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MEMORANDUM

July 15, 2008

TO: Water Resources Review Committee

FROM: David Beaujon, Senior Analyst, 303-866-4781

SUBJECT: Regulation of Stormwater Discharges from Agriculture-Related Construction Projects in Western States

This memorandum summarizes the federal law that regulates stormwater discharge from construction projects and authorizes states to administer a permitting program for this pollutant. It also compares stormwater discharge regulations for construction projects related to agricultural operations in Colorado and seven other western states that are authorized to administer discharge permit programs including Arizona, Kansas, Montana, Nebraska, Nevada, Utah, and Wyoming. The Water Resources Review Committee will hold a hearing on the regulation of stormwater discharges at its July 21, 2008, meeting in Gunnison, Colorado.

Federal Clean Water Act and Regulation of Stormwater Runoff

Overview. According to the U.S. Environmental Protection Agency (EPA), sediment runoff from construction sites is typically 10 to 20 times greater than those of agricultural lands, and 1,000 to 2,000 times greater than those of forest lands. Silt and other pollutants from construction sites may cause physical, chemical, and biological harm to lakes and streams. In 1987, the Federal Water Pollution Control Act, commonly known as the Clean Water Act,¹ was amended to require stormwater dischargers to obtain a National Pollutant Discharge Elimination System (NPDES) permit.

Phase I of the EPA's stormwater regulations took effect in 1990 and requires construction activities that disturb five or more acres of land to obtain an NPDES permit. Phase II of the federal stormwater regulations took effect in 2003 and require small construction activities that disturb between one and five acres to obtain an NPDES permit. Regulated construction activities include clearing, grading, and excavating that disturb soils. The law also regulates construction activity that disturbs less than one acre of total

¹33 U.S.C. 1251, et seq.

land area that is part of a larger common plan of development that cumulatively disturbs more than one acre.² For example, an operator building homes on three half-acre lots in a six-acre development is required to obtain a small construction project permit. Construction activity that disturbs less than one acre of total land area may also be required to obtain a NPDES permit if it would substantially impact water quality.

In general, construction project operators are required to submit a permit application prior to the start of construction. They must also implement an erosion and sediment control plan prior to starting construction activities. Upon completion of a construction project, an operator must remove temporary erosion and sediment controls and ensure that there is no potential for construction-related sediment discharge to enter surface waters. The law exempts routine maintenance projects that are performed to maintain the original line and grade, hydraulic capacity, or original purpose of a facility.

Exemptions for agricultural activities. Federal law exempts stormwater runoff from orchards, cultivated crops, pastures, range lands, and forest lands from the NPDES permit requirements. It also exempts the water that returns to a stream after it has been applied to crops by irrigation, called *return flows*.³ Federal law does not exempt construction activities related to agricultural operations, such as road construction or the construction of barns and other buildings that disturb more than one acre of land from regulation.

State Stormwater Discharge Regulations

Federal law allows states to administer the NPDES permitting program including issuing and enforcing stormwater permits. States and local governments may impose stricter regulations than the federal regulations. However, states may not impose less restrictive regulations or exempt activities that would otherwise be regulated by federal law. Alaska, Idaho, Massachusetts, New Mexico, and New Hampshire are the only states that have not been authorized to administer the NPDES permitting program. For these states, the EPA is the permitting authority for stormwater discharges.

Comparison of Regulation of Stormwater Discharge by Western States

Table 1 summarizes the stormwater discharge permit requirements for Colorado and seven other western states that have been authorized to administer the NPDES permitting program including Arizona, Kansas, Montana, Nebraska, Nevada, Utah, and Wyoming. As mentioned above, Idaho and New Mexico are not authorized to administer the NPDES permitting program. Construction projects in these states must obtain stormwater discharge permits from the EPA. Essentially, the seven states with administrative authority have

²40 CFR 122.26 (b) (15) (i)

³40 CFR 122.3 (e) and (f)

adopted similar stormwater permit requirements for construction activity. For example, all states require construction projects that disturb more than one acre of land to obtain a stormwater discharge permit; and all states exempt routine maintenance projects that maintain the original line and grade, hydraulic capacity, or original purpose of a facility if they disturb less than five acres of land.

No state exempts construction projects related to agricultural operations from stormwater permit requirements. However, staff from Montana and Utah could not recall issuing a stormwater discharge permit for an agricultural operation. Staff from Colorado, Arizona, Kansas, Nebraska, Nevada, and Wyoming said that their states have issued stormwater discharge permits for agricultural operations, primarily for construction activity related to feed lots, roads, barns, and waste retention ponds. Finally, no state exempts emergency construction projects from permit requirements. However, staff from Nevada said that operators are typically allowed to perform emergency repairs prior to obtaining a stormwater discharge permit.

**Table 1
Stormwater Permit Requirements in Eight Western States**

State	Construction Projects Required to Obtain a Stormwater Discharge Permit	Exemption for Maintenance projects	Exemption for Construction Projects for Agricultural Operations	Has a Stormwater Permit Been Issued for an Agricultural Operation?	Exemption for Emergency Construction
Colorado	<ol style="list-style-type: none"> 1. Construction projects that disturb at least one acre of land; and 2. Construction projects that disturb less than one acre of land if the disturbance is part of a larger common plan of development or sale with a planned disturbance of one acre or greater. 3. Affected disturbances include clearing, grading, and excavation. 	State law exempts routine maintenance projects that disturb less than five acres and are performed to maintain the original line and grade, hydraulic capacity, or original purpose of a facility.	None	Yes	None
Arizona	Same as Colorado	Same as Colorado	None	Arizona has issued stormwater permits for construction projects related to agricultural operations including roads and buildings.	None
Kansas	Same as Colorado	Same as Colorado	None	Kansas has issued stormwater permits for construction projects related to agricultural operations including feedlots.	None
Montana	Same as Colorado	Same as Colorado	None	Staff was unaware of a stormwater discharge permit issued for an agricultural operation.	None

**Table 1
Stormwater Permit Requirements in Eight Western States (Cont.)**

State	Construction Projects Required to Obtain a Stormwater Discharge Permit	Exemption for Maintenance projects	Exemption for Construction Projects for Agricultural Operations	Has a Stormwater Permit Been Issued for an Agricultural Operation?	Exemption for Emergency Construction
Nebraska	Same as Colorado	Same as Colorado	None	Nebraska has issued general stormwater permits for construction projects related to agricultural operations including livestock waste facilities.	None
Nevada	Same as Colorado	Same as Colorado	None	Yes	None. However, emergency work may be undertaken prior to obtaining the required permit.
Utah	Same as Colorado	Same as Colorado	None. However, small construction projects that start and finish between January 1 and April 30 may seek an exemption from permit requirements due to the low risk of erosion.	Staff was not aware of stormwater permits issued for an agricultural operation.	None
Wyoming	Same as Colorado	Same as Colorado	None	Wyoming has issued general stormwater permits for construction projects related to agricultural operations including construction of barns, ponds, and ditches.	No