

Office Memorandum

DATE : February 5, 2004

TO : Construction Activity Conditional Exclusion Stakeholders

FROM : Mary H. Lynn
Storm Water Rulemaking

PHONE : (651)297-2331

SUBJECT : Construction Activity Conditional Exclusion

The Minnesota Pollution Control Agency (MPCA) is currently developing draft rules to address the federal Phase II storm water regulations which are part of the National Pollutant Discharge Elimination System (NPDES) permit program. As part of the rule development process, the MPCA is conducting a series of stakeholder meetings to solicit input and gather feedback on several issues that are expected to be controversial during this rulemaking effort. You are part of one such group that we are convening to advise the MPCA on the specific issue of conditionally excluding certain construction activities from the requirement to apply for storm water permit coverage. The purpose of this memorandum is to provide a brief discussion of this issue and the MPCA's proposed approach to this issue.

Background

When the MPCA initiated the Phase II Storm Water rulemaking effort in July of 2002, with the publication of a Request for Comments on the proposed rulemaking, the MPCA did not contemplate appointing an advisory committee to comment on the possible rules. At that time, the MPCA expected to be working under an expedited rulemaking timeline, in an effort to adopt rules to meet the March 10, 2003, federal deadline for Phase II program compliance. However, in part due to limited resources and competing priorities within the Storm Water Program, the MPCA needed to revise the timeline for the Phase II rulemaking. This revised timeline provides time for the MPCA to conduct stakeholder meetings on the draft rules. The MPCA is planning to formally propose the rules in May 2004.

Agricultural Exclusion

Storm water runoff from non-point source agricultural activities are excluded from NPDES permit requirements under 40 CFR 122.3(e). Specifically, storm water discharges associated with construction activity on agricultural land for the purpose of growing crops are not covered by the NPDES program. Discharges from these activities are considered to be "agricultural storm water discharges" and are excluded from the requirements of the NPDES permit program. The Natural Resource Conservation Service (NRCS)/Board of Water and Soil Resources (BWSR) has requested that the MPCA consider some conservation practice projects for the purpose of controlling erosion, such as grassed waterways, be considered under the agricultural exclusion.

However, storm water discharges associated with the construction of livestock feeding facilities are subject to NPDES permit coverage. The U.S. Environmental Protection Agency has determined that discharges associated with the construction of livestock feeding facilities, including clearing, grading, and excavation, are different both in content and nature from storm water discharges associated with the operation of these facilities. The former are not considered "agricultural" and are not entitled to the exclusion for agricultural storm water discharges.

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Therefore, under the NPDES storm water regulations, a permit is required from operators of livestock feeding facilities for any construction activity disturbing equal to or greater than one acre. Disturbances of less than one acre also need permit coverage if that activity is part of a "larger common plan of development or sale" that is greater than one acre.

Conditional Exclusion

The MPCA tried to take a common sense approach in developing the Phase II storm water program and rules with the understanding that Agency resources are limited and the number of regulated entities is large. Therefore, in order to protect water quality while keeping the permitting system as simple as possible, the MPCA is proposing to conditionally exclude certain qualifying feedlot and NRCS/BWSR conservation practice projects from the requirement to apply for construction storm water permit coverage, if certain requirements are met. The goal of the conditional exclusion is to develop a more streamlined permitting process for the construction program, and to prevent double permitting and double fees for feedlot facilities. This streamlined permitting approach provides the MPCA the needed flexibility in managing the construction storm water program by reducing the permitting workload and allowing the MPCA to focus its' efforts on those areas of the program which will provide the most environmental benefit.

For feedlot projects, the MPCA used the existing state feedlot permit structure to meet the construction storm water permit requirements for feedlots. This approach prevents the feedlot owner from having to get two permits, however some of the permits will be state permits instead of federal NPDES permits. For NRCS/BWSR conservation practice projects, the MPCA used the existing financial assistance contract and project specification documents. This approach addresses the concern that landowners, if required to get permit coverage for smaller construction activities, might be discouraged from conducting land conservation projects. The proposed conditional exclusion keeps these parties under the Phase II program, but allows them to avoid submitting a permit application if they fulfill certain requirements. Specifically, there must be another mechanism in place to ensure project oversight, and best management practices (BMPs) for erosion and sediment control must be implemented. Attachment 1 contains the draft rule provision for the construction activity conditional exclusion.

Because this proposed rule provision does not closely follow federal permit coverage requirements for construction activity, concerns may be raised regarding this approach because it does not include the issuance of an NPDES permit to every party that is required to have such a permit under the federal requirements. However, the conditional exclusion rule provision still requires these construction activities to comply with certain requirements, and it provides for specific actions that must be taken if they do not. Additionally, owners and operators of these construction projects also have the option of submitting a permit application should they seek legal coverage under the NPDES permit.

Interim Policy

The MPCA has developed an interim policy to bridge the time between when the Phase II requirements became effective and when this rulemaking will be completed. As part of this interim policy, the MPCA worked to identify the specific requirements and oversight needed for these proposed conditionally excluded projects. As part of this interim policy, the MPCA staff developed a fact sheet for storm water BMPs for feedlot construction sites (*Storm water Control Requirements at Feedlot Construction Sites*), and worked with NRCS staff to develop erosion and sediment control requirements within NRCS grant and project specification documents.

Stakeholder Meeting

The MPCA is seeking input and comment on this proposed approach for the construction activity conditional exclusion and has scheduled a stakeholder meeting on this issue for February 18, 2004, at the MPCA Office in St. Paul, 520 Lafayette Road North. The MPCA expects that possibly more than one meeting on this issue may be scheduled.

If you would like to provide comment on this issue, but will not be able to attend the stakeholder meeting on February 18th, you may submit written comments by e-mail to: stormh2orules@pca.state.mn.us.

The Storm Water Rulemaking Team has also been working to coordinate this rulemaking effort with the planning efforts of the Storm Water Design Team. The Design Team, which consists of MPCA staff and external stakeholders with varying interests, is currently working to design a long-term state-wide storm water management effort to be based on effective partnerships with others outside the MPCA, at both the state and local level. Because the storm water rulemaking and program design efforts are inter-related, the Rulemaking Team is also bringing several rule issues to the Design Team for discussion, including the construction activity conditional exclusion. This issue was discussed at the December 19, 2003, Design Team meeting; the notes from that meeting are provided in Attachment 2 for your information.

The MPCA hopes this stakeholder process will assist us in developing and completing the draft rule. The MPCA thanks you in advance for agreeing to participate in this rulemaking process, for your time and efforts, and for assisting us in this effort to move this rulemaking effort forward.

Attachments

Subp. 5. **Construction activity conditional exclusion.** The following construction activities that meet the requirements in subpart 6, items A to E, are conditionally excluded from the requirement to submit a permit application prior to commencement of construction:

A. construction activities that disturb one or more acres of soil for purposes of building a new or expanded animal feedlot, manure storage system or animal holding facility or performing related maintenance; and

B. construction activities that disturb one to less than 5 acres of soil and receive financial assistance from the Natural Resources Conservation Service or the Board of Water and Soil Resources.

Editor note: The goal here is to develop a more streamlined permitting process for the construction program, and prevent double permitting and double fees for feedlot facilities. The proposed rule conditionally excludes certain feedlots and NRCS/BWSR projects from the requirement to apply for construction storm water permit coverage if certain requirements are met.

Are there other activities that could also be potentially excluded, - i.e. DNR or SWCD projects that involve soil and erosion damage projects that do not fall under the federal exemption for agricultural tillage activities?

Subp. 6. **Conditional exclusion criteria.** If a construction activity covered under this conditional exclusion is found not to be in compliance with the conditions in items A to E, the owner or operator must submit a complete permit application within 30-days of receipt of notice of this finding. The commissioner will determine the conditions that must be met before an owner or operator can qualify for this conditional exclusion after noncompliance has occurred.

A. the owner or operator applied for and obtained:

(1) a state disposal permit as required under part 7020.0405, subpart 1, item B;

(2) an interim permit as required under part 7020.0405, subpart 1, item C; or

(3) a short form construction permit as required under part 7020.0405, subpart 1, item D; or

B. the owner or operator fulfilled the pre-construction notification requirements under part 7020.2000, subpart 5; or

C. the owner or operator applied for and entered into a financial assistance contract with the Natural Resources Conservation Service or the Board of Water and Soil Resources; and

D. the owner or operator implements the best management practices identified in subpart 7, and if applicable, part 7090.2070, subparts 1, 2, 4 and 6; and

E. the owner or operator works cooperatively with staff and/or the jurisdictional MS4 or county feedlot officer to solve storm water pollution problems if they arise, enters into an agreement or schedule for corrective action, if applicable, within ten business days and fulfills the agreement conditions.

Subp. 7. **Best management practices required for conditional exclusion projects.**

Construction at sites meeting the requirements for a conditional exclusion under subpart 5 must include the BMPs in items A. to E.

A. Minimize size of disturbed area. When permanent vegetation must be disturbed, limit the area of disturbance to the minimum required for the project.

B. Sediment control. Where disturbed areas have steep slopes of concentrated flow, use a combination of buffers and/or other sediment control measures to protect water quality. All sediment control practices must be established on down gradient perimeters before any upgradient construction activities begin. These practices shall remain in place until final stabilization has been established.

C. Soil stockpiles. Place topsoil or other temporary stockpiles of soil in locations where they will not be subject to erosion from channelized flow. If stockpiles are placed within 300 feet and up-slope of a surface water or tile inlet, maintain a minimum 50-foot-wide grass buffer or use equivalent sediment control measures between the soil stockpile and surface water.

D. Providing cover. Seed and temporarily stabilize disturbed areas with mulch or blanket until the seed establishes a permanent vegetative cover. Temporary stabilization must be done within the following time frames after final grading for the following slopes, described as horizontal run followed by vertical rise:

- (1) slopes steeper than 3:1, 7 days;
- (2) slopes of 10:1 to 3:1, 14 days; and
- (3) slopes flatter than 10:1, 21 days.

E. Final stabilization. If construction is completed after the fall seeding cutoff date, implement seeding and final stabilization as soon as feasible the following spring using any combination of the following practices:

- (1) grade along the contour with tracks horizontal to the slope and track the finished grade to compact the soil surface for temporary erosion protection;
- (2) apply mulch for erosion and frost protection;
- (3) apply mulch, blanket and dormant seeding; and
- (4) install silt fence or stake hay bales down slope of disturbed area.

Editor note: These BMPs are based the Construction Program factsheet “Storm Water Control Requirements at Feedlot Construction Sites”

Subp. 8. Storm Water Pollution Abatement Requirements. Persons performing construction activities that disturb one or more acres of soil that are required to apply for a permit under part 7020.0405, subpart 1, must comply with, at minimum, the best management practices in subpart 7, and if applicable, part 7090.2070, subparts 1, 2, 4 and 6.

Editor note: Subp. 8 is included to identify the storm water requirements that apply to feedlots permits.

The feedlot rules, if amended in the future, could include the requirement that feedlot permittees comply with the applicable requirements of the storm water rule. Specifically, identify in the feedlot rules (under 7020.0535), the storm water rule requirements that apply to feedlots by modifying existing permits issued to feedlot owners to include the storm water regulations.

Storm Water Design Team Meeting Notes for Conditional Exclusion Rule Discussion - 12/19/03

The purpose of the afternoon discussion was to provide an overview of the conditional exclusion draft rule, and to request some input and feedback on the draft rule provision.

1. What types of conservation projects should be conditionally excluded?
 2. Are there other specific construction activities, other than feedlot and conservation projects, that should be considered under the conditional exclusion, and why?
 3. What challenges exist that could make compliance with the draft rule difficult?
- Why exempt feedlots? Feedlots not exempted, are excluded from requirement to apply for permit coverage if specific requirements (i.e. covered under feedlot permit, must implement BMPs).
 - Federal agricultural exemption for construction activity for the purpose of growing crops – interpreted to include grassed waterway construction.
 - Feedlot exemption – should only pertain to those with permits.
 - What projects should be conditionally excluded?
 - Prairie
 - Wetland banks
 - Habitat restoration
 - Streambank stabilization
 - Restoration
 - DNR permit rule – SWCD obtains a general permit through DNR for specific projects (10 day permit process).
 - Restoration projects – some are “problem” projects.
 - Better project oversight needed.
 - Problems more likely with projects of longer duration.
 - Greater likelihood of project oversight by implementing agency than under MPCA permit.
 - No permit fee for projects of a certain size or cost.
 - Generic SWPPP– reduced plan requirement for certain projects.
 - SWCD currently does plans for projects.
 - There are other agencies, besides NRCS and BWSR that are doing conservation practice projects – SWCDs,... and others(?) that should be considered.
 - Adopt plans, with pre-approved standards, for specific types of projects.
 - Model plans could be in rule appendix.
 - Permit all projects.
 - Haybales – out.