



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 13 1994

MEMORANDUM

SUBJECT: Policy for End of Moratorium for Storm Water
Permitting--October 1, 1994

FROM: Michael B. Cook, Director
for Office of Wastewater Management

A handwritten signature in dark ink, appearing to read "John P. Lehman".

Robert Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Water Management Division Directors, Regions I - X
NPDES State Water Program Directors

Section 402(p)(1) of the Clean Water Act (CWA) provides that National Pollutant Discharge Elimination System (NPDES) permits cannot be required for discharges composed entirely of storm water prior to October 1, 1994, except for discharges identified in Section 402(p)(2) of the Act. The purpose of this memorandum is to provide guidance from the Environmental Protection Agency (EPA or Agency) with respect to permit application requirements for these discharges after October 1, 1994.

Background

In 1972, the Federal Water Pollution Control Act (later known as the Clean Water Act or CWA), was amended to provide that a point source discharge of pollutants to waters of the United States is unlawful except as authorized by a NPDES permit. The 1987 amendments to the CWA provides three exemptions from this permit requirement for certain discharges composed entirely of storm water, two of which are permanent, and one of which was temporary. Section 402(l)(2) of the CWA provides that the EPA shall not require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities if the storm water discharge is not contaminated by contact with, or does not come into contact with, any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations.¹ Section

¹ See 40 CFR 122.26(a)(2) for implementing regulations.

502(14) of the CWA excludes agricultural storm water discharges from the definition of point source, thereby excluding these discharges from the requirement to be authorized by an NPDES permit.²

Section 402(p)(1) of the CWA provides that EPA or NPDES States cannot require a permit for discharges composed entirely of storm water prior to October 1, 1994,³ except for discharges identified in Section 402(p)(2) of the Act. Section 402(p)(2) identifies five classes of discharges composed entirely of storm water which were exempt from the moratorium on NPDES permits.⁴ This constitutes phase I of the storm water program:

- (A) A discharge with respect to which has been issued a permit prior to February 4, 1987;
- (B) A discharge associated with industrial activity;
- (C) A discharge from a municipal separate storm sewer system (MS4) serving a population of 250,000 or more;
- (D) A discharge from a municipal separate storm sewer system (MS4) serving a population of 100,000 or more, but less than 250,000; and
- (E) A discharge for which the Administrator or the State determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

Section 402(p)(6) of the CWA requires that EPA, in consultation with State and local officials, is to issue regulations by no later than October 1, 1993,⁵ which designate additional storm water discharges not identified in Section 402(p)(2) of the CWA to be regulated to protect water quality and establish a comprehensive program to regulate such designated

² See 40 CFR 122.2 for implementing regulations.

³ The 1987 amendments to the CWA provided that permits for affected storm water sources could not be required prior to October 1, 1992. The moratorium deadline was extended to October 1, 1994, by the Water Resources Development Act of 1992.

⁴ See 40 CFR 122.26(a)(1) for implementing regulations.

⁵ The 1987 amendments to the CWA provided that EPA must issue regulations under Section 402(p)(6) of the CWA by October 1, 1992. This deadline was extended to October 1, 1993, by the Water Resources Development Act of 1992.

sources. This constitutes phase II of the storm water program. EPA has not issued these regulations at this time.

Several legislative proposals were introduced in Congress to amend certain provisions of the CWA, including NPDES requirements for storm water discharges. All major proposals would either eliminate the statutory requirement at Section 402(p)(6) to establish NPDES regulations for discharges composed entirely of storm water previously in the permit moratorium (discharges not identified in Section 402(p)(2)), and would identify which moratorium storm water discharges, if any, would be subject to the NPDES program, or would give EPA additional time to identify those discharges subject to permit requirements. Congress did not act on reauthorization of the CWA this session, so none of the comprehensive amendments to the storm water section of the law were adopted.

Clarification of Requirements

EPA did not issue regulations for implementing the requirements of Section 402(p)(6) of the CWA before October 1, 1994. However, the Agency and approved NPDES States are unable to waive the statutory requirement that point source discharges of pollutants to waters of the United States need an NPDES permit.

At this time, EPA has completed a draft study identifying potential point source discharges of storm water for regulatory consideration under the requirements of Section 402(p)(6) of the CWA. In addition, the Agency has initiated a process to develop implementing regulations.

General application requirements for the NPDES program are contained in 40 CFR 122.21(f). As noted above, however, a process is underway to develop more specific requirements relating to storm water dischargers covered by section 402(p)(6). Development of more focussed application requirements will be part of this effort. EPA plans to develop these requirements through the rulemaking process and will seek comment and public input before issuing final regulations.

Dischargers previously covered by the moratorium should note that under EPA's Storm Water Enforcement Strategy (dated January 12, 1994) the Agency's compliance/enforcement priorities in the early stages of the storm water program, through FY 1995, will be the identification of and appropriate compliance and enforcement action on:

1. Phase I MS4s that have failed to submit a timely or complete permit application;

2. Regulated phase I storm water discharges associated with industrial activity that have failed to apply for a permit and are outside of the jurisdictional boundaries of a regulated phase I MS4; and

3. Regulated phase I storm water discharges associated with industrial activity that have failed to apply for a permit and are within the jurisdictional boundaries of a regulated phase I MS4.

The Agency does recognize that under the CWA, citizen suits can be brought against operators of phase II point source discharges composed entirely of storm water to waters of the U.S. that are not authorized by an NPDES permit after October 1, 1994.

If you have any questions, please contact Cynthia Dougherty, Director, Permits Division, at (202) 260-9545, or have your staff contact William Swietlik, Chief, Storm Water Section, at (202) 260-9529.

cc: Susan G. Lepow