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NEW STORM WATER PERMITTING AT SMALL CONSTRUCTION SITES

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Over the past decade, the construction industry confronted new challenges under the federal Clean Water Act's National Pollutant Discharge Elimination System storm water discharge permitting program. Since the early 1990s, an operator of a construction site of greater than five acres - referenced in this article as a large construction site - or a smaller site that is part of a common plan of development of more than five acres has been required to obtain authorization from the federal Environmental Protection Agency (EPA) to discharge storm water.

Many interesting legal developments have occurred as this program has matured. Among the most significant, and most recent, of these developments is the implementation of the so-called "Phase II" small construction site requirements. By the time this article is published, an operator of a construction site that will disturb one to five acres - referenced in this article as a small construction site - or a smaller site that is part of a common plan of development of one to five acres also will be required to obtain a permit for the discharge of storm water under the Texas program that went into effect on March 6.

This new and lower threshold will greatly increase the number of construction projects nationwide that will be required to obtain a permit. Real estate and construction businesses, and their legal counsel, will want to take special note. This article will examine the rapidly changing regulatory landscape for small construction sites in Texas.

At the federal level, permitting of large construction sites has been accomplished historically through the issuance of general permits by the EPA. The EPA issues a federal general permit by publication in the Federal Register after public notice and comment, which is intended to describe terms and conditions under which a large number of sites with similar discharges can be authorized without the administrative burden of individually permitting each site.

To obtain permit coverage, a potential permittee must comply with the terms and conditions of the permit, and submit a notice of intent to the EPA confirming compliance. The federal EPA Region 6 construction general permit, which authorizes storm water discharges from large construction sites in Texas, Arkansas, Oklahoma, Louisiana and New

Mexico, will expire statutorily on July 6. (There are other federal general permits for storm water discharges from nonconstruction industries.)

To make matters more interesting, the EPA delegated to the state of Texas the authority to administer the Clean Water Act's storm water permit program through the Texas Pollutant Discharge Elimination System (TPDES). This delegation of authority includes the authority to issue general permits. However, as a special provision to the delegation of the program to Texas, the EPA retained authority to administer its general permit until its statutory expiration or until Texas issued its own equivalent permit. Given that the EPA Region 6 construction general permit's statutory expiration date was not due to expire until July 2003, most large construction site operators expected to continue looking to the EPA as the permitting authority until that date. However, that may not be case.

The New Texas Permit

Phase II of the delegated federal Clean Water Act permit program required permitting for small construction sites no later than March 10. On March 5, the Texas Commission on Environmental Quality (TCEQ) finalized the long-awaited "TPDES General Permit for Construction Storm Water Runoff," state permit No. TXR150000. The TCEQ signed the permit, and it went into effect on March 6.

The issuance of this permit, four days before the Phase II deadline and several months before the statutory expiration of the EPA Region 6 construction general permit, creates quite a bit of confusion. For small construction sites, it signals the beginning of new permitting requirements. However, this particular state permit, TXR150000, somewhat prematurely terminates the effectiveness of the Region 6 construction general permit applicable to large construction sites. Thus, after March 10, large and small construction sites must now look to TXR150000's terms, and to the TCEQ as the permitting authority. Note, however, that the TCEQ provides large construction sites formerly permitted under the EPA Region 6 construction general permit a period of 90 days to send a new notice of intent to the TCEQ, or to finally stabilize the site and file a notice of termination with the EPA. In the interim, large construction sites must continue to comply with the federal permit.

The terms and conditions of TXR150000 are similar to the EPA Region 6 construction general permit. Consequently, for large construction site operators, there will be some continuity in the learning curve.

For those less familiar with the storm water permitting requirements, here's a brief look at the requirements:

Definition of Operator. As a threshold point, permit coverage must be obtained by the "operator," defined as the party or parties that, either individually or taken together 1. have operational control over the site specifications (including the ability to make modifications in specifications); or 2. have the day-to-day operational control of those activities at the site necessary to ensure compliance with the plan requirements and permit conditions (i.e. are authorized to carry out the activities that are identified in the storm water pollution prevention plan). There may be multiple parties that meet this definition at any one site (e.g. owners, developers, general contractors).

Storm Water Pollution Prevention Plan. TXR150000 requires, as does its federal counterpart, the operator to develop and implement a storm water pollution prevention plan (SWPPP). However, unlike large construction sites, small construction sites in Texas are not required to submit a notice of intent. Instead, in consideration of the short-term nature and number of small construction sites, TXR150000 requires a small construction site to post a site notice with information concerning the operator's authorization under the permit.

The storm water controls required under TXR150000 are largely based on implementing best management practices (BMPs) and do not contain water-quality-based effluent limits. Note that construction activities that include a concrete batch plant at the site are covered by another TPDES general permit that does contain numeric effluent limits for storm water discharges. The core of the permit is the development and implementation of the SWPPP. The required contents of an SWPPP include, among other things, identifying and addressing all potential sources of pollution that may affect the quality of storm water discharges from the site.

An SWPPP contains, at a minimum, a project description, a location map, a site map showing construction details, information on receiving waters, and a description of the BMPs used to minimize the potential for pollution in storm water discharges during and after construction activities. Additionally, the SWPPP must confirm compliance with fairly rigid site inspection requirements. The TCEQ allows, in TXR150000, a choice of alternative inspection schedules - either 1. inspections at least every 14 days, and inspections within 24 hours of any rainfall event of 0.5 inches or greater; or 2. inspections every seven days. During the course of a construction project, the original plans may be changed often, and the SWPPP always must reflect the current conditions and controls employed at a site.

Permit Waiver. Small construction sites will be granted an opportunity to apply for a waiver from permit requirements when such sites are in regions and seasons that are likely to have very low potential for erosion. To claim this "Low Rainfall Erosivity Waiver," the operator of the site must calculate the total annual erosive potential that is due to climatic effects - the so-called "R-factor" calculation. The calculation requires the operator to follow an equation known as the Revised Universal Soil Loss Equation. If the R-factor is less than five, the operator may complete a waiver form and submit it to the TCEQ in lieu of observing the other requirements of TXR150000.

These early days of compliance for small construction sites under the storm water permit program can be expected to be a time of some confusion for the regulated community and the TCEQ. After March 6, small and large construction sites are subject to the terms and conditions of new TXR150000. Due to the daily oversight of the program requirements during a construction project, and advance planning necessary to ensure timely permit coverage, storm water discharge controls are now a permanent and pervasive part of construction in Texas.

Jean M. Flores is a shareholder in the Dallas environmental law boutique of Guida, Slavich & Flores. The opinions expressed in this article are expressly those of Flores.

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