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The New MDE General Permit for Stormwater from Construction Activity

The Maryland Department of the Environment (“MDE”) recently released a new draft version of the General Permit for Stormwater Associated with Construction Activity (the “Draft Permit” or the “Permit”) that, if adopted, will replace the existing interim General Permit (the “Interim Permit”) that expires December 31, 2008. MDE expects to adopt the Draft Permit effective January 1, 2009. Once adopted, the Permit will be in effect for five years. MDE has indicated that projects currently covered under the Interim Permit, or a previous version of the General Permit, will be covered under the Draft Permit effective January 1, 2009. This could impose significant additional obligations on projects already under construction.

The Draft Permit contains several important changes, including:

- A mandatory 45 day waiting period after submission of a Notice of Intent (“NOI”) to be covered under the permit; 30 days for smaller sites of 1 to 3 acres.
- A public comment process after submission of the NOI during which the public can request that MDE require an individual permit for the activity subject to the permit.
- A requirement that permittees monitor for specific sediment discharge problems that could necessitate changes to approved erosion and sediment control (“ESCP”) and stormwater management plans (“SMP”).
- A requirement that erosion and sediment control plans address eight critical points related to “Environmental Site Design.”
- A requirement that permittees ascertain the water quality standards of receiving waters and implement certain measures depending on those standards.

TIMELINES & PUBLIC COMMENT

The Draft Permit introduces significant new requirements for the filing of a Notice of Intent (“NOI”), the required submission to be covered under the Permit. The Interim Permit requires that an NOI be filed 48 hours prior to the beginning of land disturbing activity. The Draft Permit requires that an NOI be filed 47 days prior to the beginning of construction activity. This includes a mandatory 45 day period to allow the public to review the ESCP and comment to MDE, and a 48 hour period at the end of the 45 days for MDE to issue notice of coverage. For sites between 1 and 3 acres, the time period for public comment is 30 days plus the additional 48 hour MDE turnaround period.

Additionally, the Draft Permit imposes a new requirement that applicants obtain a “certification” that an erosion and sediment control plan has been submitted to the appropriate local agency *before* the NOI will be accepted and the 45 day period begins to run. The applicant must subsequently demonstrate that the ESCP has been approved before notice of coverage is issued. These new requirements attempt to harmonize coverage under the Permit with approval of the ESCP and to allow greater public scrutiny of the NOI request and ESCP submittals by concerned citizens. It is important to be aware of these new procedural hurdles and their impact on planning and timing of anticipated construction activity.

The Draft Permit also establishes a new public participation process. During the 45 (or 30) day comment period a member of the public can request that a site be required to obtain an individual permit by submitting a detailed, written explanation of why an ESCP is inadequate. MDE will then notify the applicant, evaluate the information, and engage in an undefined decision-making process on the submitted NOI and the request for individual coverage. The Draft Permit’s inclusion of this new procedure will increase the likelihood of delays due to public comment.

CHANGES TO ESCP & SMP REQUIREMENTS

The Draft Permit enumerates several new elements that must be addressed in ESCPs and SMPs (collectively, the “Plans”). These requirements are the result of the Stormwater Management Act of 2007, which requires Environmental Site Design (“ESD”) be implemented in the Plans to the maximum extent practicable. ESD means using small-scale stormwater management practices and nonstructural techniques to mimic natural hydrologic runoff characteristics and minimize the impact of land development on water resources.

Several new specific requirements for the Plans are incorporated into the Draft Permit, including a written explanation demonstrating that the Plans address the following “critical points”:

- a. Utilization of Environmental Site Design during all phases of design and construction, including but not limited to early construction and development of site design, continuation of Environmental Site Design from first disturbance to post-construction. Such Environmental Site Design shall be included in an approved Erosion and Sediment Control Plan or Stormwater Management Plan.
- b. Maintenance of the limits of disturbance shown on plans are inclusive, consistent and prevent disturbance to streams, natural drainage features, stream buffers, soil conservation areas, wetlands, and forest conservation areas during construction except as specified in an approved Erosion and Sediment Control Plan.
- c. Control of construction equipment and vehicles so that they do not enter areas reserved for future stormwater infiltration or recharge except as specified in an approved Erosion and Sediment Control Plan.
- d. Evaluation and appropriate limitation of site clearing needed to accommodate the building and transportation footprint at low-density sites so as to minimize impacts as specified in an approved Erosion and Sediment Control Plan or Stormwater Management Plan.
- e. Evaluation and designation as to whether there is a minimum site area where construction phasing or sequencing must be used on specific sites in accordance with an approved Erosion and Sediment Control Plan.
- f. Identification of soils at high risk for erosion and designation of advanced stabilization techniques, such as geotextile erosion control mats and blankets, as well as mulch and turf reinforcement, that can be used for such soils on specific sites in

accordance with an approved Erosion and Sediment Control Plan.

g. Identification of steep slopes and designation of limitations on clearing on the steep slopes on specific sites in accordance with an approved Erosion and Sediment Control Plan.

h. Evaluation and designation of stabilization requirements, such as hydroseeding, mulch, etc., including a time limit to initiate stabilization after soil has been exposed, on a site-by-site basis to minimize exposure of disturbed areas and visible dirt in accordance with an approved Erosion and Sediment Control Plan.

i. Protection measures for discharges to the Chesapeake Bay or impaired waters or waters with an established TMDL.

It is important to recognize that approved ESCP and SMP are incorporated into the General Permit. Therefore, a violation of the Plans can be a violation of the General Permit. This has critical significance, as recurring violations of the Plans may prompt citizen suits authorized under the federal Clean Water Act.

EFFLUENT LIMITATIONS & REPORTING REQUIREMENTS

The Interim Permit requires that permittees use “Best Available Technology” to prevent the discharge of sediment in stormwater runoff from a construction site. The Draft Permit institutes a more rigorous standard requiring the installation of control measures that “minimize pollutants in the discharge as necessary to meet applicable water quality standards.” The Draft Permit provides that, “in general,” the controls cited above are considered “as stringent as necessary” to ensure that discharges do not cause or contribute to an excursion above a water quality standard. This language is ambiguous and leaves potential for enforcement action notwithstanding the fact that a permittee has properly implemented and maintained its approved ESCP.

The Draft Permit includes new language regarding MDE’s options if the agency determines that a permittee’s discharges may violate a water quality standard. The options include: requiring modification of controls, provisions for increased reporting procedures, and the ability to require an individual permit.

TRIGGERING EVENTS

The most significant new provision involves the steps that permittees must take upon the occurrence of certain “triggering” events. In addition to the “as necessary” language, the Draft Permit requires permittees to take “all reasonable measures” to prevent the discharge of “significant” amounts of sediment. These discharges, called “triggering events,” include:

a. Earth slides or mud flows;

b. Concentrated flows of stormwater such as rills, rivulets or channels that cause erosion when such flows are not filtered, settled or otherwise treated to remove sediment;

c. Turbid flows of stormwater that are not filtered, settled or otherwise treated to reduce turbidity;

d. Deposits of sediment at the construction site in areas that drain to unprotected stormwater inlets or catch basins that discharge directly to surface waters;

e. Deposits of sediment from the construction site on public or private streets outside of the permitted construction activity;

f. Deposits of sediment from the construction site on any adjacent property outside of the permitted construction activity; or

g. Discharges from the construction site to municipal conveyances, curbs and gutters, or streams running through or along the site where visual observations show that the discharges differ from ambient conditions in terms of turbidity so as to indicate significant amounts of sediment present in them.

Within 24 hours after the occurrence of a triggering event, the permittee must inspect its erosion and sediment controls to verify compliance with the Plans. Any deficiency must be corrected immediately and may be considered a violation until corrected. There is no express obligation to report the triggering event or deficiencies to MDE, though they must be logged in weekly inspection reports.

If the site is in compliance, however, the permittee must contact the enforcement and the local plan approval authorities by the next business day to inform them of the results of the inspection. In addition to any action ordered by the relevant authorities, permittees must take certain actions within four days of the triggering event if “determined to be appropriate towards the prevention of further trigger events.” The actions include:

- (1) Any change that may be approved in the field by the inspector for the enforcement authority for the site;
- (2) Modifications to the Plans allowed as field modifications by the approval authority;
- (3) Performing temporary or permanent seeding of disturbed areas more frequently than required by the approved Plan or regulation; or
- (4) Increasing buffer distances.

The four-day timeframe may be unrealistic considering day to day business realities and the involvement of multiple government agencies.

If triggering events are observed on a second occasion, the permittee must determine whether the Plans are adequate or additional modifications are needed. The permittee must contact the relevant enforcement and approval authorities within 3 days to inform them of the subsequent triggering event. The permittee must also review its Plans, and submit revised Plans within 30 days of the second triggering event. The Plans must be implemented “immediately” upon approval. It is unclear what the ramifications will be of altering compliance with the initial Plans prior to approval of the revised Plans. Even though such changes may be warranted prior to approval of the revised Plans, permittees could conceivably incur enforcement action if they deviate from approved Plans before revised Plans are approved.

The Draft Permit continues the existing requirement in the Interim Permit that permittees conduct weekly inspections of the site to ensure compliance with the Plans. However, the Draft Permit now requires that the permittee use a standardized written report form provided by MDE. This form has not yet been made available by MDE.

TMDL

The Draft Permit includes a new requirement that applicants determine whether the waterway receiving stormwater runoff from a site is impaired for sediment. If the stormwater enters waters with an established or approved total maximum daily load, or TMDL, the permittee must implement measures to ensure that the discharge of pollutants from the site is consistent with the assumptions and requirements of

the approved TMDL, including any specific wasteload allocation that has been established that would apply to the discharge.

The practical meaning and impact of this provision will evolve over time as MDE develops policies to implement this new responsibility. It is likely that water bodies will increasingly be listed for sediment impairment in coming years. The evolution of the TMDL policy may have significant impacts on the regulated community and is likely to influence public comment on particular sites.

GENERAL PROVISIONS

Effective Date of Coverage

The Interim Permit makes coverage effective upon receipt by MDE of a complete NOI. The effective date of coverage under the Draft Permit occurs when the applicant receives notice that permit coverage has been approved, although there is no express statement on this point. The period from initial NOI submission to permit coverage may therefore be extended because of delays in receiving notice of coverage. Permit applicants should consider filing an NOI at least 50-60 days prior to the commencement of construction activity to ensure coverage and to guard against potential delays resulting from public comment.

Reopener Provision

The Reopener Clause is no longer premised on the need for evidence indicating a potential impact on water quality due to stormwater discharges. The Draft Permit states that it may be reopened at any time at the discretion of MDE or EPA.

IMPLICATIONS FOR CONSTRUCTION PROJECTS

The Draft Permit includes numerous provisions that will impact the management of stormwater discharges from construction sites. Greater lead time before permit approval, new opportunities for public comment, incorporation of ESD, more robust inspection and reporting obligations, and increased and ongoing assessment of ESCP and SMP effectiveness are the most significant differences.

Also significant is the change in coverage for existing permit holders. Though existing permittees will not have to resubmit an NOI or be subject to the new public participation process, they will be subject to certain requirements under the Draft Permit, such as monitoring for and responding to the “trigger events.” This could ultimately lead to the modification of an approved ESCP.

For construction activity that will occur after January 1, 2009, potential permittees should consider submitting an NOI for coverage under the General Permit prior to December 31, 2008. This will ensure coverage under the Interim Permit, even if construction activity is not imminent, avoiding the enhanced NOI requirements of the Draft Permit.

The issuance of the Draft Permit is one of several actions undertaken by MDE in recent months that will impact construction activity. Proposed regulations implementing ESD requirements, the subject of a previous Venable Alert, were published in the Maryland Register in December 5, 2008. MDE has also committed to updating the 1994 Standards and Specifications for Soil Erosion and Sediment Control. In addition, new regulations being promulgated by EPA will establish effluent limitation guidelines (“ELG”) and new source performance standards (“NSPS”) for construction stormwater. These developments, together with an anticipated increase in enforcement by MDE, will likely continue to broaden the

impacts on the regulated community.

The Draft General Permit is available on the MDE website at
www.mde.state.md.us/Permits/WaterManagementPermits/mdr10.asp

Regulations governing Environmental Site Design and revisions to the Maryland Stormwater Design Manual can be viewed at
www.mde.state.md.us/Programs/WaterPrograms/SedimentandStormwater/swm2007.asp Look under the heading “October 17 Updates.”

Maryland’s 303(d) TMDL list can be found at
www.mde.state.md.us/Programs/WaterPrograms/TMDL/Maryland%20303%20dlst/index.asp

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