



Storm Water Phase II Proposed Rule

Conditional No Exposure Exemption for Industrial Activity

Storm Water Phase II Proposed Rule Fact Sheet Series

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This fact sheet is based on the Storm Water Phase II Proposed Rule. Therefore, the information provided herein is subject to change upon publication of the final Phase II rule in November 1999. A revised series of fact sheets will be provided at that time. A comprehensive list of the current fact sheets is in the text box at left.

Why Is the Phase I No Exposure Exemption Addressed in the Phase II Proposed Rule?

The 1990 storm water regulations for Phase I of the federal storm water program identify eleven categories of industrial activities that must obtain a National Pollutant Discharge Elimination System (NPDES) permit. Operators of certain facilities within category eleven (xi), commonly referred to as "light industry," were exempted from the definition of "storm water discharge associated with industrial activity," and the subsequent requirement to obtain an NPDES permit, provided their industrial materials or activities were not "exposed" to storm water. This Phase I exemption from permitting was limited to those facilities identified in category (xi), and did not require category (xi) facility operators to submit any information supporting their no exposure claim.

In 1992, the Ninth Circuit court remanded to EPA for further rulemaking the no exposure exemption for light industry after making a determination that the exemption was arbitrary and capricious for two reasons. First, the court found that EPA had not established a record to support its assumption that light industrial activity that is not exposed to storm water (as opposed to all other regulated industrial activity not exposed) is not a "storm water discharge associated with industrial activity." Second, the court concluded that the exemption impermissibly relied on the unsubstantiated judgment of the light industrial facility operator to determine the applicability of the exemption.

This fact sheet describes the conditional no exposure exemption as presented in the Phase II Proposed Rule. EPA relied heavily upon the conditional no exposure exemption concept and rule language developed by the Urban Wet Weather Flows Federal Advisory Committee. The Committee included a balanced mix of representatives from State and local government, industry, construction, and environmental groups.

Who Would Be Eligible to Claim No Exposure?

As revised in the Phase II Proposed Rule, the conditional no exposure exemption applies to ALL industrial categories listed in the 1990 storm water regulations, regardless of the type of industry, except for construction activities disturbing more than 5 acres (category ten (x)) and those facilities individually designated by the NPDES permitting authority.

What Would Be Required Under the No Exposure Provision?

The Phase II proposal represents a significant expansion in the scope of the original no exposure provision in terms of eligibility (as noted above) and responsibilities for facilities claiming the exemption. Under the original no exposure provision, a light industry owner/operator was expected to make an independent determination of whether there was "exposure" of industrial materials and activities to storm water and, if not, simply not submit a permit application. Under the proposed conditional no exposure exemption, however, an owner/operator seeking an exemption, including

existing light industry owners/operators (i.e., category (xi) facilities) claiming no exposure, would need to:

- ❑ Submit written certification that the facility meets the definition of “no exposure” to the NPDES permitting authority once every 5 years.
 - The Phase II Proposed Rule includes a draft three-page *Checklist for No Exposure Certification* that uses a series of yes/no questions to aid facility owners/operators in determining whether they have a condition of no exposure. The *Checklist* serves as the necessary certification of no exposure if the owner/operator is able to answer all the questions in the negative.
 - A copy of the draft *Checklist* can be obtained from the U.S. EPA Office of Wastewater Management (OWM) web site, the Storm Water Phase II Proposed Rule published in the *Federal Register*, or by contacting OWM.
- ❑ Submit a copy, upon request, of the *Checklist* to the municipality in which the facility is located.
- ❑ Allow the NPDES permitting authority or, if discharging into a municipal separate storm sewer system, the owner/operator of the system, to (1) inspect the facility and (2) make such inspection reports publicly available upon request.

A regulated industrial owner/operator would need to either apply for a permit or submit a no exposure certification in order to be in compliance with the NPDES storm water regulations. It is important to note that any permit held before submitting a certification would become null and void.

Even when an industrial owner/operator certifies to no exposure, the NPDES permitting authority would still retain the authority to require the owner/operator to apply for an individual or general permit if the NPDES permitting authority has determined that the discharge is contributing to the violation of, or interfering with the attainment or maintenance of, water quality standards, including designated uses.

What Is The Proposed Regulatory Definition of “No Exposure”?

The intent of the no exposure provision is to provide facilities with industrial materials and activities that are entirely sheltered from storm water a simplified way of complying with the storm water permitting provisions of the Clean Water Act (CWA). This includes facilities that are located within a larger office building, or facilities at which the only items permanently exposed to precipitation are roofs, parking lots, vegetated areas,

and other non-industrial areas or activities. The Phase II proposed regulatory definition of “no exposure” follows.

As proposed, ***no exposure*** means all industrial materials or activities are protected by a storm-resistant shelter so that they are not exposed to rain, snow, snowmelt, or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, byproducts, or waste products, however packaged.

The term “storm-resistant shelter,” as used in the proposed no exposure definition, would include completely roofed and walled buildings or structures, as well as structures with only a top cover but no side coverings, provided materials under the structure are not otherwise subject to any run-on and subsequent runoff of storm water. While the intent of the proposed no exposure provision is to promote a condition of permanent no exposure, it would allow certain machinery, such as trucks, to pass between buildings and, during passage, be exposed to rain and snow. Adequately maintained mobile equipment (e.g., trucks, automobiles, trailers, or other such general purpose vehicles found at the industrial site that are not industrial machinery or material handling equipment and that are not leaking contaminants or are not otherwise a source of industrial pollutants) also could be exposed to precipitation or runoff. Such activities alone would not prevent a facility from certifying no exposure under the proposed provision. Similarly, trucks or other vehicles awaiting maintenance at vehicle maintenance facilities that are not leaking contaminants or are not otherwise a source of industrial pollutants, would not be considered exposed.

In addition, EPA recognizes in the proposed rule that other instances could occur in which permanent no exposure of industrial activities or materials is not possible and, therefore, under such conditions, materials and activities could be covered with temporary covers (e.g., tarps) between periods of permanent enclosure. The proposed rule does not specify every such situation, but NPDES permitting authorities could address this issue on a case-by-case basis.

For purposes of the proposed exemption, particulate matter emissions from roof stacks/vents that are regulated by, and in compliance with, other environmental protection programs (i.e., air quality control programs) and that do not cause storm water contamination would be considered not exposed. Visible deposits of residuals (e.g., particulate matter) near roof or side vents would be considered “exposed.” Likewise, visible “track out” (i.e., pollutants carried on the tires of vehicles) or windblown raw materials would be considered “exposed.” Leaking pipes containing contaminants exposed to storm water would be deemed “exposed,” as would past sources of storm water

contamination that remain onsite. General refuse and trash, not of an industrial nature, would not be considered exposed industrial materials; however, industrial refuse and trash that is left uncovered would be deemed “exposed.”

Would There Be Any Concerns Related to Water Quality Standards?

Yes. The proposed rule specifies that actions taken to qualify for no exposure must not interfere with the attainment or maintenance of water quality standards, including designated uses. Designated uses can include use as a drinking water supply or for recreational purposes.

Many efforts to achieve no exposure would employ simple good housekeeping and contaminant cleanup activities such as moving materials and activities indoors into existing buildings or structures. In limited cases, however, industrial owners/operators may make major changes at a site to achieve no exposure. These efforts could include constructing a new building or cover to eliminate exposure or constructing structures to prevent run-on and storm water contact with industrial materials and activities. Major changes undertaken to achieve no exposure, however, could increase the impervious area of the site, such as when a building with a smooth roof is placed in a formerly vegetated area. Increased impervious area can lead to an increase in the volume and velocity of storm water runoff, which, in turn, can result in a higher concentration of pollutants in the discharge, since fewer pollutants are naturally filtered out.

The concern of increased impervious area is addressed in the last question on the draft *Checklist*, which asks, “Have you paved or roofed over a large, formerly exposed, pervious area in order to qualify for no-exposure? Please indicate approximately how much area was paved or roofed over from the choices below.” The single purpose of this question is to aid the NPDES permitting authority in assessing the likelihood of such actions interfering with water quality standards. Completing this question would not influence the ability to qualify for the conditional no exposure exemption and would be used for informational purposes only.

What Would Happen if the Condition of No Exposure Is Not Maintained?

Under the proposal, the no exposure exemption would be conditional and not an outright exemption. Therefore, in cases in which there is a change in circumstances that causes exposure of industrial activities or materials to storm water, the owner/operator would be required to comply immediately with all the requirements of the NPDES Storm Water Program, including applying for and obtaining a permit.

Failure to maintain the condition of no exposure or obtain coverage under an NPDES permit would result in the unauthorized discharge of pollutants to waters of the United States, which could result in penalties under the CWA. Where a facility operator determines that exposure would occur in the future due to some anticipated change at the facility, the operator would need to submit an application and acquire storm water permit coverage prior to the exposed discharge to avoid such penalties.

Having the proposed no exposure exemption be conditional and requiring submission of a written certification is EPA’s response to the court’s second basis for the remand, which criticized allowing the facility owners/operators to determine for themselves that there was no exposure and then simply not apply for a permit without any further action. The draft *Checklist* provides a greater assurance of actual no exposure as defined by EPA, while the conditional nature of the exemption removes the chance of potentially harmful discharges being legally unpermitted.

For Additional Information

Contacts

- ☞ U.S. EPA Office of Wastewater Management
 - Phone : 202 260-5816
 - E-mail: SW2@epa.gov
 - Internet: www.epa.gov/owm/sw2.htm
- ☞ Your NPDES Permitting Authority. (A list of names and phone numbers for each U.S. EPA Region is included in Fact Sheet 2.9. Additional contact names, addresses, and numbers for each State can be obtained from the U.S. EPA Office of Wastewater Management)

Reference Documents

- ☞ Storm Water Phase II Proposed Rule Fact Sheet Series.
 - Contact the U.S. EPA Water Resource Center at 202 260-7786 or at waterpubs@epa.gov
 - Internet: www.epa.gov/owm/sw2.htm
- ☞ Storm Water Phase II Proposed Rule, published on Jan. 9, 1998 in the *Federal Register* (63 FR 1536).
 - Internet: www.epa.gov/owm/sw2.htm