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Stormwater Legal Framework

A. Federal Clean Water Act

1. Rivers and Harbors Appropriations Act (1899); Federal Water Pollution Control Act (1948); Clean Water Act (1972); and Water Quality Act (1987). 33 U.S.C. §§ 1251 to 1387.
2. Proposed rule defining “Waters of the United States” under the Clean Water Act. 40 C.F.R. § 122.2; 79 Fed. Reg. 22188 (Apr. 21, 2014).
3. Discharges of pollutants are generally prohibited unless a permit is obtained under the National Pollutant Discharge Elimination System (“NPDES”). 40 C.F.R. Part 122.
4. Congress passed the Water Quality Act in 1987, amending the Clean Water Act to require that NPDES permits be obtained not only for typical point source discharges from industrial facilities, but also for certain discharges of stormwater. The 1987 amendments authorized EPA to develop regulations for (1) stormwater discharges “associated with industrial activity,” (2) municipal separate storm sewer systems serving more than 100,000 people, and (3) stormwater discharges that contribute to a violation of a water quality standard or are significant contributors of pollutants to waters of the United States. 33 U.S.C. § 1342(p)(2).
5. Phase I focused on stormwater discharges related to industrial activities, construction sites over five acres and municipal separate storm sewer systems in municipalities of 100,000 or more. EPA issued regulations in 1990. 40 C.F.R. § 122.26; 55 Fed. Reg. 47,990 (Nov. 16, 1990).
6. Phase II covered construction sites between one and five acres and storm sewer systems in smaller municipalities.
7. Civil penalties under federal law for violations of permit conditions can be up to \$37,500 per day. 40 C.F.R. § 19.4; C.R.S. § 25-8-608 (\$10,000 per day civil penalty).
8. Criminal penalties for negligent violations include fines and imprisonment up to one year. For truly bad actors who knowingly violate the Clean Water Act more than once and put others in danger, individuals can go to prison for up to 30 years

and organizations can be fined up to \$2,000,000. 40 C.F.R. § 122.41(a)(2). C.R.S. § 25-8-609 (potential \$50,000 per day criminal penalty for second offense).

9. Citizen suits to enforce stormwater permit requirements. Clean Water Act § 505; 33 U.S.C. § 1365.

B. Colorado Stormwater Regulations

1. The Colorado Department of Public Health and Environment (“CDPHE”) has authority for administering most of the NPDES program in Colorado, which is referred to as the Colorado Discharge Permit System (“CDPS”).
2. The Colorado Water Quality Control Commission (“Commission”), acting under the authority of the Colorado Water Quality Control Act, C.R.S. § 25-8-101 *et seq.*, initially adopted the Colorado Discharge Permit System Regulations, Regulation No. 61, 5 CCR 1002-61, in 1981 to comply with NPDES requirements. The Commission has amended Regulation No. 61 more than forty times to conform to EPA and other requirements.
3. CDPHE has EPA approval to run the NPDES permit program and general permits program, but is not approved to regulate federal facilities or Indian lands.
4. The Water Quality Control Division within CDPHE is responsible for administering and enforcing the stormwater discharge permit regulations in Colorado.
5. Subsection 61.3(2) of Regulation No. 61 identifies stormwater discharges for which permits are required. With few exceptions, State CDPS regulations use the same language as the Federal NPDES regulations. Regulation No. 61 explicitly states that CDPS permit provisions “shall not be any more stringent than, and shall not contain any condition for monitoring or reporting in excess of, the minimum required by the Federal Act or regulations.” Reg. No. 61.3(1)(b).
6. CDPHE has issued numerous general permits, including CDPS General Permit COR900000 for Stormwater Discharges Associated with Non-extractive Industrial Activity (effective July 1, 2012; expires June 30, 2017).
7. The Commission has made clear through Regulation No. 65 (Regulation Controlling Discharges to Storm Sewers) that one may not discharge a pollutant from a point source that flows directly into a storm sewer pipe or inlet without having a permit for the discharge. This restriction does not apply to pollutants that are incidentally deposited and are mobilized by waters that only flow as a result of a storm event. Reg. No. 65.2, 5 CCR 1002-65.2.

C. Phase I Stormwater Program

1. Phase I covers stormwater discharges “associated with industrial activity,” including construction sites over five acres, and discharges from municipal separate storm sewer systems serving populations over 100,000.
2. Eleven categories of facilities that are considered to be engaging in “industrial activity” are described at 40 C.F.R. § 122.26(b)(14). These categories include manufacturing facilities, hazardous waste facilities, landfills, certain sewage treatment plants, recycling facilities, powerplants, mining operations, some oil and gas operations, airports and certain other transportation facilities. “Industrial activity” also specifically includes “[c]onstruction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.” 40 C.F.R. § 122.26(b)(14)(x).
3. Facilities subject to Phase I must obtain either a general permit or an individual permit.
4. In order to get a general permit, the facility should confirm that it meets the requirements for the particular general permit for its industry (*e.g.*, construction, heavy industry, recycling) and submit a Notice of Intent (“NOI”) seeking to be covered under the terms of that general permit.
5. In Colorado the NOI is referred to as an “Application.”
6. The permit will likely require the facility to control and eliminate the sources of pollutants in stormwater through the development and implementation of a Stormwater Management Plan (“SWMP”).
7. The SWMP should identify potential sources of pollution and include Best Management Practices (“BMPs”) to minimize discharges.
8. In addition to the development of a SWMP, the permit may also require semi-annual inspections, annual reports, discharge monitoring reports and annual fees.

D. Phase II Stormwater Program

1. EPA expanded the NPDES Stormwater Program in 1999 by issuing Phase II regulations addressing: (1) small construction sites disturbing between one and five acres; (2) stormwater discharges from small MS4s (serving less than 100,000 people); and (3) a conditional exclusion for industrial activities from having to get a stormwater permit where there is “no exposure” to stormwater. 64 Fed. Reg. 68,722 (Dec. 8, 1999).

2. Small construction activity subject to the Phase II Rule includes clearing, grading and excavating that result in land disturbance affecting between one and five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb between one and five acres.
4. A significant component of the Phase II Rule is a conditional exclusion from having to get a stormwater permit where industrial activities and materials are not exposed to stormwater.

“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. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

40 C.F.R. § 122.26(g); 64 Fed. Reg. 68722, 68782-87 (Dec. 8, 1999); Reg. 61.3(2)(h); 5 CCR 1002-61.3(2)(h).

E. Total Maximum Daily Loads (“TMDLs”)

1. A TMDL is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards. Clean Water Act § 303(d); 33 U.S.C. § 1313(d).
2. The Colorado Water Quality Control Commission establishes water quality standards based on the designated use (*e.g.*, recreation or protection of aquatic life) and the amounts of various pollutants that may be present without impairing the designated use. Clean Water Act § 303(c)(2)(A).
3. If the Water Quality Control Division determines that compliance with the terms and conditions in a general permit will not control the discharge as necessary to be consistent with a TMDL, the Division may include a site specific water quality-based effluent limitation or inform the permittee if coverage under an individual permit is necessary. The Division may also include additional terms and conditions. *See* CDPS General Permit COR900000, Part I.D.3.b.

EPA and CDPHE Websites

Numerous helpful forms and guidance documents may be found at EPA and CDPHE websites: www.epa.gov/npdes (search “stormwater”); and www.colorado.gov (search “CDPHE” and “stormwater”).