



Michigan COMMENTARY

New Federal Storm Water Regulations: Michigan's Failure to Act Will Have Serious Consequences

By Jack D. Bails, Affiliated Consultant

The Michigan Department of Natural Resources (DNR) is proposing new rules and a fee schedule to implement federal storm water rules recently promulgated under the U.S. Clean Water Act. If the state regulations—which include a streamlined permit procedure—are not approved by the legislature by October 1, 1992, Michigan commercial, industrial, and municipal operations regulated under the new federal rules will face significant problems and potentially high compliance costs. This Commentary summarizes the history of storm water regulation, explains how the DNR proposes to implement the new federal requirements, and discusses the consequences to Michigan if the DNR is prevented from promulgating and implementing the new rules by the October deadline.

Since 1972 state and national efforts under federal law to control water pollution have focused largely on controlling discharges from industrial and municipal wastewater treatment systems, so-called point sources of pollution. The principal means of control has been the National Pollution Discharge Elimination System (NPDES), which requires any entity discharging wastewater to navigable waters to have a permit. Michigan is one of thirty-five states that have been delegated authority by the U.S. Environmental Protection Agency (EPA) to manage the NPDES program at the state level.

Over the last twenty years significant progress has been made in improving water quality throughout the nation. Billions of dollars have been spent by government at all levels and by the private sector to adequately treat sewage and industrial waste discharged to surface waters. The improvements in Lake Erie and the Detroit, Grand, Kalamazoo, St. Joseph, and Saginaw rivers are obvious even to casual observers. Millions of Michigan residents and tourists benefit from improved water quality in our Great Lakes and inland waters whether they fish, boat, swim, or depend on this resource for their drinking water. Unfortunately, pollution still impairs some uses of our lakes and streams; for example, health officials advise against eating more than small quantities of Great Lakes fish.

Continued improvement in water quality is expected as new requirements limiting the discharge of certain toxic chemicals are implemented. However, it has become clear that large point sources of water pollution are only part of the problem. A variety of diffuse sources of water pollution are contributing collectively to remaining, significant water quality problems. Urban and industrial storm water discharges have been identified as one such major problem. The significance of diffuse water pollution is documented in the *National Water Quality Inventory, 1988 Report to Congress* and *America's Clean Water—The States' Nonpoint Source Assessment, 1985*, both prepared under EPA auspices. These studies find that in many cases pollution levels in the storm water runoff that reaches surface waters exceeds that allowed in discharges regulated by NPDES permits.

The federal Water Quality Act of 1987 added provisions to the Clean Water Act to address storm water discharges. Specifically, these amendments require the EPA to establish rules governing storm water permit application requirements, identify types of facilities and activities required to obtain permits, and eventually phase in the regulation of all storm water pollution. In April 1989 the EPA was charged in federal court with failure to promulgate the required rules; the agency subsequently agreed to a consent decree and promulgated the rules in November 1990. The rules take effect October 1, 1992.

The DNR proposes three approaches to implement the new federal storm water permit program. The first is specific to five cities, but the second and third apply to all other entities, both public and private, with discharges that must be regulated. The proposed approaches will minimize the cost both to the state and to the regulated entities and allow Michigan to meet the new storm water pollution control requirements.

- There are only five Michigan communities that serve a population of more than 100,000 by separate storm sewer systems: Ann Arbor, Flint, Grand Rapids, Sterling Heights, and Warren. They were required by federal rule to make initial application for individual storm water NPDES permits by May 18, 1992. The DNR will take steps to help these communities meet the May 1993 deadline for the second part of their applications.
- For industrial activities requiring permits—with the exception of construction sites—the DNR is proposing *general permits* in which a single permit would be issued to cover all facilities with similar discharges. Industries would be grouped by type of expected discharge and freed from the expense and time involved in obtaining *individual permits*.
- Finally, for regulated construction projects (the rules currently apply to sites of five acres or more) the DNR is proposing to use a *permit by rule* approval system: If contractors obtain a permit under the state Soil Erosion and Sedimentation Control Act (Public Act 347 of 1972), which is administered by local units of government, this locally issued permit will double as a NPDES storm water permit.

To implement the expedited general permits for industrial facilities and establish permit by rule for construction sites, the new rules adopted by the Water Resources Commission on June 18, 1992, must be approved by the legislature's Joint Committee on Administrative Rules. Furthermore, the legislature must pass a statute authorizing a fee schedule to fund the program (the 1992 DNR appropriation bill contains start-up monies to implement the program, but its use is contingent on the passage of the fee schedule).

If the DNR rules and funding package are not adopted by October 1 there will be considerable disruption to business operations in Michigan, particularly those involving construction projects affecting five acres or more (a recent federal court case may result in the permit requirement being imposed on even smaller projects).

Therefore, if the legislature fails to approve new DNR general permit and permit by rule procedures, after October 1 the new federal rules will require about ten thousand facilities in Michigan and every new construction project involving five acres or more (an estimated sixteen hundred a year in Michigan) to obtain individual NPDES permits from the DNR under the old procedures. Included among the affected entities are most manufacturing operations as well as certain mining, oil/gas exploration and production, landfill, and warehouse operations. Local governments will be affected if they operate certain types of landfills, power plants, or airports. The cost to prepare individual applications is high, and the time required for DNR—already lean from cutbacks—to review and issue them will be unacceptably long. Any regulated site without a permit will be subject to fines and penalties and also may be sued under federal law by individuals for injunctive relief and costs.

There understandably is little support in the business community for new environmental regulations and new fees, particularly when many companies are struggling to overcome more than two years of recession. However, the new federally mandated storm water regulations leave little choice. Under the DNR plan, compliance with the new regulations will be as painless as possible through the liberal use of permit by rule (which uses existing local authority) and general permits (which cover the majority of industrial categories).

Those who believe that resisting the DNR rules will avoid enforcement of the new storm water runoff regulations ignore the reality that the regulations are mandated by federal law, backed up by a federal court

order, and enforceable under the provisions of the Clean Water Act by any citizen or organization. Twenty-six of the thirty-nine states with delegated NPDES authority already have general permit authority in place, and several others are establishing new regulations similar to those proposed by the DNR. Failure of the Michigan Legislature to approve the rules and adopt at least a minimum fee to support implementation will place Michigan businesses in jeopardy at a time when they can least afford further uncertainty.

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