



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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*****Original signed by Gary Hudiburgh for James Pendergast on 2/5/98*****

FROM: James F. Pendergast, Acting Director
Permits Division

TO: Water Division Directors, Regions 1 - 10

SUBJECT: Applicability of the NPDES Program to Discharges of Storm Water Associated with Construction Activity at, or Construction of, Livestock Feeding Facilities

The purpose of this memo is to clarify our interpretation of the National Pollutant Discharge Elimination System (NPDES) regulations as they apply to discharges of storm water associated with construction activity at, or construction of, livestock feeding facilities involving animal feeding operations, concentrated animal feeding operations, and feedlots. Several Regions have asked whether storm water discharges associated with the construction of these facilities are exempt from the NPDES permit requirements based on the definition of "point source," which excludes "agricultural storm water discharges." (Clean Water Act section 502(14), 33 U.S.C. § 1362(14); see also 40 CFR 122.3(e)(excluding "agricultural storm water runoff")).

After review of the reasoning in the applicable regulations and consultation with regional storm water coordinators, we believe that the regulations treat discharges associated with the construction and operation of these facilities as two distinct activities. Under the existing storm water regulations, storm water discharges associated with construction activities require permit authorization if they disturb five or more acres of total area or disturb less than five acres but are part of a larger plan of common development or sale (40 CFR 122.26(b)(14)(x)). The Agency also may require a permit for storm water discharges from smaller construction sites on a case-by-case basis in accordance with 40 CFR 122.26 (a)(1)(v) or under 122.26(a)(9) and 122.26(g)(1)(i). Note that on January 9, 1998, the Agency proposed to categorically expand applicability of the NPDES permit program to discharges of storm water associated with certain construction sites down to one acre in size.

Under the NPDES regulations for storm water, all activities associated with the construction of livestock feeding facilities, including clearing, grading, and excavation, are subject to NPDES coverage. By contrast, storm water discharges from any clearing, grading and excavation for the purpose of growing crops are not covered by the NPDES program; discharges from these activities are considered to be "agricultural storm water discharges" and therefore are excluded from the requirements of the NPDES permitting program. Because storm water discharges associated with the construction of livestock feeding facilities is different both in content and nature from storm water discharges associated with the operation of such facilities, the former are not "agricultural" and are not entitled to the exclusion for agricultural storm water

discharges. Also, the applicability of the NPDES program to the post-construction, operational phase of these facilities must be determined according to the Federal Clean Water Act regulations for animal feeding operations, concentrated animal feeding operations, and feedlots.

As with any storm water discharge from a regulated construction project in an area where EPA issues NPDES construction general permits, operators who submitted a NOI to obtain permit coverage must also submit a Notice of Termination (NOT) after construction is completed and the site has been finally stabilized. Submission of the NOT is necessary for permittees to terminate their obligations under EPA's NPDES General Permits for Storm Water Associated with Construction Activity.

If you have any questions, please call me at (202) 260-9545, or have your staff contact Brian Burgess at (202) 260-9529.