

A SUPPLEMENT TO THE HOUSTON BUSINESS JOURNAL BUSINESS SURVIVAL GUIDE

Storm warning: New permits required at Texas construction sites

All developers, contractors and even homeowners who are engaged in construction activities need to be aware of several important changes that took place to the storm water permitting program in Texas in early March.

First, the storm water permitting requirements now cover sites as small as one acre. Previously, these rules applied only to developments of five acres or more.

This change is part of the implementation of the Phase II requirements imposed by the federal Environmental Protection Agency pursuant to the federal Clean Water Act.

Second, the Texas Commission on Environmental Quality has become the permitting authority for all storm water discharges from construction sites.

Sites in developments of five acres or more have been subject to storm water permitting requirements for a number of years, but until now, those permits have been issued by the EPA, not the state of Texas.

CHANGES TO OPERATORS

The change means that even operators of these larger sites will now need to secure coverage under a state permit. The TPDES Construction General Permit was approved, signed and became effective on March 5.

The program is designed to prevent run-off of sediment and pollutants from construction sites and will continue to work much as it did before.

To reduce the administrative burden of individually permitting each site, the EPA and now the state, issue a general permit that defines what must be done to minimize the environmental impacts of runoff from construction sites.

In order to fall within the protection of the general permit, individual contractors indicate their intent and commitment to comply with these terms through a Notice of Intent (NOI) filed with the state. Other general permits cover non-construction sites such as industrial facilities.

Generally, the owners or "operators" (anyone with operational control of the site specifications or day-to-day operations) of sites where one acre or more of land will be disturbed are required to have a permit for storm water discharges from the site.

For purposes of calculating the size of the

development, the state looks at the larger plan of development, not just the area that has been disturbed so far. It will look, for example, at sales literature, plats and plans to determine the anticipated size of the project.

Construction site operators should also be aware that if the site has a ready-mixed concrete batch plant, there are special permit conditions and limits on discharges. Also, construction activities within the Edwards Aquifer Recharge Zone must meet additional requirements.

SECURING A PERMIT

Most owners or operators can submit an NOI to obtain coverage under a general permit issued to the state of Texas. The form can even be submitted electronically. The forms and instructions are available on the state's Web site (www.tnrcc.state.tx.us/permitting/waterperm/wvperm/construct.html).

To obtain coverage, permittees have to review and agree to comply with the terms of the general permit, which includes establishment of a Storm Water Pollution Prevention Plan, use of best management practices, routine inspections and compliance with certain record-keeping requirements.

A copy of the NOI must be posted in plain view at the site before commencement of construction, and it must be maintained until final stabilization occurs. A copy also must be sent to the operator of any municipal separate storm water sewer system that receives discharge from the construction site. Coverage under the permit begins provisionally two days after the NOI is postmarked for mail delivery or 24 hours after electronic submission.

Failure to have a required storm water permit can result in civil penalties and even criminal prosecution. Task forces have been set up in Houston and Dallas to vigorously pursue storm water permit violations and prosecutions have increased as a result.

NOTIFICATION DEADLINES

If work began on or after March 5 and disturbs five acres or more, the operator must:

- Obtain a copy of the General Permit (TCEQ CGP/TPDES Permit No. TXR150000).
- Develop and implement a storm water pollution prevention plan.
- Complete and submit an NOI to the TCEQ (using a TCEQ form) electronically or to the

address listed on the form prior to commencement of construction.

- Submit a Notice of Termination once the site has reached final stabilization.

If work was begun on or before March 4 and will disturb five acres or more (including the larger plan of development), an NOI must be submitted by June 3, unless construction and final stabilization will be completed by that date.

In the meantime, the operator must continue to meet the conditions and requirements of the prior

federal NPDES storm water discharge permit. If construction at a larger site is completed within the 90-day period, the operator can submit a notice of termination with the EPA, rather than file an NOI with the state.

Luckily, the requirements for smaller sites are somewhat less burdensome. If one to five or less acres are disturbed, including the larger common plan of development, the operator must:

- Obtain a copy of the General Permit (TCEQ CGP/TPDES Permit No. TXR150000).
- Develop and implement a storm water pollution prevention plan.
- Complete and post a site notice before construction begins.

An NOI does not have to be submitted to the state.

PRACTICAL IMPLICATIONS

The requirements under the state permit will not be substantially different than under the federal program, although there may be some bumps in the road as both the state and construction contractors adjust to the new program.

In addition, with the inclusion of sites as small as one acre, some contractors and even homeowners may now fall within the requirements for permit coverage and be faced with developing storm water pollution prevention plans for the first time.

However, with the proper preparation and counsel, Texas builders, construction site operators, and owners should be able to navigate the new regulations without falling victim to stormy weather.

DAVID BATES, a partner at Gardere Wynne Sewell LLP in Houston, represents a variety of businesses, including manufacturing and energy companies, in a broad spectrum of environmental and litigation matters.



CONSTRUCTION
PERMITS

DAVID
BATES

Failure to have a required storm water permit can result in civil penalties and even criminal prosecution.