

Civil Fines up to \$32,500 Per Day for Storm Water Pollution

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The Storm Water Pollution Permit Program

The goal of the Clean Water Act (CWA) is to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” To achieve this goal, Congress set the mandate to eliminate the discharge of pollutants into the navigable waters.¹ To help eliminate discharges, Congress set up the National Pollutant Discharge Elimination System (NPDES) which requires a permit and compliance with permit conditions to discharge pollutants into the navigable waters. The NPDES authorizes the Environmental Protection Agency (EPA) and authorized states to issue permits and administer the permit conditions.²

Most states have been authorized and do administer the permit program in their states. In Utah for example, permits are administered by the Utah Pollutant Discharge Elimination System (UPDES). Idaho, however, is one of the few states that still follows a permit program administered by the EPA; in Idaho, permits are administered by Region 10 of the EPA. In addition to federal and state administration of the permit program, local cities and municipalities may enact their own storm water pollution prevention ordinances. For example, the City of Boise has enacted the Construction Site Erosion Control Ordinance.³

Pollution Prevention Requirements for the Construction Industry

The construction industry has been significantly impacted by the NPDES permit program. Clearing, grading, and excavation activity removes natural vegetative erosion controls which allows for the transport beyond construction site perimeters of sediment and other pollutants with storm water runoff. Common sources of pollutants on construction sites are dirt in the street, blowing trash, petroleum leaks and spills, paint and concrete washout waters, and improperly maintained erosion controls. In 2003, all regions of the EPA reissued the NPDES General Permit for Storm Water Discharges From Construction Activities (General Permit). This General Permit is intended to prevent the point source discharge of construction activity pollutants from storm water runoff into the national waters. In order to obtain coverage under the General Permit and avoid liability, the following phase 2 requirements must be met for all construction activity that disturbs one acre of land or more or less than one acre if it is part of a larger common plan of development that disturbs one acre or more.

A signed and certified Notice of Intent (NOI) to discharge under the General Permit must be submitted. The NOI is the application to operate under the General Permit. Fines for pollutant discharges may be assessed for sites that do not have permit (NOI) coverage and/or do not comply with the permit conditions.

A Storm Water Pollution Prevention Plan (SWPPP) must be prepared for and followed on the construction site. Among other items, the SWPPP includes the following: (1) an identification of potential erosion and pollutant discharges from the construction activity, (2) a description of the Best Management Practices (BMPs) to be used on the site to control erosion and prevent pollutant discharges, (3) a program for conducting the required inspections to ensure proper maintenance of the installed BMPs, (4) a storm water pollution prevention training program for workers on the site, and (5) a method for stabilizing the construction site upon completion with permanent erosion controls.

Finally, a signed and certified Notice of Termination (NOT) must be submitted upon completion of the construction project. The NOT terminates coverage for discharges under the General Permit and is a mechanism to avoid liability for future discharges caused by others on the site. In order to submit the NOT for commercial sites, one of the following requirements must be met: (1) final stabilization has been achieved on all portions of the site for which the applicant is responsible, (2) another operator has assumed control over the areas of the site that have not been finally stabilized, or (3) coverage under another NPDES permit has been obtained. The NOT can be very important to relieve liability for a contractor that had initial control of the construction site but later transferred responsibility to another contractor (*e.g.* infrastructure contractor to vertical construction contractor).

Recent Enforcement Activity

The current maximum civil penalty for violating the conditions of the General Permit is \$32,500 per day for each violation.⁴ With such maximum penalties, a single violation lasting one month could cost one million dollars. Public owners, private owners, and contractors are all at risk for fines due to violations on their construction sites.

On May 12, 2004, the EPA announced that Wal-Mart settled with the United States and the states of Utah and Tennessee for \$3.1 million dollars due to violations. The complaint alleges that Wal-Mart failed

to obtain coverage under the appropriate General Permits and/or failed to comply with the permit conditions during the construction of seventeen Wal-Mart stores around the nation. On May 3, 2006, Region 10 of the EPA announced that the Idaho Transportation Department (ITD) and Scarsella Brothers, Inc. agreed to pay \$895,000 for violations relating to the Bellgrove-Mica realignment of Highway 95 near lake Coeur d'Alene. Of the settlement amount, ITD will pay \$495,000 and Scarsella Brothers will pay \$400,000. The complaint alleges that the failure to apply BMPs caused a significant impact on the receiving waters of lake Coeur d'Alene. Just this year on January 10, 2007, Region 10 announced that Pinewood Lakes, LLC and Superior Construction & Excavating, Inc. agreed to pay \$20,000 for the alleged failure to obtain permit coverage under the General Permit and install adequate BMPs. The activity in question occurred at the Pinewood Lakes Subdivision construction site near state Highway 44 in Star, Idaho.

Risk Management

Such enforcement measures create a significant business risk for construction owners and contractors. In order to help clients manage this risk, construction contracts might require compliance with the General Permit, assign responsibility for compliance to the contractor and among the subcontractors, and include specific indemnity provisions protecting upstream parties from any fines assessed for downstream violations. Further, similar to the practice of requiring certificates of insurance on construction projects, the NOI and SWPPP might be required as a condition precedent to commencement of construction work. Finally, both owners and contractors should insure that the NOT is filed on the site and that all records evidencing compliance with the General Permit are maintained for at least three years.

As the EPA and authorized states continue their aggressive enforcement, owners and contractors will see the benefits of investing in storm water pollution prevention controls and managing their NPDES risk.

About the Author

David E. Merrell, an attorney licensed in Utah and Idaho, is an associate with Babcock Scott & Babcock PC, a law firm that specializes in construction law. Before joining Babcock Scott & Babcock, David taught construction law as a Fulbright Scholar overseas and at Brigham Young University-Idaho, received his bachelor's degree in Construction Management, and worked in the construction industry for over fifteen years. This article was previously published in *The Advocate*, official publication of the Idaho State Bar, 50(6), June 2007 and *The Intermountain Contractor, A&E Quarterly*, a publication of The McGraw-Hill Companies, July 2007. Comments may be directed to David at david@babcockscott.com.

Endnotes

¹ 33 U.S.C. § 1251(a).

² 33 U.S.C. § 1342.

³ Boise Municipal Code § 8-17-01 *et. seq.*

⁴ 33 U.S.C § 1319(d) and 40 C.F.R. § 19.4.