

Stormwater Discharge: Avoid Enforcement Actions

Constantly changing federal, state, and local rules governing stormwater discharges often increase both the complexity of compliance and cost of noncompliance.

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Constantly changing federal, state, and local rules governing stormwater discharges are intended to improve the management and control of runoff water, but the practical result often increases both the complexity of compliance and cost of noncompliance. The rules impact the operation of existing facilities, design of new and modified facilities, and management of construction. As stormwater regulations become more stringent, it is increasingly difficult for facility management to figure out how to go with the flow and not drown in an enforcement tidal wave.

Industrial Facilities. How do you know if your industrial facility is subject to stormwater regulations? A facility's standard industrial classification (SIC) code or North American Industrial Classification System (NAICS) Code determines whether it must have an industrial stormwater permit. A fair presumption is that industry, such as manufacturing, mining, disposal sites, recycling yards, and transportation facilities, usually must obtain a permit. However, the answer is not always straightforward. For example, auxiliary functions, such as vehicle maintenance at a facility that primarily functions as a warehouse, can trigger a permit. If a regulator or environmental group believes a facility is discharging industrial storm water without a permit, then the facility could face administrative or judicial enforcement action.



(Credit: Hemera Technologies)

Construction Sites. When are permits required for “disturbed” areas of construction sites? In California and under federal regulations, construction of new facilities or remodeling of existing facilities requires a storm water permit for projects that will disturb (1) more than one acre of land or (2) less than one acre of land but are part of a common plan of development that will disturb more than one acre of land altogether.

Most facilities use a contractor for construction and require the contractor to maintain compliance with stormwater regulations. Project owners should pay close attention to contractual provisions allocating responsibility for construction stormwater compliance and related contractor's pollution liability insurance policies.

New and Remodeled Commercial Sites. Stormwater regulators frequently impose Low Impact Development (LID) requirements in permits issued to public agencies operating municipal separate storm sewer systems, such as cities and counties. LID

provisions require these agencies, when issuing construction permits, to regulate new development, redevelopment, and, sometimes, remodeling projects over certain size thresholds to incorporate design features to capture and treat, or infiltrate into the ground, certain amounts of precipitation.

LID design features can significantly impact a project's overall design. Local agencies also usually require project owners to execute operations and maintenance agreements for LID features, which creates potential future enforcement actions by the agency if operations or maintenance problems occur.

Requirements for Pollution Prevention Plans

Develop Required Plan. Industrial facilities or construction projects obtain permits by submitting a Notice of Intent and associated documents to the regulatory agency. Permittees must develop and implement Stormwater Pollution Prevention Plans, self-monitor implementation, and submit reports on the results. Monitoring reports are reviewed by regulators, but are also often available to the public on the regulator's website. Failure to develop a pollution prevention plan can be a violation in and of itself. These plans are technical documents that must address criteria specified in the permit.

Implement Plans. A common compliance mistake is failing to implement the pollution prevention plan carefully. Many basic pollution control measures are housekeeping strategies designed to conduct facility operations so that pollutant accumulation on impervious surfaces is minimized and accumulated pollutants are cleaned up before they wash into storm drains. Sometimes these practices may seem inconvenient to employees, and non-compliance can be tempting. Compliance managers should develop a system to monitor compliance practices so corrections can be made before the regulator or environmental group alleges violations.

Evaluate Monitoring Reports Before Submitting. Another common problem arises from submitting self-monitoring reports without critically evaluating what they mean from a compliance and enforcement exposure perspective. For example, it is better to investigate whether an instrument error resulted in a pH reading of 1 before submitting the self-monitoring report under penalty of law than after receiving a violation notice.

This is particularly important in California where industrial stormwater facilities with sampling results exceeding specified Numeric Action Levels must conduct Exceedance Response Actions that continue and escalate in complexity the longer exceedance persists. Develop a solid plan of action the first time exceedance occurs.

Respond Rapidly to Enforcement. It is very important to respond quickly upon receiving a notice of violation or enforcement from the regulator, or a notice of intent to sue from an environmental group. Some alleged violations, such as a failure to obtain a permit for a discharge, can be cured in a way that prevents environmentalists from suing if the discharger acts quickly. Similarly, California allows industrial stormwater dischargers to avoid civil penalties if the facility files a Notice of Intent within 60 days of receiving the regulator's notice. If the facility does not act within those 60 days, mandatory civil penalties must be imposed by the

regulator. Employees should use caution when attempting to “fix” non-compliance issues by negotiating directly with a regulator or environmentalist without also involving technical and legal professionals. Correspondence intended to “explain” a situation can sometimes make things more complicated and is impossible to retract.



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