

STORMWATER REGULATION IN TEXAS

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In 1972 Congress enacted the Federal Clean Water Act (CWA) which prohibited the discharge of pollutants from point sources to waters of the United States unless such discharge is authorized by a permit issued under the National Pollutant Discharge Elimination System (NPDES). Thirty years following enactment of this statutory prohibition, the Environmental Protection Agency (EPA) and the Texas Commission on Environmental Quality (TCEQ) are nearing completion of actions to implement a permitting program for stormwater runoff from small municipal dischargers. This program, if implemented, would culminate EPA's efforts over the last three decades to develop a regulatory program for stormwater discharges. This paper will provide a brief summary of the history and status of EPA's stormwater regulation program in Texas.

Statutory Background and History

In 1972 Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters". One major focus of the CWA is to control "point source" pollution. A "point source" is "any discernable, confined, and discreet conveyance, including but not limited to any pipe, ditch, channel...from which pollutants are or may be discharged" 33 U.S.C § 1362(14). The term "pollutant" encompasses a long list of substances including industrial, municipal, and agricultural waste. 33 U.S.C § 1362(6). In 1973 EPA promulgated NPDES permit regulations exempting most classes of stormwater discharges from NPDES permit requirements on the basis of "administrative infeasibility," i.e. the extraordinary administrative burden imposed on EPA should it have to issue permits for possibly millions of point source discharges of stormwater runoff.

EPA's regulations were challenged by The Natural Resources Defense Council. *Natural Resources Defense Council v. Costle* 568 F 2d 1369(D.C. Cir 1977). The State of Texas, through Attorney General John Hill, filed an amicus brief in support of EPA's position. The D.C. Circuit held that EPA did not have authority to create categorical exemptions from regulation. The court responded to EPA's administrative infeasibility arguments by noting that EPA could issue area-wide or general permits rather than issuing permits for each stormwater outfall and that the permits could impose regulation by proscribing practices that aggravate the problem of point source pollution rather than establishing numerical limits. The court also noted that EPA could address its administrative infeasibility problem by exercising the power vested in EPA by Congress to define point and non-point sources. However, EPA has declined to accept the court's invitation.

Following the decision of the D.C. Circuit, EPA issued proposed and final rules covering stormwater discharges in 1980, 1982, 1984, 1985, and 1988. Each promulgation generated substantial controversy. For example, given the intermittent and variable nature of stormwater discharges, dischargers voiced serious concerns about effluent limitations expressed as numeric performance standards measured at the point of discharge. These rules were challenged at the administrative level as well as in the courts.

In 1987 Congress overrode President Reagan's veto¹ and enacted the Water Quality Act of 1987, which significantly amended the CWA. The amendments created a new scheme for regulation of stormwater runoff. The amendments recognized both the environmental threat posed by stormwater runoff and EPA's problems in implementing regulations. Among other things, the amendments:

- Exempted agricultural stormwater runoff from the definition of "point source", thus relieving agricultural stormwater discharges from the requirement to obtain an NPDES permit.

¹ In the message accompanying his veto of the act, President Reagan objected to the Act because he believed it would "become the ultimate whip hand for Federal regulators" who would "become a major force in local zoning decisions that would determine whether families can do such basic things as build a new home." In overriding the veto, supporters of the act in both houses affirmatively stated that the bill would not intrude on local decision making about land use. (Statements of Sen. Stafford and Rep. Strangeland)

- Required EPA to establish regulations controlling stormwater runoff in two phases.
- Required EPA to adopt Phase 1 regulations setting forth the permit application requirements for stormwater discharges from industrial activity and large (population greater than 250,000) and medium (population greater than 100,000) municipal separate storm sewer systems (MS4) by February 4, 1989.
- Required that permits issued for MS4's effectively prohibit non-stormwater discharges into the storm sewers and reduce the discharge of pollutants to the maximum Extent Practicable (MEP).
- Required EPA to conduct studies and submit reports to Congress that would serve as the basis for developing additional stormwater controls in Phase 2. EPA's first report, due October 1, 1988, was required to identify those stormwater discharges for which permits were not required in Phase 1 and determine the nature and extent of pollutants in such discharges. EPA's second report, due October 1, 1989, was to evaluate procedures and methods to mitigate impacts on water quality from the stormwater discharges identified in EPA's first study.
- Required EPA to adopt Phase 2 regulations by October 1, 1993 based on the studies submitted to Congress. The amendments did not require that Phase 2 sources be regulated by an NPDES permitting program.

Implementation of Phase 1 Requirements

Industrial Activities

On November 16, 1990, nearly two years after its congressionally-mandated deadline, EPA adopted Phase 1 rules setting forth the permit application requirements for stormwater discharges from industrial activities and from large and medium MS4s. As

initially proposed, EPA's rules would have held operators of large and medium MS4s responsible for applying for and obtaining NPDES permits covering discharges for industrial activity which passed through their MS4. EPA acknowledged in its response to comments on the proposed rule that it favored this approach because it would shift the administrative burden for permitting and regulating industrial stormwater discharges from EPA to MS4 operators. In response to significant public comment, EPA modified its proposal to require operators of stormwater discharges associated with industrial activity, including construction sites, to obtain their own NPDES permits. In reaching its decision EPA noted that the person who transports pollutants through an MS4 into waters of the U.S. is legally responsible for that discharge even though pollutants are generated at a remote location. Although EPA's rule required that industrial discharges through an MS4 be covered by a separate permit, EPA noted its belief that MS4 operators should be involved in identification of industrial sources and the development of pollutant controls for industries that discharge stormwater through MS4 systems.

EPA's Phase 1 rules identified the following eleven categories of industrial discharges that were required to obtain an NPDES permit for stormwater discharges:

1. Facilities which are subject to effluent limitations.
2. Manufacturing.
3. Mineral, metal, oil and gas.
4. Hazardous waste treatment or disposal facilities.
5. Landfills.
6. Recycling facilities.
7. Steam electric plants.
8. Transportation facilities.
9. Treatment works.
10. Construction activity except operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale.
11. Light industrial activity.

Operators of any of the above listed industrial activities could obtain permit authorization through an individual application, a general permit, or a group permit. Since adoption of EPA's Phase 1 rules, both EPA and TCEQ have adopted general permits authorizing stormwater discharges from industrial activity. The general permit for industrial activity cannot be used to authorize discharges from construction activity. Both EPA and TCEQ have adopted general permits for construction activity. The TCEQ permit was adopted on March 5, 2003. New construction activity must be authorized under the TCEQ's permit. Construction activities that were authorized under EPA's general permit, but will continue to operate after issuance of the TCEQ permit, must obtain permit authorization from TCEQ on or before June 2, 2003.

EPA's decision to limit the Phase 1 permitting requirements to construction activities that disturb 5 acres or more of land was determined to be arbitrary and capricious because of EPA's failure to include in its rulemaking record support for its position that construction activities of less than 5 acres were non-industrial in nature. *Natural Resources Defense Council v. U.S. EPA* 966 F 2nd 1292 (9th Cir. 1992). However, EPA chose to address smaller construction sites as part of its Phase 2 rules rather than through an amendment of its Phase 1 rules.

Large and Medium MS4s

Phase 1 MS4 permits are required for cities with a population in excess of 100,000 based on the 1990 decennial census. Cities that exceed a population of 100,000 after the 1990 census will be regulated under EPA's Phase 2 stormwater program.

Approximately twenty MS4 operators in Texas were required to obtain a Phase 1 permit. All MS4s operators in Texas subject to the Phase 1 requirements have now obtained their initial NPDES permit. However, in some cases the time required for EPA to issue a permit following receipt of a permit application was in excess of 5 years and some permits did not become effective until 2002. Two Texas MS4 operators requested

a hearing before the regional administrator on EPA's final permitting decision. Although EPA's procedural rules expressly required that a decision on the granting or denial of the hearing request be made within 60 days, EPA took longer than 18 months to deny the hearing requests and then only because EPA's rules were amended to eliminate the opportunity for a hearing before the Regional Administrator. Those same two Texas cities have challenged EPA's final permitting decision by filing petitions for review in the United States Court of Appeals for the Fifth Circuit.

The permit provisions challenged through this litigation are virtually identical to provisions contained in other NPDES permits for MS4s issued by EPA region 6. The challenge permit provisions include:

- The cities are not authorized to discharge stormwater associated with industrial activity from their MS4s. (Part I.B.2.a.)
- The cities are not authorized to discharge materials resulting from spills except where the discharge is the result of an Act of God or necessary to prevent loss of life, personal injury, or severe property damage. (Part I.B.2.b)
- The cities must regulate to effectively prohibit the discharge of non-stormwater into the MS4. (Part II Introductory Provisions)
- The cities must develop, implement, and enforce a regulatory program to minimize the discharge of pollutants from areas of new development and significant redevelopment. (Part II.A.2)
- The cities must regulate to reduce the discharge of pollutants related to commercial application and distribution of pesticides, herbicides, and fertilizers. (Part II.A.5)

- The cities must regulate to effectively prohibit non-stormwater discharges to the MS4 by: (1) regulating the activities of sanitary sewer system operators to prevent overflows; (2) regulating the discharge of floatables; (3) regulating the discharge or disposal of used motor vehicle fluids, household hazardous waste, and the intentional disposal of grass clippings, leaf litter, and animal waste into the MS4; (4) providing for facilities for the proper disposal of used motor vehicle fluids and toxics from households, and; (5) regulating to eliminate illicit discharges and improper disposal into the MS4. (Part II.A.6)

- The cities must regulate to identify and control pollutants and stormwater discharges to the MS4 from: municipal landfills, hazardous waste treatment, disposal and recovery facilities; industrial facilities are subject to section 313 of SARA; and other industrial discharges that are contributing substantial pollutant loading to the MS4. (part II.A.8)

- The cities must regulate construction site activities to require the use and maintenance of appropriate structural and non-structural BMPs. (Part II.A.9)

- The cities may not change their regulatory programs without obtaining EPA's approval. (Part II.G.2.a)

- The cities must implement a public education program. (Part II.A.10)

- The cities must ensure legal authority to regulate discharges to and from its MS4. In particular, cities must ensure legal authority to: (1) regulate the quality of stormwater discharge from sites of industrial activity; (2) prohibit illicit discharges to the MS4; (3) regulate the discharge of spills and dumping and disposal of materials other than stormwater into the MS4; and (4) require compliance with conditions in ordinances, permits, contracts or orders. (Part II.E)

- One city must revise its landscaping ordinance to address elements sensitive to and supportive of improvement of stormwater quality and review its ordinances that regulate development and amend such ordinances as necessary to minimize the discharge of pollutants from areas of new development and significant redevelopment. (Part III.A.1)
- The cities must annually provide the permit authority a resolution from their governing bodies that the governing body has reviewed or been appraised of the annual report. (Part V.D)

Through their petitions for review, the cities have asserted the following legal positions concerning the challenged permit provisions:

- The permits expressly compel the cities to regulate their citizens as conditions of an NPDES permit. The permits also impermissibly restrict the cities ability to exercise their sovereign police powers by forcing the cities to seek EPA's approval prior to amending or adopting ordinances or changing public policies. EPA lacks the statutory and constitutional authority to compel the cities to regulate their citizens and to restrict the cities in their exercise of the sovereign police powers as conditions of NPDES permits.
- The permits require the cities to engage in a public education program to disseminate a message selected by EPA. EPA lacks the statutory and constitutional authority to compel the cities to speak EPA's message.
- The permits arbitrarily force the cities to guarantee that they will maintain legal authority to control discharges to and from their MS4s. EPA's requirements are arbitrary because cities lack the authority to make such guarantees because they are subject to the control of their own electorate and to control of the Texas Legislature.

- The permits are arbitrary because they do not authorize all discharges from the cities MS4s, which EPA is required to do under the statute and expressed terms of its own permitting rules.

After the cities filed their brief in the Fifth Circuit, EPA petitioned the court to voluntarily remand the permits to the agency so that it could modify the permits to address the cities concerns. The cities opposed EPA's motion for voluntary remand because EPA's proposed method of addressing the City's concern was unacceptable and failed to address all of the City's concerns. Through their response the cities noted that all arguments raised through their petition for review had been before EPA for years without action and that EPA's eleventh hour motion for remand was a frivolous attempt to avoid judicial review. The Fifth Circuit has denied EPA's request for remand. These cases have been fully briefed, but have not yet been set for oral argument.

Implementation of Phase 2 Requirements

Through the 1987 amendments to the Clean Water Act Congress expressly directed EPA to conduct studies prior to developing the Phase 2 stormwater program. The purpose of those studies was to: (1) identify those stormwater discharges or classes of stormwater discharges exempted from Phase 1; (2) determine, to the maximum extent practical, the nature and extent of pollutants in such discharges; and (3) establish procedures and methods to control such discharges to the extent necessary to mitigate impacts on water quality. EPA was statutorily required to submit the results of the first two parts of the study to Congress by October 1, 1988 and to submit the final part by October 1, 1989.

EPA's response to this congressional mandate was significantly delayed and, to state it bluntly, "put the cart before the horse". In February 1994 EPA reported to Congress on the third part of the study via President Clinton's Clean Water Initiative. The initiative addressed issues associated with NPDES requirements for stormwater discharges and proposed, among other things, targeting urbanized areas through the NPDES permit program. Then, in March 1995 (almost 7 years late and more than a year after the report addressing procedures and methods to

control stormwater discharges not regulated under Phase 1), EPA submitted to Congress a report reviewing and analyzing the nature of stormwater discharges from municipal and industrial facilities that were not already regulated under the Phase 1 program.

On December 8, 1999, more than six years after the congressionally-mandated deadline, EPA adopted Phase 2 stormwater regulations. The Phase 2 rule extends the NPDES permit requirements to all construction activities including clearing, grading, and excavating, that result in land disturbance of equal to or greater than one acre and less than five acres, or smaller disturbances if the disturbance is part of a larger common plan of development or sale that will ultimately disturb between one and five acres. Additionally, the Phase 2 rules require “Regulated Small MS4s” to obtain NPDES permits for their stormwater discharges. The Phase 2 rules automatically extend the NPDES permit requirement to all Small MS4s located in “urbanized areas” as defined by the census bureau. Additionally, the rules require the NPDES permitting authority to develop criteria and assess all Small MS4s located outside of urbanized areas and to include in the NPDES permit program all remaining Small MS4s that meet the designation criteria. The deadline for obtaining permit authorization for small construction sites and regulated small MS4s is March 10, 2003. EPA recommends that permit authorization be obtained under general permits to be developed by the permitting authority.

A small MS4 may be owned or operated by any public body created pursuant to state or federal law and would encompass cities, counties, districts, and state agencies or institutions. EPA’s Phase 2 rule identified 178 Texas cities and/or counties that were automatically designated as requiring an NPDES permit and 56 cities and/or counties that were potentially designated.

EPA’s Phase 2 rules provide that NPDES permits for small MS4s will require the development, implementation, and enforcement of a stormwater management program that must include the following six minimum measures:

1. *Public education.* You must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities

about the impacts of stormwater discharges on water bodies and steps that the public can take to reduce pollutants in stormwater runoff.

2. *Public involvement/participation.* You must comply with State, Tribal, and local public notice requirements when implementing a public involvement/participation program.
3. *Illicit discharge detection elimination.* You must develop, implement, and enforce a program to detect and eliminate illicit discharges to your small MS4. To the extent allowable under State, Tribal, or local law you must effectively prohibit, through ordinance or other regulatory mechanism non-stormwater discharges into your storm sewer system and implement appropriate enforcement procedures and actions.
4. *Construction site stormwater runoff control.* You must develop, implement, and enforce a program to reduce pollutants in any stormwater runoff to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. The program must include the development and implementation of an ordinance or other regulatory mechanism to require erosion and sediment controls as well as sanctions to ensure compliance to the extent allowable under state, tribal, or local law.
5. *Post-construction stormwater management in new development and redevelopment.* You must develop, implement, and enforce a program to address stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects that are less than one acre that are part of a larger common plan of development or sale that discharge into your small MS4.
6. *Pollution prevention/good housekeeping for municipal operations.* You must develop and implement an operation and maintenance program that includes a training component that has the ultimate goal of preventing or reducing pollutant runoff from municipal operations.

Following adoption of EPA's Phase 2 stormwater rule a group of 94 Texas cities formed the Texas Cities Coalition on Stormwater (TCCOS) in order to respond to EPA's Phase 2 rules and to work toward development of rational stormwater control programs. TCCOS has actively participated in the TCEQ advisory group concerning the development of that agencies general permit for small MS4s. Additionally, TCCOS has sought judicial review of EPA's Phase 2 stormwater rule. Positions taken by TCCOS in that litigation include:

- EPA lacks the statutory and constitutional authority to compel Regulated Small MS4s to regulate their citizens as a condition of an NPDES permit.
- EPA lacks the statutory and constitutional authority to compel Regulated Small MS4s to speak EPA's message through mandated public education programs.
- EPA lacks the statutory authority to implement the Phase 2 stormwater program through the NPDES permit program. Congress intended that the Phase 2 stormwater program be implemented by a comprehensive program developed outside the NPDES permit program.
- EPA's designation of Regulated Small MS4s on the basis of their locations within Urbanized Areas and small construction sites that result in the service of one to five acres is arbitrary and capricious.

TCCOS' challenge to EPA's Phase 2 stormwater rule has been fully briefed and was argued in December, 2001. To date, no decision on this appeal has been rendered.

Permitting Authority

The "permitting authority" is the entity responsible for administering the NPDES permit program. Administration includes processing of permit applications and notices of intent under

general permits, permit appeals, modification requests, variance requests, conducting inspections, and receiving and reviewing self monitoring reports.

On September 14, 1998 TNRCC (predecessor to TCEQ) entered into a Memorandum of Agreement with EPA concerning assumption of the NPDES program in Texas. That Memorandum of Agreement provides that EPA shall retain administration over all medium and large MS4 permits issued prior to program authorization and those permit applications in the public notice process but not issued at the time of program assumption. TCEQ would process any renewal applications for such large and medium MS4 permits. The Memorandum of Agreement also provides that EPA will retain administration over all stormwater general permits issued by it until the existing permit expires or until the time that the TCEQ issues its own general permit.

At the current time EPA remains the permitting authority for large MS4s that have not yet filed their permit renewal and/or amendment applications with TCEQ. TCEQ is the permitting authority for small MS4s, large MS4s seeking permit renewal, stormwater discharges associated with industrial activity and for all construction sites.

Under EPA's phase 2 rules the deadline for obtaining permit authorization for stormwater discharges from small MS4s was March 10, 2003. However, neither EPA nor TCEQ has issued a general permit that can be used to authorize such discharges. TCEQ has announced that its proposed permit would allow a 90 day time frame after the date of issuance for permittees to submit a notice of intent with a Stormwater Management Program (SWMP). TCEQ states that it does not foresee initiating any enforcement activity for MS4s that seek to obtain permit coverage under the proposed general permit and meet the application time frame.

Judicial Review

As noted above Texas cities have initiated and actively participated in cases seeking judicial review of EPA's Phase 2 stormwater regulations and EPA's final permitting decisions under Phase 1. Although the courts have denied the petitions of Texas cities in both cases, these cases remain pending on petitions for rehearing.

Judicial Review of EPA's Phase 2 Rules

EPA's Phase 2 rules were challenged by the Environmental Defense Center, Natural Resources Defense Council, American Forest and Paper Association, National Association of Homebuilders, the Texas Cities Coalition on Stormwater, and the Texas Counties Stormwater Coalition. Because separate petitions for review were filed in the Ninth Circuit, the Fifth Circuit, and the District of Columbia Circuit, the cases were consolidated and transferred to the Ninth Circuit Court of Appeals where the first petition for review was filed.

These cases were argued on December 3, 2001. On January 14, 2003 the Ninth Circuit issued its opinion in *Environmental Defense Center v. EPA*, 319 F. 3d 398 (9th Cir. 2003). In a split decision the Ninth Circuit rejected Texas Cities' statutory and constitutional (Tenth Amendment) claims that EPA's Phase 2 rules unlawfully commandeer the cities exercise of these police powers. The majority opinion rests on the belief that cities can avoid EPA's requirements to regulate third persons by either electing not to discharge stormwaters into waters of the United States or by obtaining an individual permit under the Phase 1 rule.

The dissenting opinion noted the impossibility of cities ceasing their discharge of stormwater or refusing to accept stormwater discharges from third persons: "the law of gravity is inflexible, the stormwater will run downhill through the municipalities into federal waters whether the sewer system is open or blocked. No matter how much we may want to uphold EPA's regulatory scheme, we cannot change the law of gravity".

The dissent also noted that the alternative permit option compels City's to regulate third parties and is not qualitatively different from the phase 2 general permit requirements: "under the Phase 1 rule, a petitioner must submit a description of programs that accomplish essentially the same regulation of third parties as do the three minimum measures of the Phase 2 rule."

In the same opinion the Ninth Circuit granted that petitions of the environmental petitioners and ruled that EPA erred in providing by rule that a MS4 could obtain permit authorization by merely filing a notice of intent. The court held that EPA's approach constituted an impermissible failure to regulate. The court held that NOIs are the same as permit applications and that EPA or the NPDES permitting authority must review every NOI to determine whether the stormwater management program will reduce discharges of pollutants to the maximum extent practicable.

Petitions for rehearing have been filed by EPA as well as the Texas Cities Coalition on Stormwater and Texas Counties Stormwater Coalition. The petition for rehearing filed by Texas cities the counties asserts that the "alternatives" relied upon by the panel majority could not realistically be accomplished and that there is nothing in the administrative record that supports the proposition that local governments may stop discharging stormwater runoff through recycling programs and wetland construction as suggested by the majority.

Judicial Review of Phase 1 Permits

As noted above the cities of Abilene and Irving Texas challenge EPA's final decision issuing NPDES permits for their stormwater discharges through petitions for review filed in the United States Court of Appeals for the Fifth Circuit. After Abilene and Irving filed their initial brief in the Fifth Circuit, EPA filed a motion for voluntary remand based on the agency's decision to propose modifications to the challenged permits. EPA proposed to add end-of-the-pipe effluent limits which would allow the cities to satisfy their Clean Water Act obligations without being required by the permit to

regulate the discharges of third parties. Abilene and Irving opposed EPA's motion for voluntary remand, the motion was denied.

Abilene and Irving's petitions for review were argued on February 11, 2003 and decided on April 2, 2003. The court held that EPA has broad discretion under the Clean Water Act to impose pollution control requirements when issuing NPDES permits, and that the challenge permit conditions did not exceed EPA's statutory authority. The court also held that the cities cannot establish a Tenth Amendment violation "without demonstrating that they had no other option but to regulate according to federal standards". Relying upon EPA's letter to the cities transmitting a "preliminary copy of a sample alternative NPDES permit" stating that "EPA expects to proceed with a permit similar to the one enclosed" unless the cities accepted permits requiring them to regulate third parties, the court held that the City's were offered a choice that avoided a Tenth Amendment violation.

Abilene and Irving have filed petitions for rehearing. Abilene and Irving assert that the Clean Water Act provision allowing EPA to include in the stormwater permits "such other provisions as the Administrator...determines appropriate for the control of such pollutants" does not satisfy the "clear statement rule" needed for an administrative agency to alter the traditional relationship between federal and local governments. Additionally, Abilene and Irving assert that EPA's "offer" to develop numeric end of pipe permits and the cities' response cannot be construed as a waiver or intentional relinquishment of the City's Tenth Amendment rights because the City's never knowingly waived or consented to the commandeering of their police powers. Abilene and Irving's petitions for review remain pending.