



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

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EPA REGION VIII  
CLARIFICATION OF THE DEFINITION OF  
STORM WATER DISCHARGES  
ASSOCIATED WITH INDUSTRIAL ACTIVITY

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The following is intended to provide some clarification of the definition given in the Code of Federal Regulations (CFR) at 40 CFR 122.26(b)(14) (November 16, 1990 Federal Register, page 48065). A facility is required to apply for, and obtain a permit, if the facility meets the definition of "storm water discharge associated with industrial activity" and they have a point source discharge (see page 7) of storm water to waters of the United States or that discharge through municipal separate storm sewer systems.

The paragraphs or sentences in italics following each of the 11 Roman numerals (e.g., (ii)) is the same wording as in the regulation. All of the other material to the next Roman numeral is intended to provide additional information.

The term "storm water discharge associated with industrial activity" means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under 40 CFR part 122. For the industries identified by categories (i) through (x), starting on page 3, the term includes, but is not limited to:

(These are applicable areas)

- storm water discharges from industrial plant yards;
- immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility;
- material handling sites;
- refuse sites;
- sites used for the application or disposal of process waste waters (as defined at 40 CFR part 401);
- sites used for the storage and maintenance of material handling equipment;
- sites used for residual treatment, storage, or disposal;
- shipping and receiving areas;
- manufacturing buildings;
- storage areas (including tank farms) for raw materials, and intermediate and finished products; and
- areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.

For industries identified by category (xi), the term includes only storm water discharges from all the areas (except access roads and rail lines) that are listed above, where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery are exposed to storm water<sup>1</sup>. For the purposes of this definition, material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, finished product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the areas described above.

The following is from the November 16, 1990 Federal Register (page 48008):

"The critical distinction between the facilities identified at 40 CFR 122.26(b)(14)(xi) and the facilities identified at 40 CFR 122.26(b)(14)(i)-(x) is that the former are not classified as having "storm water discharges associated with industrial activity" unless certain materials or activities are exposed to storm water. Storm water discharges from the latter set of facilities are considered to be "associated with industrial activity" regardless of the actual exposure of these same materials or activities to storm water."

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<sup>1</sup> (Comment: If everything except the access roads and rail lines are under a roof, the facilities in category (xi) which are not otherwise included within categories (ii)-(x) do not have to apply for a permit unless designated.)

**THE ELEVEN CATEGORIES DEFINED BY THE REGULATION  
(40 CFR 122.26(b)(14):**

- (i) *Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi));*

Effluent limitations guidelines that include storm water:

40 CFR 411	Cement Manufacturing
40 CFR 412	Feedlots
40 CFR 418	Fertilizer Manufacturing
40 CFR 419	Petroleum Refining
40 CFR 422	Phosphate Manufacturing
40 CFR 423	Steam Electric Power Generating
40 CFR 434	Coal Mining
40 CFR 436	Mineral Mining and Processing
40 CFR 440	Ore Mining and Dressing
40 CFR 443	Asphalt Emulsion portion of Paving and Roofing Materials

The phrase "toxic pollutant effluent standards" has been used by EPA exclusively as a technical reference to the standards at 40 CFR Part 129. Part 129 applies only to owners or operators of specified types of facilities (e.g., manufacturing, formulating, etc.) that involve the use of any of the following toxic pollutants: Aldrin/Dieldrin; DDT, DDD, DDE; Endrin; Toxaphene; Benzidine; and Polychlorinated biphenyls (PCBs).

Most effluent limitations guidelines listed in 40 CFR Subchapter N contain New Source Performance Standards (NSPS). The following categories of Subchapter N facilities do not have new source performance standards. All other categories have at least one subcategory with new source performance standards.

Oil and Gas Extraction (40 CFR 435)  
Mineral Mining and Processing (40 CFR 436)  
Gum and Wood Chemicals Manufacturing (40 CFR 454)  
Pesticide Chemicals (40 CFR 455)  
Explosives Manufacturing (40 CFR 457)  
Photographic (40 CFR 459)  
Hospital (40 CFR 460)

- (ii) *Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283 and 285), 29, 311, 32 (except 323), 33, 3441, 373;*

24 Lumber and wood products, except furniture  
Does not include 2434

2434 - wood kitchen cabinets

**Note:** SIC code 24 includes 241, logging, and 242, sawmills. At 40 CFR 122.27(b), "Silvicultural point source" is defined as any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. All other discharges from silvicultural activities are non-point sources and not subject to the requirements of this program.

- 26 Paper and allied products
  - Does not include 265 and 267
    - 265 - paperboard containers and boxes
    - 267 - misc. converted paper products
- 28 Chemicals and allied products
  - Does not include 283 and 285
    - 283 - Drugs
    - 285 - Paints and allied products
- 29 Petroleum refining and related industries
- 311 Leather tanning and finishing
- 32 Stone, clay, glass, and concrete products
  - Does not include 323
    - 323 - Products of purchased glass
- 33 Primary metal industries
- 3441 Fabricated structural metal
- 373 Ship and boat building and repairing

(iii) *Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);*

- 10 Metal mining
- 12 Coal mining
- 13 Oil and gas extraction
- 14 Mining and quarrying of nonmetallic minerals, except fuels

*The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:*

*(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or*

*(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or*

*(C) Contributes to a violation of a water quality standard.*

(Comment: On a practical basis the most stringent requirement of (A) and (B) above is not to have a visible sheen of oil reach waters of the United States (or waters of the State if a delegated program). Depending on the pollutant, the minimum reportable quantities for hazardous substances range from one (1) pound to 5,000 pounds per day.)

*The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.*

- (iv) *Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;*
- (v) *Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described in any of these categories (i) - (xi)) including those that are subject to regulation under subtitle D of RCRA;*
- (vi) *Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;*

5015 Motor vehicle parts, used

5093 Scrap and waste materials

- includes facilities that recycle scrap metal, plastic, paper, glass, aluminum etc.

Gas stations or repair shops that collect tires or batteries are not included in this category.

Municipal waste collection sites that collect bottles, cans or newspapers for recycling purposes are also not covered.

- (vii) *Steam electric power generating facilities, including coal handling sites;*

Heat capture co-generation facilities are not covered; however, dual fuel co-generation facilities, and steam electric generators at educational facilities are covered, and are required to apply for a permit.

- (viii) *Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;*

40 Railroad transportation

41 Local and suburban transit and interurban highway passenger transportation

42 Motor freight transportation and warehousing

Does not include 4221-25

4221 - Farm product warehousing & storage

4222 - Refrigerated warehousing & storage

4225 - General warehousing and storage

43 United States Postal Service

44 Water Transportation

45 Transportation by air

5171 Petroleum bulk stations & terminals

Does not include gas stations, automotive repair shops or truck stops.

(ix) *Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;*

(x) *Construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale;<sup>2</sup>*

Any construction activity that results in the disturbance of five acres of land or more in total is covered by the rule. Such activities may include road building (including those associated with oil and gas production), construction of houses, office buildings, industrial buildings, pipelines, and demolition activity. This does not apply to agricultural or silvicultural activities, which are exempt from NPDES permit requirements under 40 CFR 122.3.

"Part of a larger common plan of development or sale" describes a situation in which multiple construction activities are occurring on a contiguous area. The activities could be taking place at different times on different schedules. The key is that these different construction activities are part of one common plan, common blueprint, or development.

(xi) *Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, 4221-25, (and which are not otherwise included within categories (iii)-(x));*

- 20 Food and kindred products
- 21 Tobacco products
- 22 Textile mill products
- 23 Apparel and other finished products made from fabrics and similar materials
- 2434 Wood kitchen cabinets
- 25 Furniture and fixtures
- 265 Paperboard containers and boxes
- 267 Misc. converted paper products
- 27 Printing, publishing, and allied industries
- 283 Drugs
- 285 Paints and allied products
- 30 Rubber and miscellaneous plastics products
- 31 Leather and leather products
  - Does not include 311
  - 311 - Leather tanning and finishing
- 323 Products of purchased glass
- 34 Fabricated metal products, except machinery and transportation equipment
  - Does not include 3441
  - 3441 - Fabricated structural metal
- 35 Industrial and commercial machinery and computer equipment
- 36 Electronic and other electrical equipment and components, except computer equipment

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<sup>2</sup> See discussion of 9th Circuit Court Decision on page 7.

- 37     Transportation equipment
  - Does not include 373
  - 373 - Ship and boat building and repairing
- 38     Measuring, analyzing, and controlling instruments: photographic, medical and optical goods; watches and clocks
- 39     Miscellaneous manufacturing industries
- 4221   Farm product warehousing and storage
- 4222   Refrigerated warehousing and storage
- 4225   General warehousing and storage

Facilities in this category, and this category only, are exempt from current storm water permitting requirements if there is no exposure to storm water of material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery<sup>3</sup>.

## TRANSPORTATION ACT OF 1991

The Transportation Act of 1991 provides an exemption from storm water permitting requirements for certain industrial activities owned or operated by municipalities with a population of less than 100,000. Such municipalities must submit storm water discharge permit applications for only airports, powerplants, and uncontrolled sanitary landfills that they own or operate. The Transportation Act defines "uncontrolled sanitary landfill" as a landfill or open dump, whether in operation or closed, that does not meet the requirements for run-on and run-off controls established pursuant to subtitle D of the Solid Waste Disposal Act. The permitting authority (EPA or the State) may designate other municipally owned or operated industrial facilities for permitting on a case-by-case basis.

## 9th CIRCUIT COURT DECISION

The 9th Circuit United States Court of Appeals' opinion in NRDC v. EPA (June 4, 1992) invalidated and remanded for further proceedings two regulatory exemptions from the definition of "storm water discharges associated with industrial activity": (1) the exemption for construction sites disturbing less than 5 acres of land (category x), and (2) the exemption of certain "light" manufacturing facilities without exposure of materials and activities to storm water (category xi). In response to these two remands, the Agency intends to conduct further rulemaking proceedings on construction activities under 5 acres and light industry without exposure as ordered by the Court. EPA will not require permit applications for construction activities disturbing less than 5 acres of land and category xi facilities without exposure until further rulemaking is completed.

## WHAT IS CONSIDERED A POINT SOURCE

The intent of the following is to provide some clarification on the terms "point source" and "discharge" under the storm water regulations. A point source is defined at 40 CFR 122.2 as "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, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff." EPA notes that this definition would encompass municipal separate storm sewers. In view of this comprehensive definition of point source, EPA needs to clarify in this rulemaking only that a storm water discharge subject to NPDES regulation does not include storm water that enters the waters of the United States via means other than a "point source."

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<sup>3</sup> See discussion of 9th Circuit Court Decision.

As further discussed below, storm water from an industrial facility which enters and is subsequently discharged through a municipal separate storm sewer is a discharge associated with industrial activity which must be covered by an individual or general permit pursuant to today's rule (55 FR 47997, November 16, 1990).

EPA would also note that individual facilities have the burden of determining whether a permit application should be submitted to address a point source discharge. Those unsure of the classification of storm water flow from a facility, should file permit applications addressing the flow, or prior to submitting the application consult permitting authorities for clarification.

EPA intends to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA and court interpretations to include any identifiable conveyance from which pollutants might enter the waters of the United States. In most court cases interpreting the term "point source", the term has been interpreted broadly. For example, the holding in Sierra Club v. Abston Construction Co., Inc., 620 F.2d 41 (5th Cir. 1980) indicates that changing the surface of land or establishing grading patterns on land will result in a point source where the runoff from the site is ultimately discharged to waters of the United States. That case holds:

Simple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge, absent some effort to change the surface, to direct the water flow or otherwise impede its progress . . . Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the [discharger] at least initially collected or channeled the water and other materials. A point source of pollution may also be present where [dischargers] design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the [dischargers] have done nothing beyond the mere collection of rock and other materials . . . Nothing in the Act relieves [dischargers] from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a . . . drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act." 620 F.2d at 45 (emphasis added).

Under this approach, discharges of storm water resulting from structures which increase the imperviousness of the ground which acts to collect runoff, with runoff being conveyed along the resulting drainage or grading patterns, are point source discharges.

The entire thrust of the regulation is to control pollutants that enter receiving water from storm water conveyances. It is these conveyances that will carry the largest volume of water and higher levels of pollutants. The storm water permit application process and permit conditions will address circumstances and discharges peculiar to individual facilities.

In summary, if storm water runoff can be traced from a definite source of pollution to waters of the United States and the other criteria are met (e.g., meets the definition of associated with industrial activity), there is a very good likelihood that a permit is required for that discharge of storm water.

## WHAT ARE WATERS OF THE UNITED STATES

Waters which are (or have been) used for interstate or foreign commerce including waters subject to the ebb and flow of the tide; interstate waters, (including wetlands); lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, including tributaries to any of these waters. Also included are irrigation canals.



Some State definitions of waters of the State also include roadside ditches and other rights of way. For a complete definition of waters of the United States see 40 CFR 122.2.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States nor resulted from the impoundment of waters in the United States. Note: at 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies ..."

## **STORM WATER**

Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

### **DISCHARGES THROUGH LARGE AND MEDIUM MUNICIPAL SEPARATE STORM SEWER SYSTEMS**

In addition to applying for a permit, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge:

- the name of the facility;
- a contact person and phone number;
- the location of the discharge;
- a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and
- any existing NPDES permit number.

In Colorado large and medium municipal separate storm sewer systems include Aurora, Denver, Colorado Springs, Lakewood, and Pueblo. After the 1990 Census figures are final, Pueblo might be deleted and the unincorporated portions of Arapahoe County added. In Utah the large and medium municipal separate storm sewer systems consist of Salt Lake City and the unincorporated portions of Salt Lake County.

The City of Sioux Falls, South Dakota went over 100,000 population in the 1990 census and accordingly will be added to the list medium municipal separate storm sewer systems in the near future. Facilities that discharge storm water associated with industrial activity to a publicly owned storm sewer located within the City of Sioux Falls should submit the above specified information to the City.