

## UNDERSTANDING THE LAW

In Pennsylvania, both state and federal law govern water pollution caused by stormwater. We briefly examine both.

### **FEDERAL REQUIREMENTS**

In the United States, the Environmental Protection Agency (“EPA”) is charged with regulating stormwater pursuant to the Clean Water Act (CWA). The goal of the CWA is to restore all “Waters of the United States” to their “fishable” and “swimmable” conditions. Point source discharges, which originate mostly from municipal wastewater (sewage) and industrial wastewater discharges, have been regulated since enactment of the CWA in 1972. Pollutant loadings from these sources are tightly controlled and limited. However, despite these controls, thousands of water bodies in the U.S. remain classified as “impaired,” meaning that they contain pollutants at levels higher than is considered safe by EPA for the intended beneficial use of the water. Much of this impairment is due to polluted runoff. The EPA is now required to set stormwater runoff limits for construction activities by December 1, 2009 based on a recent Ninth Circuit appellate decision.

Under the CWA, point source discharges to “Waters of the United States” require National Pollution Discharge Elimination System (NPDES) permits. NPDES is administered by the EPA, but EPA may delegate its authority to individual states. Originally, stormwater was not covered under the CWA. However, to address the nationwide problem of stormwater pollution, in 1987 Congress enacted the Water Quality Act, which broadened the CWA definition of “point source” to include industrial stormwater discharges and municipal separate storm sewer systems (“MS4”). This 1987 expansion was promulgated in two phases: Phase I and Phase II. Phase I required that all municipalities of 100,000 persons or more, industrial dischargers, and construction sites of 5 acres or more have NPDES permits for their stormwater discharges. Phase I permits were issued in much of the U.S. in 1990. Phase II required that all municipalities, industrial dischargers, construction sites of 1 acre or more, and other large property owners (such as school districts) have NPDES permits for their stormwater discharges. Phase II rules came into effect in 1999.

Thus, under the CWA, **construction sites 1 acre or greater in size** are subject to stormwater regulations. EPA has delegated stormwater regulation to the Commonwealth of Pennsylvania.

### **STATE REQUIREMENTS**

Stormwater regulation in Pennsylvania rests upon the interplay of several state statutes: the Stormwater Management Act of 1978 (known as Act 167); the Municipal Planning Code (Act 247), and the Clean Streams Law. Overarching all these state statutes is the federal Clean Water Act, which guides the application of the Clean Streams Law on issues regulated under the CWA. Here is a summary of how these laws work together:

The MPC authorizes Pennsylvania cities, boroughs, townships, and counties to prepare comprehensive plans for community development, zoning ordinances and subdivision and land

development ordinances and regulations that may include provisions for drainage and stormwater management. Act 167 authorizes a program of comprehensive watershed stormwater management which retains local implementation and enforcement of stormwater ordinances. Under the Act, the state DEP provides grant money to counties to develop management plans for designated watersheds. Upon completion of a plan by a county and approval by DEP, municipalities located in the watershed adopt ordinances consistent with the plan. Developers are then required to follow the local drainage regulations that incorporate the standards of the watershed plan when preparing their land development plan. This planning effort is designed to result in the incorporation of sound engineering standards and criteria into local codes and ordinances to manage runoff from new development in a coordinated, watershed-wide approach. Finally, the federal Phase I and Phase II standards described above are in turn made applicable to construction activities in Pennsylvania via regulations issued under the Clean Streams Law.

There are two key players in the regulation of stormwater discharges: County Conservation Districts and the DEP. The bulk of enforcement work is done by the Conservation District in the County in which the construction takes place—especially inspections and oversight. The DEP focuses more on the issuance of individual NPDES permits described more below) and on major violations of the regulations.

### **Pennsylvania Regulations Pursuant to CWA**

The Pennsylvania Administrative Code implements both NPDES permitting and water management. According to Pennsylvania regulations, “a person may not discharge pollutants from a point source into surface waters except authorized under an NPDES permit.” The regulations recognize two types of permits: General permits (which cover an activity), and individual permits (which are specific to a given site). Both types of permits come into play with stormwater. A copy of relevant regulatory sections is included at the end of this section of the Manual, but we have summarized the requirements below.

According to DEP, 2 types of earth disturbance (i.e., construction) activities require stormwater permits:

- Sites of 5 acres or more of earth disturbance (roughly, the Phase I regulated sites)
- Sites of 1-5 acres of earth disturbance which discharge to waters of the Commonwealth (roughly, the Phase II regulated sites)

For stormwater, construction sites need only apply for the General NPDES permit for stormwater discharges for construction sites (PAG-2) UNLESS they fall into one of the following 3 categories:

1. The construction (and hence the stormwater discharge) is in a Special Protection watershed (meaning that an Exceptional Value (EV) or High Quality (HQ) water is present)

2. The activity may affect either existing Water Quality standards or threatened/ endangered species or habitat
3. There is potential for hazardous or toxic releases

If the construction falls within one of these categories, then the site must apply for and obtain an Individual NPDES Permit for Stormwater Discharges Associated with Construction Activity.

### *General Permits*

To fall under the General Permit, applicants must file a Notice of Intent (NOI) to proceed under the General Permit. As part of the NOI process, the applicant must also submit:

- An Erosion and Sediment Control Plan
- Provide proof of consultation with the Pennsylvania Natural Diversity Inventory (PNDI) regarding the presence of a State or Federal threatened or endangered species on the project site
- The Best Management Practices (BMPs) that will be used to control stormwater at the site
- A Post-Construction Stormwater Management Plan
- A Preparedness, Prevention and Contingency Plan to deal with spills if toxic, hazardous, or other polluting materials will be on site.

The NOI process is rather perfunctory. Our focus is on the Erosion and Sediment Control Plan and the BMPs. Generally, the information will be with the County Conservation District.

### *Individual Permits*

Applicants for an Individual NPDES permit must fill out a more extensive application, and provide the following:

- An Erosion and Sediment Control Plan
- Provide proof of consultation with the Pennsylvania Natural Diversity Inventory (PNDI) regarding the presence of a State or Federal threatened or endangered species on the project site
- The Best Management Practices (BMPs) that will be used to control stormwater at the site
- A Post-Construction Stormwater Management Plan
- A Preparedness, Prevention and Contingency Plan to deal with spills if toxic, hazardous, or other polluting materials will be on site

- An Antidegradation Analysis under 25 Pa. Code § 93.4c if in a Special Protection Watershed (i.e., the receiving water is a HQ or EV Water of the Commonwealth)
- A Thermal Impacts Analysis

Like with the General Permit, our focus is on the Erosion and Sediment Control Plan and the BMPs. Generally, this information will be with DEP and the County Conservation District.

*What are BMPs?*

BMPs are structural and non-structural devices designed to temporarily store or treat stormwater runoff in order to mitigate flooding and reduce pollution. In 2006, DEP issued the *Pennsylvania Stormwater Best Management Practices Manual*, accessible on the DEP website at

<http://www.depweb.state.pa.us/watershedmgmt/cwp/view.asp?a=1437&q=529063&watershedmgmtNav=> which describes numerous BMPs in great detail. The regulations seek to have construction sites significantly reduce the impact of sediment-laden stormwater on local waterbodies by implementing BMPs correctly and maintaining the site's system of erosion and sediment controls. The most common BMPs are:

1. Silt fences
2. Detention ponds (*see Manual at §§ 6.6.2 and 6.6.3*)
3. Swales and ditches (*see Manual § 6.4.8*)
4. Driveway Aprons
5. Truck Washing stations
6. Street Sweeping (*see Manual § 5.9.1*)
7. Seeding and Stabilization (*see Manual § 5.6.3*)

We focus on the BMPs at a construction site because, if sediment is leaving the site and impacting local waters, it is probably because the site's BMPs are not functioning properly. By bringing these problems to the attention of the county conservation district, we hope to encourage the district to use one of the compliance and enforcement mechanisms to bring the site back into compliance. These enforcement mechanisms include:

1. Investigations and inspections.
2. Response to complaints.
3. Orders (including orders to remediate or restore).
4. Civil penalty proceedings
5. Summary proceedings.
6. The suspension, revocation, withholding or denial of permits or approvals.
7. Notices of violation.
8. Actions in a court of competent jurisdiction, including requests for injunctive relief.
9. Other administrative, civil, criminal or equitable action authorized by law.

## **PUBLIC PARTICIPATION**

### **Citizen suits**

Under section 505 of the CWA (Citizen Suit provision), when a polluter continually violates the CWA and the state fails to “diligently prosecute” the violator, a citizen or group can file suit in federal court to enforce compliance with the permit terms. After documenting a violation, citizens are required to provide a 60-day advance notice of intent to sue. This notice must be sent to the polluter, DEP, EPA Region III, EPA Main Office, and the U.S. Attorney General. If these government officials fail to take action and the polluter fails to achieve compliance within 60 days, then the citizen can file a lawsuit. Citizens who bring successful citizen suits may be entitled to recover reasonable attorney’s fees.

Citizen suits will only be an effective weapon in a limited number of cases involving construction permit violations. Waiting 60 days may suffice for ongoing violations of pollutant discharges from a chemical factory, but most construction sites will have been radically transformed in this time frame, making it difficult—but not impossible—to show ongoing violations. Citizen suits are therefore most appropriate for large-scale projects that will involve earth disturbance activities for a long period of time.

### **Complaints**

For smaller, shorter-term construction site, citizens should be ready to complain to local and state authorities if they witness illegal discharges of sediment or other pollutants from construction sites. Most enforcement officials appreciate the help provided by concerned citizens because they do not have the resources to monitor all sites. Thus, the Get The Dirt Out – Chesapeake program seeks to give you tools to report problem sites more effectively. The program utilizes the following steps:

1. Identify a construction site generating stormwater problems. This will most likely occur by simple observation: brown, muddy water is seen on the street or in a ditch, stream or lake and you can see it is coming from a construction site.
2. Gather information to assist the Conservation District. Recording your observations on the GTDO Site Report Card and gathering photos or videos will go a long way towards giving the District what it needs to pursue a violation.
3. Report your observations to the Conservation District (see the Contact Information section in this manual for a list of contacts to report violations) and provide a copy of your gathered information.
4. Get a copy of your report and information to the Lower Susquehanna Riverkeeper so that GTDO – Chesapeake can keep track of the nature, volume and location of violations throughout the watershed.

5. Follow up with the Conservation District to make sure they investigated your report. Keep the Riverkeeper informed as well.

The Field Guide will help you to carry out these steps.

Together, we can Get The Dirt Out of the Chesapeake!