



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

MEMORANDUM

SUBJECT: 2000 Storm Water Enforcement Strategy Update

FROM: Eric V. Schaeffer, Director
Office of Regulatory Enforcement

TO: Water Management Division Directors
Regions I-X

Enforcement Division Directors
Regions II, VI, VIII

Regional Counsels
Regions I-X

Attached is an update to the 1994 EPA Storm Water Enforcement Strategy. This revised strategy shifts the focus of storm water enforcement from major municipal separate storm sewer systems (MS4s) to industrial storm water dischargers that have not acquired coverage under an NPDES storm water general permit or filed an application for an individual NPDES permit. The strategy's targeting approach draws from several data sources and incorporates a risk-based component into the decision path, aligning with several critical elements of the Clean Water Action Plan. This strategy also attempts to address the challenge of identifying the potential universe of regulated entities under the Phase I industrial program (*40 CFR 122.26(b)(14)*).

This update focuses on getting regulated industrial facilities (including construction activities disturbing 5 acres or more) into compliance with the NPDES storm water permitting requirements by first identifying and taking appropriate action against those facilities which have yet to file for a permit to discharge (known as "non-filers"). The rationale for prioritizing those who have yet to identify themselves is self-evident; establishing the universe is a necessary first step and those who have not begun any effort to comply will likely have few pollution control measures in place.

This updated approach should fit well into existing MOA commitments by the Regions to address wet weather violations as well as serve to address water quality impairment in targeted watersheds and stream reaches. As now structured, this approach can accommodate a Region's focus on priority industrial sectors or be tailored to better reflect areas of specific regional concern. Once the target area is selected, the next step is to identify those facilities which have failed to file an application for a storm water permit or are not covered under a general permit.

Facilities which have not filed either an NOI (Notice of Intent) or an application for

coverage under an individual permit should then be sent an information collection request under section 308 of the Clean Water Act (CWA).

- The request requires that, if the facility still engages in a covered industrial activity and discharges storm water, it must file and return either an NOI or an NPDES Form 1 and Form 2F.
- An expedited settlement offer, such as the one Region 6 is using in their Auto Salvage Yard initiative, may also be sent at the same time.

Facilities that continue to maintain “non-filer” status after these efforts should receive an on site NPDES inspection with appropriate enforcement responses for identified violations. The discharge of pollutants in storm water from a regulated Phase I industrial facility without authorization under an NPDES permit is a violation of section 301, and the failure to provide a complete permit application and the unpermitted discharge should both be addressed in any administrative or civil enforcement action. Regardless of the enforcement mechanism selected, a penalty recovering economic benefit and an appropriate gravity based component must be pursued. Additionally, where there is evidence of imminent and substantial endangerment to human health or aquatic resources, a section 504 action should be considered.

The three central points of the 1994 storm water enforcement strategy are worth restating:

1. Section 308 letters, issued in the context of an enforcement action, may be used to request the submittal of an NOI/permit application from more than nine addressees nationwide. In instances where an existing OMB clearance number has been issued for the information that is requested (e.g., the NPDES application or NOI form), 308 letters also may be sent to more than nine entities.
2. A storm water discharge need not be observed in order to determine inclusion in the program (but evidence of a conveyance for a discharge must exist).
3. Failure to apply for a permit is a violation of section 308, as this section requires reports or other information to carry out section 402.

Although this strategy was developed for use by EPA Regions, States are encouraged to adopt a similar approach to industrial storm water enforcement. Several Regions have recently begun to focus compliance/enforcement activities on industrial storm water dischargers with apparent success; further progress across the country can be obtained through frank discussions on this approach during the monthly water enforcement conference calls and other similar forums. Information gathered on general rates of compliance, elements of non-compliance by area or sector, and strategy effectiveness should be shared with enforcement partners and permitting authorities as appropriate, to foster continuing improvement in both our permitting and compliance/enforcement efforts.

Finally, I want to thank Jeremy Johnstone and Laurie Kermish (Region 9), Kevin Magerr and Lori Reynolds (Region 3), Taylor Sharpe (Region 6), William Swietlik (Office of Science and Technology), and Daniel Weese (Office of Wastewater Management) for their participation in this effort. If you have any questions regarding the strategy, please contact Don Olson (202) 564-5558 or Brad Mahanes at (202) 564-2879.

Attachment

cc: Enforcement Coordinators, Regions I - X
Compliance Branch Chiefs, Regions I-X
Permits Branch Chiefs, Region I-X
Water Branch Chiefs, ORC, Regions I-X
Storm Water Coordinators, Regions I-X

2000 Industrial Storm Water Discharge Enforcement Strategy

Office of Regulatory Enforcement

Water Enforcement Division

January 18, 2000

2000 Industrial Storm Water Discharge Enforcement Strategy Update

I. Introduction

The goal of this update to the 1994 storm water enforcement strategy is to ensure consistent and effective enforcement against non-complying priority industrial storm water dischargers. Requirements for application and coverage under an NPDES permit have been in effect for over seven years now; full compliance by the entire regulated industrial community is the nucleus of this strategy. Although this enforcement strategy has been developed for use by EPA Regions, authorized NPDES States are encouraged to adopt a similar approach as they update their own storm water enforcement strategies.

Until now, intensive outreach has been the primary mechanism employed to move industrial storm water dischargers into compliance. Starting in FY 1999, EPA shifted its focus from outreach and compliance assistance to targeting potential enforcement candidates as a means to increase compliance. The enforcement priorities for the program in FY 2000-2001 are identification of and action against:

- 1) industrial facilities discharging storm water without coverage under either an individual or general NPDES permit;
- 2) large construction sites discharging storm water without coverage under an individual or general storm water permit.; and
- 3) industrial or construction storm water dischargers that have acquired storm water discharge permit coverage, but are not complying with the requirements of their permit.

The way the Agency intends to manage its storm water enforcement program is based on three principles:

- 1) integration of storm water compliance/enforcement activities into NPDES and other media inspection activities;
- 2) use of publicity to maximize the impact of enforcement actions, particularly civil referrals;
- 3) expediting the Administrative Penalty Order/Administrative Order issuance process to obtain prompt compliance and recover appropriate penalties; and

- 4) encouraging the use of the Audit Policy to reward prompt voluntary disclosure and complete corrective measures.

The size of the regulated universe far exceeds that of the traditional NPDES program. Therefore, Regions and States are encouraged to make use of innovative approaches to enforcement and share information with each other about what works and what does not. This strategy discusses the enforcement activities available to identify priority industrial non-filers, the use of local and State sediment and erosion control programs to manage regulated construction sites, and ways to expedite the issuance of Administrative Orders (AOs) and Administrative Penalty Orders (APOs).

II. NPDES Permits for Storm Water Discharges Associated with Industrial Activity

The term “storm water discharge associated with industrial activity” is defined as the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. **Eleven categories of facilities which have point source storm water discharges associated with industrial activity must apply for either individual or general NPDES permit coverage. The application deadline for most permit applications was October 1, 1992.** Facilities that discharge into a small, medium, or large MS4s are considered direct dischargers and are also required to submit signed copies of their permit application to the operator of the MS4¹. Discharges of storm water to a combined sewer system or POTW are not regulated under 40 CFR 122.26 (Storm water regulations); rather such discharges are regulated under “normal” NPDES requirements (40 CFR 122.21). In addition, certain industrial storm water discharges into the collection system of a POTW may trigger violations of the prohibitions under the general pretreatment regulations (40 CFR 403) or local pretreatment requirements.

The NPDES regulatory scheme originally provided three ways that facilities could obtain permit coverage for storm water discharges associated with industrial activity:

- 1) Individual Permit - applications for these permits are processed in the Regions for non-authorized NPDES States;
- 2) Baseline Industrial Storm Water General Permit - Notice of Intent (NOI) applications from approximately 60,000 facilities were received for coverage under storm water general permits issued by NPDES States; approximately 25,000 facilities submitted NOIs to be covered in the non-authorized NPDES States under the federal general permit. These general permits were intended to cover the majority of storm water discharges associated with industrial activity; or

¹ See *United States of America v. TGR Corporation*, March 26, 1999.

- 3) Multi-Sector General Permit (MSGP)- Approximately 44,000 industrial facilities participated in the storm water group application process. This process allowed similar industries to form groups from which one combined group application could be submitted for an industry-specific permit. After receiving 1,200 different group applications, EPA issued a storm water general permit covering 29 different industrial sectors, called the MSGP. The group application, per se, provided EPA information from which the MSGP was developed. Any industrial facility seeking coverage under the MSGP must also submit an NOI to the permitting authority.

Most storm water general permits, at a minimum, require development of a storm water pollution prevention plan (SWPPP) to reduce pollutant loadings at a facility's site and an annual site compliance evaluation. Under EPA's Baseline General Permit, facilities were required to prepare their SWPPP by April 1, 1993 and implement their SWPPP by October 1, 1993. Under the initial MSGP, facilities were required to develop and implement their SWPPP by June 27, 1996, with specific plan requirements set out in the MSGP for each sector. The MSGP (and attendant fact sheet) also set out common Best Management Practices (BMPs) and those control measures to be incorporated into a facility's SWPPP. Under the Baseline Permit, certain facilities are required to monitor storm water discharges semi-annually and report annually while others are required to monitor annually but not submit a discharge monitoring report (DMR). It is estimated that 3,800 facilities in the 12 non-approved NPDES States and 12,000 facilities in approved NPDES States are required to monitor. Under the MSGP those facilities in sectors required to monitor, must do so quarterly in the second and fourth years of the permit. Data must be submitted by the end of March in the year following the sampling period.

B. Industrial Activity Strategy

The recommended approach employs a "sweep" across a targeted watershed, stream reach, or geographic area. The first step is the identification and selection of the impaired or threatened waterbody within which to focus. The selection can be expedited through the use of ESTAT and other databases which identify areas within a watershed exhibiting impaired characteristics (e.g., fish advisories, bioassessment survey data, or index of watershed indicators). Other prioritization criteria, such as proximity to Outstanding Natural Resource Waters, environmental justice localities, or resources heavily used for contact recreation or consumption fishing, can be added into the prioritization process. In general, the geographic unit(s) of interest should be at a sufficiently refined scale such that baseline environmental data and subsequent water quality monitoring is capable of revealing any improvement.

Once the watershed/geographic range is selected, the next step is to identify those facilities which have failed to file for a storm water permit or coverage under a general permit. To further refine the target group:

- 1) Compare the resource retrieval datasets such as Envirofacts and ESTAT

(identifying NPDES facilities, resource components, stream reaches) against:

- one of the Regional priority industrial sectors (such as animal feeding operations);
 - Standard Industrial Classification (SIC) Code sectors with a potential for highly contaminated storm water runoff, (e.g., SIC 3731, shipbuilding and repairing or SIC 5015 and 5093, auto parts and scrap recycling);
 - other industries with high levels of exposure of contaminants to rainfall or runoff using one of the commercially available “yellow pages” on CD ROM; or
 - lists of construction permits for projects 5 acres or larger.
- 2) Once a list of candidate facilities has been developed by sorting higher risk entities in the selected industrial sector against the geographic (e.g., zip code, lat/long) area boundaries of the watershed, compare the initial candidate list against application databases:
- the State or Federal Storm Water General Permit Notice of Intent; and
 - the permit compliance system (PCS).
- 3) Review those information resources that can provide input into the targeting process, including local fire marshals, police units, and federal and state resource trustees (e.g., Fish and Wildlife, Park Service and National Park Police, State Fish and Game officers). Citizen complaints and lawsuits, along with contacting local sediment/erosion control programs can be an important source of information for screening construction sites.
- 4) Send an information collection request under section 308 to those facilities which have not filed either a NOI (Notice of Intent) or application for individual coverage.
- The request requires that, if the facility still discharges storm water, either a NOI or NPDES Form 1 and Form 2F be completed and returned.

An expedited settlement offer, such as the one Region 6 is using in their Auto Salvage Yard initiative, may be sent at the same time². Facilities that continue to maintain “non-filer” status after outreach efforts should be subject to formal enforcement action. The specific elements of non-compliance may be determined through an on site NPDES investigation or, in

² The advantage of this approach is that an entire section is assessed for compliance and a large number of “non-filer” facilities are brought into the system. The disadvantage is that only those facilities that fail to respond are targeted for an on site inspection. Those facilities that file but still fail to fully implement controls are not addressed initially. Thus, Regions that select this approach must obtain concurrence from ORE prior to employing this option.

appropriate cases, a “show cause letter” that requires the facility to either admit or rebut the assessment of their compliance status. Where the watershed/geographic area and the targeted industrial sector are sufficiently defined, 100 per cent of the targeted facilities can be inspected. While this approach is more resource intensive than the “expedited settlement” or “show cause” approach, both non-filers and non-implementers are addressed in the initial sweep. This approach also allows collection of sufficient information to support any appropriate enforcement action or the issuance of an in-field notice of violation (NOV)³.

III. NPDES Permits for Storm Water Discharges from Construction Activities

The construction industry is generally regulated at the State and local level. Surveys conducted by EPA in 1989, by the Maryland Department of Environmental Resources in 1990, and by the Center for Watershed Protection in 1996, reveal that many States and localities have implemented erosion and sediment control programs for construction activities. The general approach taken by this enforcement update toward construction sites is to initially defer to local or State agencies for initial inspection and enforcement actions where an effective program is in place.

Typically, construction sites are highly visible operations that have a high potential for environmental degradation due to the loss of soil from the site during rain events. Because of this high visibility, citizen complaints are more likely to be lodged compared with other types of industrial activities and are a valuable source for identifying potential violators. Regions should establish a mechanism for promptly addressing these complaints. Where State or effective local programs do not exist, Regions should prioritize unpermitted construction sites the same way as other regulated industrial storm water dischargers. The construction non-filer enforcement hierarchy is therefore:

- 1) construction sites where no state or local programs exist or are ineffectual;
- 2) very large construction sites where inadequate controls are apparent;
- 3) sites proximate to critical, sensitive or Outstanding National Resource Waters (ONRWs) or wetlands; and

³ To contrast the two approaches, the “expedited settlement letter” covers a broader area and/or larger number of facilities than the “site investigation” approach, while only collecting data on filing status and targeting non-responsive facilities for increased investigation. The “high resolution” approach can be more resource intensive, but will collect data on the full range of compliance status and site specific corrective actions. This includes information on any economic benefit, environmental harm, and recalcitrance, which would be recovered in subsequent enforcement action.

4) sites with the high potential for erosion and receiving water impacts based upon:

- close proximity to a receiving water;
- steep slopes or highly erodible soils;
- high rainfall amounts and rates.

Again, those construction site dischargers that have acquired storm water permit coverage but failed to comply with permit requirements should be addressed under the general Enforcement Management System (EMS) hierarchy of response. Owner/Operators of regulated construction sites (those with disturbances of five or more acres) that predate October 1, 1992, were required to obtain coverage under an individual or general permit by that date. For disturbances commencing after October 1, 1992, an owner/operator is required to apply for general permit coverage at least 48 hours prior to the start of construction activities or 90 days prior to the start of construction activities for coverage under an individual permit.

A subset of regulated construction activities are construction sites for which a separate general or individual permit has been issued. The NOI (or permit conditions in the case of an individual permit) requires certification that a SWPPP has been prepared for the site, and this plan complies with approved State and/or local sediment and erosion plans or permits and/or storm water management plans or permits. Inspections and enforcement actions are required at those sites where BMPs or other aspects of their SWPPPs are not implemented, are improperly implemented, or are ineffectual.

IV. Enforcement Approach

A. Establishment of a Violation

Two criteria must be met for a facility to be subject to the storm water regulations:

1. the industrial activity at a facility must be described in 40 CFR 122.26(b)(14) of the regulations; and
2. the facility must have a point source discharge to waters of the United States either directly or through a municipal separate storm sewer system.

A facility's inclusion in the storm water regulatory program under section 402(p)(2)(B) of the Clean Water Act (CWA) is not dependent on whether a discharge from a point source has been observed. Section 502 of the CWA defines a point source to be "any discernible, confined, and discrete conveyance . . . from which pollutants are or **may** be discharged." Therefore, an actual discharge need not be observed but there must be evidence of some conveyance of pollutants when a storm event occurs.

A frequently raised issue is: How to cite “failure to apply for a permit” as a violation? Section 308 of the CWA requires an owner/operator of a point source to “make such reports or provide such information” as the Administrator requires to carry out section 402 or any requirement established under section 402. The permit application regulations were promulgated pursuant to both sections 308 and 402 and thus the permit application is considered information required to implement section 402 of the Clean Water Act. Since the permit application regulations were published in the November 16, 1990 Federal Register, any regulated facility that failed to submit a permit application is automatically in violation of section 308. Wording of any notice of violation, AO, or APO should therefore cite “failure to apply for a permit” as a violation of section 308.

Collateral with a violation of section 308, a facility can be in violation of section 301 for “discharge without a permit” where there is evidence of a conveyance for pollutants from the industrial activity areas of the facility and an actual discharge (i.e., a precipitation event causing a discharge) has occurred. One required element of proof is a finding that the discharge is through a conveyance which is used for collecting and conveying storm water associated with an industrial activity. This “conveyance” generally will be a discrete structure, but can include culverts, ditches, gullies, swales, arroyos, or naturally formed rills and fissures.

Additional claims, such as those arising from the discharge of oil or hazardous substances in harmful quantities should also be considered where the fact pattern supports such actions. Sample investigation checklists which incorporate relevant compliance elements developed by several Regions and OECA are currently in draft and available from the Water Enforcement Division (WED).

B. Targeting and Enforcement Response

As indicated earlier in this strategy, the initial enforcement priorities for the storm water program (FY 1994-1995 time frame) were to address MS4s that had not applied for a storm water permit on a timely basis, and to identify and enforce, as necessary, where facilities with industrial activity have failed to apply for a permit--with priority given to facilities outside the jurisdiction of a regulated MS4. The level of activity with regard to the assessment of compliance with existing permits was left to the discretion of the Regions. The result of this approach, which focused on bringing MS4s into compliance with the application requirements, is a projected MS4 compliance rate of near 100% by the end of 1999. This revised strategy recommends that any MS4 facility that still has not completed the application requirements for their NPDES permit be targeted for civil referral. This strategy also recommends that, to the extent feasible, escalated enforcement against other wet weather environmental threats, such as sanitary sewer overflows, be coordinated with such actions.

The updated strategy for addressing industrial facilities which have failed to apply for a permit as required asks each Region to undertake some activity in FY2000 and in FY2001. The purpose of this activity is twofold--to address environmental problems and to serve as a vehicle for publicizing EPA’s commitment to enforcing storm water requirements, thus creating a

deterrent to noncompliance. While the selection of the “who and where” is left to the discretion of the Region, each Region is required to develop and implement an enforcement effort for this revised strategy. It should be organized on a watershed basis and address classes of facilities which are of concern. Whatever the design, it should be significant enough to serve as a vehicle for publicizing Regional activity in the storm water area through such means as press releases, press briefings, trade press publications or other means the Region may choose.

This storm water strategy recommends that most non-compliant facilities identified in this effort be initially addressed through expedited enforcement mechanisms (e.g., administrative orders and Class I penalty orders). The severity of the response should be escalated when the facility (or operator) fails to submit a complete permit application or implement corrective actions on a timely basis. Given limited resources, it is particularly important to obtain the maximum possible deterrent effect from our enforcement actions. **This can be accomplished both through obtaining substantial penalties consistent with the ERP for the most serious violations, and through smaller penalty actions that are part of widely publicized sweeps designed to return a large number of violators to compliance in a short time period.** As always, voluntary disclosures that result in prompt correction of violations that have not seriously harmed the environment may be settled under the audit policy for reduced or eliminated penalties.

V. Allocation of Responsibilities

In general, Water Enforcement Division staff will serve as the initial contact point for Headquarters involvement in storm water enforcement matters. Additional technical support for stormwater enforcement can be obtained from the storm water technical point of contact in the Office of Compliance. The following list provides the division of responsibilities for implementation of the strategy.

Headquarters Enforcement Support Responsibilities:

- 1) Update the storm water component of NPDES inspector guidance and training (ongoing with OC);
- 2) Act as a clearinghouse for success/failure of approaches to enforcement/compliance issues of the storm water program (ongoing WED);
- 3) Investigate streamlining efforts of the APO process such as delegation of authority below Division Director level (WED);
- 4) Provide technical assistance to Regions for access to national storm water and environmental indicators databases (WED & OC);
- 5) Provide technical assistance to the Regions in development of enforcement cases and any resultant litigation for storm water violations (WED);

- 6) Establish core working group of enforcement and program experts to improve storm water program effectiveness (WED); and
- 7) Coordinate summaries of regional implementation to identify templates for Success in increased compliance and pollution reduction (WED).

Regions:

- 1) Implement Update to the Storm Water Enforcement Strategy within the existing negotiated 1999-2000 MOA commitments for wet weather and watershed based enforcement activities. This should include one sweep in FY 2000 and one in FY 2001 to identify regulated facilities that have failed to apply for a permit;
- 2) Follow-up on late or incomplete industrial permit NOIs and applications;
- 3) Review major local programs that manage storm water discharges from construction sites; and
- 4) Prepare brief summary of implementation efforts and associated environmental gains, highlighting those elements that were highly innovative or produced measurable success.