment plants, together with pollution prevention programs, materials substitution, recycling, and closed loop and other re-use methodologies have resulted in a drastic reduction in the extent to which those discharges impair the quality of the nation's waterways. In addition, the capability of control technologies to reduce pollutants in a wastewater discharge is not limitless. After a certain point, if not infeasible in the first instance, the costs increase tremendously in order to achieve relatively modest incremental reductions in the amount of pollutants discharged from the traditionally regulated sources. These modest gains provide little environmental benefit when compared to the remaining major negative impacts on water quality from previously unregulated sources such as storm water or non-point source discharges.

Against that backdrop, the storm water regulations mark what is considered by EPA to be the logical next step in fulfilling its charge to implement the CWA and to address sources of pollution significantly and detrimentally affecting the quality of surface waters in the United States.[9] Studies done on a national scale since the 1980s, and consistently cited by EPA in its development and promulgation of the regulations, establish that storm water discharges passing through open construction sites cause significant sediment loadings. Additional concerns were expressed regarding storm water coming into contact with stored materials, equipment and certain types of facilities such as hazardous waste transfer, storage, and disposal facilities and open landfills, and its mixture with non-storm water.[10] As a result of such contact, the storm water becomes contaminated and carries the pollutants to the receiving waters. The 1990 regulations were EPA's answer to these concerns, and a new regulatory scheme was born.

III. Phase I v. Phase II of the Regulations

A. Phase I

The promulgation of 40 C.F.R. § 122.26 in 1990 created what is commonly referred to as Phase I of the implementation of storm water regulation. In short, the type of discharges which require a permit in Phase I of the regulation include:

- discharges of storm water already subject to a NPDES/SPDES Permit issued prior to February 4, 1987;
- a discharge associated with industrial activity;
- discharges from municipal separate storm sewer systems in municipalities of greater than 100,000 people; and
- a discharge which the permitting authority determines to contribute to a water quality problem or to significantly contribute pollutants to the waters of the state.

These categories were carried forward directly from CWA § 402(p).

The first and fourth categories of discharge do not require lengthy discussion here. With respect to the first, the statute by its terms did not "de-regulate" storm water discharges which already were of such quantity, or possessed such characteristics, as to have been included in a NPDES/SPDES permit prior to the effective date of § 402(p).

With respect to the fourth category, DEC retains the ability to regulate via a SPDES permit any discharge, regardless of nature or origin, if it is determined to be of sufficient negative impact to receiving waters to warrant that action.

The remaining two categories deserve some elaboration.

1. Storm Water Associated with Industrial Activity

Discharges of storm water "associated with industrial activity" are regulated and require a permit. Covered activities are described at 40 C.F.R. Section 122.26(b)(14)(i) through (xi).[11] The categories of discharges requiring a permit are based either on a facility's Standard Industrial Classification (SIC) Code[12] or on a narrative description of the facility. For facilities with more than one "SIC" classified activity occurring at the site, the primary SIC code governs applicability of the storm water regulations.

In determining applicability of the permit requirement to facilities described in narrative terms in the regulations such as landfills, construction sites where greater than five acres are

affected, and Resource Conservation and Recovery Act (RCRA) regulated facilities, the SIC codes are irrelevant. The narrative description governs applicability.

It is this category of discharge that is the focus of the permitting program for storm water discharges in New York. Both general permits currently available in New York address and regulate this type of discharge. One permit regulates discharges from construction activities where greater than five acres are affected (GP-93-06) and the second regulates all other discharges associated with industrial activity (GP-93-05 now GP-98-03). The salient provisions of the general permits are discussed in Section V, *below*.

2. Discharges from Municipal Separate Storm Sewers

A cursory reading of 40 C.F.R. § 122.26(a)(1) would indicate that a significant number of New York municipalities would need SPDES permits for separate storm water discharges based upon population or location.[13]

However, as the federal protocols for identifying municipalities to which the permit requirement was applicable were developed and the process completed, only six New York municipalities were deemed in need of a permit pursuant to 40 C.F.R. § 122.26(a)(1)(iii) and (iv). Of those six, five were able to avail themselves of a process by which the number of people connected to a sanitary (combined) sewer system could be subtracted from the total population to determine applicability of the permit requirement. Since the resulting number in each case was below the threshold number, the five municipalities were not subject to the permit requirement. The sixth case involves the five boroughs of New York City. In New York City, storm water discharge issues are dealt with as part of the traditional SPDES permits issued by DEC for the City's fourteen municipal wastewater treatment plants.

As a result, Phase I regulation has had virtually no impact on municipal separate storm sewer systems in New York. More telling will be the final rule for Phase II regulation which, as discussed below, appears headed for inclusion of a significant number of municipal systems in New York.

B. Phase II

On August 7, 1995, EPA promulgated a final rule for Phase II discharges, described in general terms in the Federal Register as "point source discharges of storm water from commercial, retail, light industrial and institutional facilities, construction activities under five acres, and from municipal separate storm sewer systems serving populations of less than 100,000."[14]

Described in this fashion, the Phase II category potentially includes thousands of small municipal storm sewer systems nationwide, and millions of other sources.

In what can only be assumed to have been a stark realization that no existing permitting or regulatory approach could address such a daunting volume of discharges, the final rule essentially deferred substantive action through the promulgation of a tiered approach. In the first tier, Phase II dischargers are required to apply for a permit within 180 days of being notified by the permitting authority that an application is required. Such notice will only issue upon the permitting authority's determination that the discharge is contributing to a water quality impairment or is a significant contributor of pollutants to the receiving waters. Given that CWA § 402(p) and the Phase I regulations (as well as other authority existing in the ECL) already reserved this right to the permitting authority, this "tier," in effect, added nothing new to the existing regulatory scheme.

Per the 1995 rule, the permit requirement for virtually all other Phase II discharges was deferred for six years from its promulgation, i.e. August 7, 2001, and then only in the event the permit requirement still exists. It was made clear by EPA that the deferral period would be used to evaluate alternative strategies that could permanently relieve some or all of the Phase II dischargers of the need to acquire a permit. In essence, the only real effect of the 1995 Phase II rule was to continue Phase I and formally recognize the deadlines to propose (by September 1, 1997) and issue (by March 1, 1999) supplemental rules for Phase II.

On January 8, 1998, the supplemental rule was proposed. Under the proposed rule:

> EPA no longer proposes to designate all storm water discharges for nationwide coverage under the NPDES program for storm water. The proposed framework for today's proposed rule is one that would balance both nationwide automatic designation and locally based designation. Nationwide designation would apply to those classes or categories of storm water discharges that EPA believes present a high likelihood of having adverse water quality impacts, regardless of location. EPA is proposing to designate the following sources on a nationwide basis: storm water discharges from small municipal separate storm water sewer systems located in urbanized areas and construction activities that result in land disturbance equal to or greater than one acre.[15]

Under the proposal, EPA is excluding other types of discharges, at least with respect to inclusion on a nationwide basis, due to either lack of conclusive information about a consistent potential for adverse water quality impacts from those sources or because EPA has concluded that the likelihood of adverse impacts from those sources is low. Under the proposal, sources not included on a nationwide basis could be covered under the program individually or through a local watershed-based designation process, in the discretion of the permitting authority. Further, the proposal includes the possibility that sources included in the nationwide designation could receive a waiver from otherwise applicable requirements based on water quality conditions. Sources associated with construction activities affecting an area of between one and five acres may, also on water quality-based considerations, receive a waiver.

Given the non-final status of the rule, detailed further elaboration of the proposal here might soon be outdated. In brief, for

those types of discharges which become regulated per the final rule, the requirements are expected to look similar to those applicable to discharges regulated in Phase I. EPA favors a general permit approach, with baseline expectations for a series of Best Management Practices to apply to the regulated sources. It is reasonable to expect, particularly for sources from construction activities, that many of the permit requirements will be carried forward from the existing general permit(s).

One difference from the Phase I program that may turn out to be significant is the number of areas where "flexibility" in approach would be authorized. This flexibility as described by EPA includes using general permits for coverage of sources on a watershed basis, incorporating approved local programs directly into the permits for a particular area, selecting regionally appropriate Best Management Practices for the municipal discharges, and granting waivers for some sources.

Perhaps more important than being consumed by the details of the proposed rule is to know that the proposal exists, to recognize that it will probably include a large number of discharges which were previously unregulated,[16] and to understand that there will likely be waivers and exceptions that can eliminate the unnecessary regulation of sources which do not impact water quality.

IV. Permit Activation and Termination

To activate one of the two general permits issued by DEC, all that is required is the submission of a Notice of Intent (NOI).[17] The permit authorizes the regulated discharge to begin two days after the NOI is postmarked. Until recently, the NOI was to be filed with an EPA contractor at a Virginia mailing address. However, that contract has expired, and as of August 3, 1998, NOIs must be filed with the DEC's office of storm water permitting at the Department's Central Office in Albany.

Upon cessation of the regulated discharge, an operator is to file a Notice of Termination (NOT). This filing not only results in a correct record, but has the more pragmatic result of removing the operator from the mailing list for the yearly assessment of a regulatory fee. As with the NOI, an NOT is now to be filed in the DEC's Albany office. If the identity of the operator changes, the current operator is to file an NOT, and the new operator an NOI. When the permit is up for renewal, a new NOI is also required in order to continue coverage under the permit.[18]

V. Terms of the General Permit

A. Storm Water Pollution Prevention Plan

The requirement to prepare and implement a storm water pollution prevention plan is the crux of the storm water permitting and regulatory scheme. In general, the plan is required to be prepared and signed prior to submission of the NOI. Filing of the plan with DEC is neither required nor encouraged but the plan must be made available to DEC upon request. The Plan shall:

> "**identify potential sources** of pollution which may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility. In addition, the plan shall describe and ensure the **implementation of practices** which are to be used to reduce the pollutants in storm water discharges associated with industrial activity at the facility and to assure compliance with the terms and conditions of this permit. Facilities must implement the provisions of the storm water pollution prevention plan required under this Part as a condition of this permit."[19] (emphasis added).

Minimum requirements for the Plan for storm water at industrial (non-construction) facilities include the following:

- identification of a Pollution Prevention Team;
- a description of Potential Pollutant Sources, including the existence of significant materials[20] which may be sources of pollutants entering a storm water discharge;
- a Site Map showing drainage patterns;
- an inventory of materials which have or may be exposed to precipitation;
- a list of significant spills and leaks;
- sampling data;
- Risk Identification and Summary of Potential Sources, including loading/unloading operations, outdoor storage, waste disposal, etc.; and
- a description of storm water management controls, including:
  - good housekeeping;
  - preventative maintenance;
  - spill prevention and response;
  - inspections at regular intervals;
  - employee training;
  - record keeping and internal reporting procedures;
  - testing to ensure that no non-storm water discharges are mixed with storm water discharges;
  - sediment and erosion control;
  - runoff management; and
  - site compliance evaluations.

The Plan requirements under GP-93-06 (construction sites), predictably, are less involved than for industrial sites and focus, in addition to the preparation of a site plan, on erosion and sediment controls such as silt fences, dikes, drainage swales, sediment basins, the maintenance of structures, and inspections.

B. Other Terms

The general permits are quite extensive, almost encyclopedic,

in scope and content. Modeled after EPA documents, they are the result of an effort by the permit writers to have in one location virtually all of the requirements of this program. They contain, in addition to the requirements for the Pollution Prevention Plan described above, requirements for keeping the plans current, additional conditions for certain types of discharges, detailed appendices, and a list of standard permit conditions. With the appendices, each permit is approximately 50 pages in length. Lawyers who have clients who may be subject to the storm water regulations are counseled to contact DEC for a copy to review before the client needs to file the NOI. Copies are available from any DEC office.

VI. STATUS OF GENERAL PERMITS

As of this writing, DEC is in the process of addressing the fact that both GP-93-05 and GP-93-06 were set to expire on August 1, 1998.

With respect to GP-93-05, the expiration date was extended until October 31, 1998 and the permit was proposed for reissuance with a new number (GP-98-03) and few other significant changes. The permit became effective on November 1, 1998 (as GP-98-03) with an expiration date of November 1, 2003. Permittees will need to file a new NOI to continue coverage under the renewed permit.

In part due to the lack of finality as to how small construction sites will be treated in Phase II, GP-93-06 has not yet been proposed for renewal. DEC has taken the position that current permittees are covered by the existing permit, and DEC will accept NOIs for new construction activities until the renewal of this permit is dealt with in a more comprehensive manner.

VII. CONCLUSION

Clearly, the regulation of storm water pursuant to NPDES/SPDES permits is here to stay. Perhaps unduly optimistic at the outset of storm water regulation by anticipating that it would be possible to bring all storm water discharges into a formal permit program, EPA through the recently proposed rule has recognized that an all encompassing program is infeasible. Instead the proposed rule, while still broad in scope in an effort to address previously unregulated causes of water quality impairment, seeks to end the effort to regulate many types of sources. It also endeavors to provide the permitting authority with flexibility through not only granting the power to include sources if a water quality problem is demonstrated but to exclude, through the proposed waiver provisions, those sources which are not threatening receiving waters. Through that flexibility, it is hoped that an appropriate middle ground can be found between the unnecessary regulation of sources creating no true environmental impact and the previously existing lack of regulation of problematic storm water discharges.

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[1] 55 F.R. 47990.

[2] Also known as the Federal Water Pollution Control Act, § 402(p), 33 U.S.C. § 1342 (p).

[3] "Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture. ECL § 17-0105.

[4] "Waters of the state" shall be construed to include lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction. ECL § 17-0105.

[5] ECL § 17-0801 et. seq.

[6] ECL § 17-0808.

[7] ECL § 70-0117.

[8] *See* Section VI. infra. regarding current permit status.

[9] The CWA regulates discharges to surface water only. New York State also regulates discharges of pollutants to groundwater through its SPDES program. *See* definition of "waters of the state," supra at footnote 4.

[10] *See* discussion of studies at 55 F.R. 47990, 63 F.R. 1536.

[11] The C.F.R. can be found on the internet at *Code of Federal Regulations -Retrieve CFR by Citation* (last modified October 22, 1998) <http://www.access.gpo.gov/nara/cfr/cfr-retrieve.html>.

[12] SIC codes are 4-digit codes created by the Office of Management and Budget (OMB) for statistical purposes. The *Standard Industrial Classification Manual* published by OMB in 1987 remains the most current reference for SIC codes.

[13] *See* 40 C.F.R. Section 122.26(b)(4),(7) for the definitions of Large and Medium Municipal Separate Storm Sewer System.

[14] 60 F.R. 40230.

[15] 63 F.R. 1536. Previously, the September 7, 1997 due date for this proposal had been extended until January 8, 1998.

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[16] A draft list of New York municipalities to be affected by Phase II can be found on the world wide web at List of NYS "Urbanized" Communities Likely Subject to EPA Phase II Regulations (visited December 9, 1998) <http://www.crisny.org/government/ny/nysdow/storm/phase_2_communities.htm>. A draft list of communities not located within an urbanized area, but that may require a Phase II program can be found at (visited December 9, 1998) <http://www.crisny.org/government/ny/nysdow/storm/possible_phase2.htm>.

[17] A copy of the Notice of Intent form can be found on the world wide web at the New York State Department of Environmental Conservation (visited December 9, 1998) <http://www.crisny.org/government/ny/nysdow/storm/noi.htm>.

[18] The modification to GP-93-05, discussed *infra*, introduces a new notice, i.e. a "Notice of Intent, Transfer, or Termination for Stormwater Discharges," (NOITT), which has all notice requirements in one document. A copy of the NOITT can be found on the world wide web at the New York State Department of Environmental Conservation (visited December 9, 1998) <http://www.crisny.org/government/ny/nysdow/storm/noitt.htm>.

[19] General Permit No. GP-98-03 at pp. 10-11.

[20] "Significant materials" includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to EPCRA Section 313; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.