

# Permits Cross-Examined

Assessing potential impacts of revising the national storm water program

By Jad Davis

The U.S. Environmental Protection Agency (EPA) is in the process of revising its national storm water program. Its proposed changes will impact the National Pollutant Discharge Elimination System (NPDES) permit program directly under the Clean Water Act. The EPA has delegated the NPDES permit program to most states; 46 states have approved NPDES permit programs.

## Permitting Scenarios

An NPDES permit (or waiver, if applicable) is required for any construction activity that will disturb one or more acres and might discharge storm water into the water of the U.S. Construction activity specifically refers to actual earth-disturbing construction activities and construction support operations. Construction activity unrelated to earth-disturbing activities or that is not part of the daily operation and maintenance of a facility does not require NPDES permits.

Typically, owners and developers of projects are considered operators and must apply for an NPDES permit. General contractors who have daily operational control over construction plans and specifications for projects with Storm Water Pollution Prevention

Plans (SWPPPs) also must apply for an NPDES permit or a notice of intent (NOI) to comply if the project is under the Construction General Permit (CGP). Consequently, many projects require that more than one operator submit an NOI.

Essentially, there are three permitting scenarios. First, an owner may be the sole permittee on a project in which the owner designs, develops as the general contractor and implements the SWPPP. Second, a contractor may be the sole permittee on a project when the owner hires the contractor to design, manage, construct and implement the SWPPP. Third, co-permittees occur on projects in which the owner has control over any changes to the plans and the contractor is responsible for the earth-disturbing construction activities and implementation of the SWPPP.

On the other hand, a permit may not be needed if a subcontractor is under the supervision of an owner or general contractor. A permit also may not be needed even if the construction activities involve earth disturbance, as long as another contractor is identified on the SWPPP as having operational control.

Most construction projects are governed by the CGP, which sets forth the NPDES permit requirements. The 2008 CGP expires in June 2011.

Thereafter, the EPA will issue a new CGP that will require compliance with the construction and development (C&D) rule, which incorporates the EPA's December 2009 effluent limitations guidelines and new source performance standards to control the discharge of pollutants from construction sites.

The EPA's current revisions to the federal storm water regulations include the NPDES permit program. The EPA plans on publishing the proposed revised requirements in the Federal Register for comment in late 2011, with final action taking place in late 2012. The EPA currently is considering expanding the area subject to federal storm water regulation, establishing specific requirements to control storm water discharges from new development and redevelopment, and developing a single set of consistent requirements for Phase I and Phase II construction projects.

## Challenges Ahead

Some industry professionals find it troubling that the EPA is considering expanding the jurisdiction of the NPDES permit program; thus, the agency is considering increasing the types of projects that require NPDES permits. Some also find it troubling that the EPA is considering imposing national requirements for the NPDES permit program. The apparent rationale for this consideration (as discussed in the "Urban Stormwater Management in the United States" report of the National Research Council) seems to be that the current requirements are too flexible and impossible to enforce.

Some are criticizing the proposed national requirements, saying they fail to account for the fact that construction projects take place in a variety of environments. It also can expose any industry conducting construction activities that disturb the earth to potential civil liability. Citizen groups have filed lawsuits attempting to hold



Companies currently in litigation over groundwater contamination include ready-mix operations, manufacturers and waste disposers.

the EPA's requirements as the objective standard to determine if a violation of the NPDES permit has occurred, instead of using the EPA's requirements as relevant guidelines for determining the efficacy of best management practices (BMPs).

Rigid national requirements can pose challenges to the construction industry due to a lack of available treatment equipment necessary to meet the requirements. If the EPA amends the storm water regulations to require specific numeric requirements for NPDES permits, however, the result will be an increase in the delays and complexities of the permitting process.

The delays associated with obtaining projects' NPDES permits begin with hard questions that should be easy to answer:

- "Does the project require a permit?"
- "Can my company's work or services on the project qualify under a general permit?"
- "Can my company's work or services qualify as a co-permittee?"
- "Do my company's contractual obligations require our work to comply with an existing permit?"

Once a permittee tackles these basic questions, he or she either has to begin the permit application process or begin an analysis of contractual obligations to comply with an existing permit. The delays associated with just the beginning of this process are self-evident—not to mention those in the permitting application process through compliance and enforcement issues. From 1999 to 2001, the median time for completing an Environmental Impact Statement was 4.4 years, which doubled since the 1970s when it was 2.2 years.

The EPA's proposed national requirements will increase the agency's enforcement of its self-imposed rigid requirements. If the EPA enacts numeric requirements in the storm water regulations, then the construction industry faces potential liability from enforcement actions based on noncompliance with the specific numeric requirements set forth in an NPDES permit as a permittee, or noncompliance with the specific numeric requirements set forth in an

NPDES permit not due to status as a permittee or a co-permittee but due to contractual obligations requiring compliance with such requirements.

It remains to be seen whether the EPA will opt for rigid national requirements or consider changes to the federal storm water regulations by adopting requirements that take local site-specific environmental conditions into further consideration. Many are hoping that the agency will continue

to allow authorized states to use effective BMPs and consider cost-management techniques. **[SWS]**

**Jad Davis is a partner with Ropers Majeski Kohn Bentley PC. Davis can be reached at [jdavis@rmkb.com](mailto:jdavis@rmkb.com).**

**For more information, write in 794 on this issue's Reader Service Card or visit [www.estormwater.com/lm.cfm/st031108](http://www.estormwater.com/lm.cfm/st031108).**

## RESULTS MATTER

Filterra® is proud to announce that The Washington State Department of Ecology, has approved Filterra® for **TAPE/GULD** for TSS, oil and grease and enhanced dissolved metals. Backed by our **TARP** approval and third party testing you can feel confident choosing Filterra®.



### NEW FILTERRA ROOFDRAIN. A green roof at ground level!



This new design tested at Colorado State University Hydraulics Laboratory treats roof or other piped in runoff and also eliminates the need for additional overflow structures.

Learn more at [filterra.com](http://filterra.com) or contact us at 866.349.3458

A Division of  
**AMERICAST**

**filterra**  
Bioretention Systems