ENVIRONMENTAL LAW FOR THE CONSTRUCTION INDUSTRY

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I. INTRODUCTION

Practically every significant construction project is, in effect, an environmental project that will require environmental permitting or other authorizations. If your client is the owner or operator of a construction project in Texas, it may be subject to environmental regulatory programs under the jurisdiction of federal, state, and local governmental authorities. Even if your client is not the party responsible for obtaining environmental permits, your client's project may be delayed or quashed altogether by the owner/operator's failure to obtain environmental permits at the appropriate time. A project that proceeds without authorization, or that does not comply with the terms and conditions of environmental authorizations, can result in environmental agency enforcement and significant penalties.

This paper summarizes the intertwining of several environmental law programs into the pre-construction and construction phases of a project, with heavy emphasis on the regulation of storm water discharges.

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THE ENFORCERS

Environmental laws and regulatory programs are a mishmash of intertwined jurisdictions. The regulatory authorities that implement environmental programs affecting the construction industry include:

- The U.S. Environmental Protection Agency ("EPA");
- The Texas Commission on Environmental Quality ("TCEQ");
- Municipalities;
- Counties; and
- Quasi-governmental authorities such as Municipal Utility Districts.

Failure to permit also can lead to suits by private parties, including citizen suits. In 2016, the TCEQ brought enforcement actions, and collected penalties, against over 40 companies at construction projects in Texas.

II. STORM WATER[2] DISCHARGES

The vast majority of enforcement activity against construction projects and the construction industry itself takes place under the umbrella of the federal Clean Water Act in storm water regulation.[3] The primary pollutant of concern in construction storm water discharges is suspended solids from erosion of sediment.

The Clean Water Act primarily is implemented through its permit program - the National Pollutant Discharge Elimination System program. Clean Water Act prohibits the "discharge" of any "pollutant" from a "point source" to "waters of the United States" unless that discharge is permitted in advance.[4]

A point source is:

> ...any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.[5]

[2] Burning question: Is "storm water" one word or two? EPA often uses "stormwater," but most environmental law practitioners write it as "storm water."
[3] Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq*., commonly known as the Clean Water Act.
[4] 33 U.S.C. Section 1342(a).
[5] 40 C.F.R. § 122.2.

EPA has defined discharges of storm water "associated with industrial activity" to be point sources of pollution.[6] EPA then identifies storm water discharges from two categories of construction activities as being "associated with industrial activity" and, thus, subject to permitting requirements. Those are:

- **Large Construction Activity**: Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;[7] and

- **Small Construction Activity**: Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres.[8]

One major point of confusion, and source of enforcement, is that a smaller project that is part of a "larger common plan of development" of 1 acre or more is subject to the permit requirements. The fact that individual builders can commence construction in a development at different times is irrelevant, and title to property at particular times does not determine permitting obligations.

EPA has made numerous efforts to clarify the "larger common plan of development" concept to a confused regulated industry in guidance.[9]

A. Construction General Permit

The Clean Water Act permit program allows for three types of permits: individual, group, and general. General permits are an administrative device used by EPA (and, in Texas, by the TCEQ) to relieve the burden on the agency when permits are required for large numbers of similar discharges. A general permit, unlike an individual permit, is issued by notice and publication in the Federal Register (or delegated state register). Permit coverage is obtained by filing a Notice of Intent ("NOI").[10] The NOI, as its name suggests, advises the regulator of a potential permittee's intention to fully comply with the terms and conditions of the published

[6] 40 C.F.R. § 122.26(a)(ii)
[7] 40 CFR § 122.26(b)(14)(x).
[8] 40 CFR § 122.26(b)(15).
[9] U.S. Environmental Protection Agency website, *Stormwater Discharges from Construction Activities – Frequently Asked Questions*, https://www.epa.gov/npdes/stormwater-discharges-construction-activities#faq.
[10] TCEQ Form 20022 (rev. June 13, 2016).

General Permit. A general permit carries a 5-year term from the date of its publication, regardless of when a permittee files its NOI.

The State of Texas has been delegated the authority to operate the federal Clean Water Act permit program under the Texas Water Code.[11] Texas, through the TCEQ, has issued a general permit under which discharges of storm water associated with construction activity are authorized under Chapter 26 of the Texas Water Code. This permit is commonly referred to as the Construction General Permit.[12] Storm water permitting at construction sites is largely managed through that permit.[13] The stated goals of the construction storm water permit program are to: (i) prevent or minimize the impact of construction; (ii) minimize erosion during construction; and (iii) consider post-construction storm water management.[14] The current permit - TXR 150000 - was issued on March 3, 2013 and will expire March 4, 2018.

B. What is Construction Activity?

TCEQ's Construction General Permit authorizes storm water discharges from construction activities such as clearing, grading, excavation, demolition, and activities that expose or disturb soil. The permit also authorizes discharges of storm water from "construction support activities" that specifically support the construction activity and involve earth disturbance or pollutant-generating activities such as activities associated with concrete or asphalt batch plants, rock crushers, equipment staging yards, materials storage areas, excavated material disposal areas, borrow areas. Some non-storm water discharges also are authorized.

According to EPA guidance, "construction activity" does not refer to unrelated earth-disturbing activities such as interior remodeling, completion of interiors of structures, etc. "Construction activity" also does not include routine earth disturbing activities that are part of the normal day-to-day operation of a completed facility (e.g., daily cover for landfills, maintenance of gravel roads or parking areas, landscape maintenance, etc.).[15]

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[11] Note that New Mexico is the only one of the five EPA Region 6 states that has not received delegation of the Clean Water Act permit program. As a result, construction projects in New Mexico remain directly regulated by the EPA rather than the state environmental agency, the New Mexico Environment Department.

[12] General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, effective March 3, 2013, commonly referred to as the "Construction General Permit."

[13] Note that any permit applicant may choose to permit individually, and TCEQ retains discretion to require individual permits where water quality concerns dictate.

[14] Discharges to or through Municipal Separate Storm Sewer Systems (e.g. the curb drain systems in Dallas, Austin, Ft. Worth, San Antonio, Houston, and many other municipalities) are discharges to water in the state.

[15] U.S. Environmental Protection Agency website, *Stormwater Discharges from Construction Activities – Frequently Asked Questions*, https://www.epa.gov/npdes/stormwater-discharges-construction-activities#activities.

C. Who Is Responsible?

Parties meeting the definition of "operator" of a construction project must comply with the Construction General Permit. The Construction General Permit defines two types of operators: Primary and Secondary. Operators at small construction sites (1 to less than 5 acres) are those who meet the definition of a primary operator. However, at large construction sites (5 acres or more), the two distinct categories of operators apply.

1. Primary Operators

Primary operators are defined as the person or persons that meets either of the following two criteria:

a. The person or persons that have on-site operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications; or

b. The person or persons that have day-to-day operational control of those activities at a construction site that are necessary to ensure compliance with a Storm Water Pollution Prevention Plan ("SWPPP" or sometimes "SWP3"), discussed more fully below, for the site or other permit conditions.[16]

Primary operators, as the name suggests, have primary responsibility for compliance with the Construction General Permit. TCEQ regulatory guidance advises that primary operators are parties who can modify the construction plans and specifications, or direct workers at the site in order to maintain compliance with the permit conditions.[17] At large construction sites, primary operators are responsible for developing, implementing, and maintaining on site, the SWPPP; filing the NOI with TCEQ (including an application fee), sending a copy of the NOI to the Municipal Separate Storm Sewer Systems ("MS4") authority prior to starting construction activity, posting the required Primary Operator Site Notice at the site entrance, complying with the final stabilization requirements, and filing the Notice of Termination[18] ("NOT") with TCEQ (and a copy to the MS4) after final stabilization. At small construction sites, NOIs and NOTs are not required, but the operator remains responsible for preparation and implementation of the SWPPP, posting a Small Site Notice, and notifying the MS4.

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[16] General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, effective March 3, 2013, Section I.B.
[17] *Primary and Secondary Operators Under the Construction General Permit for Stormwater Discharges*, RG-486 (Rev. Jan. 2014).
[18] TCEQ Form 20023 (Oct. 17, 2014).

There can be more than one party within the definition of a primary operator at a construction project. TCEQ does not construe the terms "on-site operational control" and "day-to-day control" to mean that the operator has to be present at the site every day. The agency has not established any minimum or maximum number of hours that create day-to-day operational control. The emphasis of the day-to-day portion of the definition is whether the operator has day-to-day control "to ensure compliance with" the storm water controls established in the SWPPP.

Developers and owners almost always are considered "operators." This is the case even when there will be one or more general contractors actually carrying out the on-site compliance activities, such as inspections and maintenance of storm water controls. Generally, contractual shifting of responsibility between the various contractors does not affect the agency's enforcement authority. General contractors are responsible for compliance with the permit terms and conditions even if the SWPPP was developed by someone else (such as the owner of the project).

2. Secondary Operators

Secondary operators are defined as the person or entity, often the property owner, whose operational control is limited to:

a. The employment of other operators, such as a general contractor, to perform or supervise construction activities; or

b. The ability to approve or disapprove changes to construction plans and specifications but who does not have day-to-day on-site operational control over construction.[19]

TCEQ regulatory guidance advises that secondary operators include parties who can approve or disapprove changes *initiated* by another permitted operator, including associated cost, and can hire or fire another operator. However, TCEQ notes that secondary operators, as distinguished from primary operators, are parties that cannot *initiate* changes to the construction plans and specs. One important caveat, if there is not a primary operator at the construction site, then the secondary operator is defined as the primary operator and must comply with the requirements for primary operators. Also note that a secondary operator is not prohibited from submitting an NOI as a primary operator, which allows the operator more flexibility to direct work at the site as the project progresses.

[19] General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, effective March 3, 2013, Section I.B.

Secondary operators are responsible for participating in development of the SWPPP, signing a completed Secondary Operator Site Notice and posting it at the site entrance, and submitting a copy of that notice to the MS4.

D. The Storm Water Pollution Prevention Plan

The SWPPP is the heart of compliance with the Construction General Permit. TXR150000 requires, as does its federal counterpart, the operator to develop and implement a SWPPP. In order to meet the terms and conditions of the Construction General Permit, an operator must perform a Texas two-step: (i) prepare *and implement* a SWPPP; and, only after implementation has taken place (ii) complete and submit the NOI signaling an intention to comply with the terms and conditions of the Construction General Permit.

The storm water controls required under TXR150000 are largely based on implementing best management practices ("BMPs"), and do not currently contain water-quality-based effluent limits, i.e. specific numerical criteria. The required contents of a SWPPP include, among other things, identifying and addressing all potential sources of pollution that may affect the quality of storm water discharges from the site. A SWPPP contains, at a minimum, a project description, a location map, a site map showing construction details, information on receiving waters, and a description of the BMPs used to minimize the potential for pollution in storm water discharges both during and after construction activities. Additionally, the SWPPP must confirm compliance with fairly rigid site inspection requirements. During the course of a construction project, the original plans may be changed often, and the SWPPP is required always to reflect the current conditions and controls employed at a site.

E. Enforcement

When enforcement does occur, the construction industry finds that it has several masters. In Texas, TCEQ has primacy over implementation and enforcement of the federal storm water permitting program, but that does not mean that EPA is devoid of enforcement authority.[20] Additionally, a lot of the real action occurs at the local level where municipalities have city code-based construction storm water programs that can almost entirely overlap the TCEQ program, but which are independently enforceable by the municipalities.

[20] In the early days of the storm water permit program, prior to TCEQ's assumption of the permitting authority, EPA aggressively pursued enforcement of construction-related storm water discharge violations. For example, in June 2001, a civil Complaint against Wal-Mart Stores, Inc. resulted in a settlement penalty amount of $1,000,000 and a $4.5 million effort to improve the retailer's compliance with storm water requirements at its construction sites nationwide.

As an example, the City of Dallas Code of Ordinances has provisions governing storm water discharges from construction sites that essentially incorporate by reference the requirements of the TCEQ's Construction General Permit.[21] But, there are several additional zingers that directly and significantly impact construction projects. *See* e.g. City of Dallas Code of Ordinances, Art. IX, §§ 19-118(f), (g), and (h).

Finally, the federal Clean Water Act contains citizen suit provisions allowing citizens with standing to stand in the shoes of the government to enforce against violations. Citizens can seek civil penalties, injunctive relief, and attorney's fees.[22]

III. OTHER PERMIT PROGRAMS AND POTENTIAL SOURCES OF LIABILITY

A. Air Permitting

Air permitting requirements can be triggered by new facility construction as well as expansion projects. Section 382.0518(a) of the Texas Clean Air Act states: "Before work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning the construction or modification must obtain a permit from the commission."[23] TCEQ's implementing air permitting regulations state that **before** any actual construction work begins on a new facility that will emit (or to modify an existing facility that does emit) air contaminants, an air permit must be obtained.[24]

Identifying what constitutes the "start of construction" is crucial to a construction project. TCEQ guidelines clarify that "construction" will be interpreted very broadly to include practically anything other than site clearance or site preparation.

B. Texas Water Rights

The construction industry also can be affected by a bizarre position of the State of Texas concerning water rights involving the "blue lines" on ancient USGS maps. Under Section 11.081 of the Texas Water Code, [25] the TCEQ's water rights regulations state: that "no person may divert, store, impound, take or use water or begin construction of any work designed for the

[21] City of Dallas Code of Ordinances, Art. IX, §19-118(a).
[22] 33 U.S.C. § 1365.
[23] Tex. Health & Safety Code Chap. 382
[24] 30 Tex. Admin. Code § 116.110.

[25] Tex. Water Code § 11.081.

storage, taking, or diversion of water without first obtaining a water right."[26] Construction on a USGS "blue line" can result in agency enforcement of this authority.

C. Waste Regulation

Parties that generate solid or hazardous wastes in connection with industrial activities are responsible for managing those wastes, including storage, transportation, and disposal, in accordance with TCEQ's regulatory program under the Texas Solid Waste Disposal Act. TCEQ defines "solid waste" broadly to include any discarded material, whether solid, liquid, semisolid, or gas, from industrial and commercial activities.

TCEQ's ultimate enforcement tool is a regulatory provision commonly called "the General Prohibition." That regulation states:

> [N]o person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause:
>
> (1) the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the Texas Commission on Environmental Quality;
> (2) the creation and maintenance of a nuisance; or
> (3) the endangerment of the public health and welfare.[27]

In the absence of, or in addition to, some other clear regulatory violation, TCEQ will often allege a violation of the General Prohibition because of the practically unlimited application to any person, and the broad array of activities that could be deemed "causing," "suffering," or "allowing." Even loose causation may be enough to support this type of claim.

The chances of an enforcement action under the General Prohibition go way up when a spill or discharge occurs. TCEQ regulations require reporting of certain spills or discharges under Chapter 327 by the "responsible person."[28] The responsible person is the owner or operator of the site, or "any other person who causes, suffers, allows, or permits, a discharge or spill."[29] The General Prohibition does not specifically depend upon a reportable release. However, in the event of a reportable release, it is entirely possible that TCEQ would look to a general contractor

[26] 30 Tex. Admin. Code § 297.11.
[27] 30 Tex. Admin. Code § 335.4.
[28] 30 Tex. Admin. Code Chap. 327.
[29] 30 Tex. Admin. Code § 327.2(15).

that is in control of a construction site where a reported discharge of waste has occurred (particularly if construction activities caused the release) as a responsible person who has spill response obligations, as well as a person who has violated the General Prohibition. This is an area where contractual risk allocation will be important, although it will not impact direct liability to the TCEQ.

D. CERCLA/Texas Solid Waste Disposal Act

The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA") imposes strict liability upon four categories of potentially responsible parties ("PRPs") for any release or threatened release of a hazardous substance into the environment, including the "operator" of the hazardous waste facility. Texas has a similar state analogue under the Texas Solid Waste Disposal Act with similarly described "persons responsible for solid waste."[30] CERCLA liability risk is increased when a contractor exercises authority/control over management, removal, or disposal of hazardous substances.

E. Texas Water Code Section 7.351

Section 7.351 of the Texas Water Code grants enforcement authority to local governments to bring lawsuits for civil penalties against those who violate Texas environmental laws, essentially to stand in the shoes of the TCEQ.[31] The penalties sought by local governments often are an order of magnitude higher than the penalties that would have been sought by the TCEQ. The maximum penalty that may be sought in a Section 7.351 case is $25,000 per violation per day the violation exists. Texas Register public notices for case resolutions reveal healthy use of Section 7.351 by counties and municipalities in the last several years, in large part because local governments can hire outside counsel on a contingency fee basis to pursue the claims.

F. Miscellaneous Environmental Issues

Other questions to ask in the pre-construction phase of a project that may identify intersections between the project and environmental laws are:

- Will a project involve renovation, repair, or painting of a pre-1978 residence or place where children are present? EPA's Lead-Based Paint program may impose certification and other requirements.

- Will dredge and fill or other activities require U.S. Corps of Engineers authorization?

[30] Texas Solid Waste Disposal Act, Tex. Health & Safety Code, Chap. 361, subchap. I.
[31] Tex. Water Code § 7.351.

- Will any demolition or renovation activities disturb asbestos-containing materials, triggering contractor licensing and regulatory requirements?

- Could the project impact any endangered species under the Endangered Species Act?

- Could this project required an Environmental Assessment under the National Environmental Policy Act?

- Are environmental justice concerns likely to arise due to the location of the project in a low income or minority neighborhood?

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