

## STORM WATER REGULATION IN ALABAMA

Storm water runoff is a significant source of water pollution nationwide, and an understanding of storm water pollution control practices is necessary to comply with environmental regulations. Failure to implement effective pollution control practices may result in enforcement actions by environmental permitting authorities or common law suits for damages.

### What is storm water runoff?

Storm water runoff results from the movement of precipitation across land and other impervious surfaces. As the runoff flows across these surfaces, it can accumulate sediments and other pollutants, and, if left untreated, these pollutants may eventually be deposited in rivers, lakes, streams, or other water bodies. Common pollutants carried in storm water runoff include fertilizers, pesticides and other chemicals, dirt, and oil and grease. Major sources of storm water runoff include industrial facilities, municipal separate storm sewer systems, and construction activities.

### How is storm water runoff regulated?

Storm water runoff may be regulated as point or nonpoint source pollution, depending upon the source. Most stormwater discharges are regulated as point source discharges under the National Pollutant Discharge Elimination System (NPDES) Stormwater Program. In a few states, the U.S. Environmental Protection Agency (EPA) implements the NPDES Stormwater Program; however, in most states, including Alabama, the state is authorized by the EPA to implement the program. Thus the primary regulatory authority for stormwater permitting and enforcement in Alabama is the Alabama Department of Environmental Management (ADEM).

Discharges of pollutants to state waters are governed by ADEM's NPDES permit regulations, found at Chapter 335-6-6 of the Alabama Administrative Code. Discharges are allowed only in compliance with permit limitations, and violations of permit requirements may result in significant penalties. ADEM Admin. Code r. 335-6-6-.12(a). Examples of potential violations include discharges in violation of state water quality criteria, failure to maintain effective best management practices, failure to conduct required inspections, and failure to retain and produce records.

In addition to compliance with ADEM's general NPDES regulations, permits issued to operators of municipal separate storm sewers (MS4s) must also comply with applicable federal regulations. Large or medium MS4s must comply with the requirements of 40 CFR Part 122.42(c). ADEM Admin. Code r. 335-6-6-.11. Similarly, permits issued to operators of small MS4s must include the requirements of 40 CFR Parts 122.30-122.37.

Specific ADEM regulations applicable to "all new and existing construction activity, noncoal mining activity, construction materials management activity and associated activities" located within the state are found in Chapter 335-6-12 of the ADEM Administrative Code. ADEM Admin. Code r. 335-6-12-.03(1). The term "construction" is defined broadly to include any land disturbance or discharge of pollutants associated with such as activities as building, excavation, land clearing, grubbing, etc. ADEM Admin. Code r. 335-6-12-.02(e). However, de minimis activities are specifically exempted from regulation, unless the activities cause discharges that have "reasonable potential for significant contribution of pollutants to State waters or reasonable potential to cause or contribute to a violation of applicable water quality standards." ADEM Admin. Code r. 335-6-12-.02(e). It is also important to note that operators subject to the specific requirements of Chapter 335-6-12 of the ADEM Administrative Code must also comply with all applicable provisions of the general NPDES Permit Program discussed above. See ADEM Admin. Code r. 335-6-12-.06(1).

Operators conducting activities subject to ADEM's NPDES stormwater regulations must maintain valid NPDES registration both during construction activities and until all disturbed areas have been reclaimed or restored. ADEM Admin. Code r. 335-6-12-.05(1). Operators must implement and maintain Best Management Practices (BMPs) to the maximum extent practicable in accordance with the operator's Construction Best Management Practices Plan (CBMPP). ADEM Admin. Code r. 335-6-12-.05(2). ADEM's regulations also require adequate recordkeeping and regular inspections of the site. ADEM Admin. Code r. 335-6-12-.05(2), (3).<sup>1</sup>

### **Best Management Practices (BMPs) and the Construction Best Management Practices Plan (CBMPP)**

At the heart of the NPDES Stormwater Program is the implementation and maintenance of Best Management Practices (BMPs) in accordance with a Construction Best Management Practices Plan (CBMPP). BMPs are practices that seek to minimize potential harmful effects of covered activities including erosion, sedimentation, and discharge of pollutants. BMPs must be developed in accordance with the *Alabama Handbook for Erosion Control, Sediment Control and Stormwater Management on Construction Sites and Urban Areas* published by the Alabama Soil and Water Conservation Committee and applicable ADEM regulations. The Alabama Handbook was recently updated in March 2009, and a copy is available on the Committee's website at <http://www.swcc.state.al.us>.

The CBMPP outlines the operator's plan for the prevention or minimization of stormwater pollution. It must be prepared and certified by a qualified credentialed professional (QCP) in accordance with ADEM regulations. A list of the necessary elements of a CBMPP can be found in section 335-6-12-.21 of the ADEM Administrative Code. Additionally, to assist with development of a CBMPP, ADEM has created an electronic template that can be customized for individual projects. The template is available for download on the Department's website at [www.adem.alabama.gov](http://www.adem.alabama.gov).

### **Additional Items of Interest**

**EPA Proposes Limits on Greenhouse Gas Emissions** – In September, the EPA announced a proposal to limit emissions of greenhouse gases under the Clean Air Act. Under the proposed regulations, large industrial facilities must demonstrate the use of best available control technologies and energy efficient measures to minimize greenhouse gas emissions when facilities are initially constructed or significantly modified. More information is available at <http://www.epa.gov/nsr/actions.html>.

**TSCA Reform on the Horizon** – The Obama Administration plans to develop a new chemical risk management law that will address the weaknesses in the 1976 Toxic Substances Control Act. EPA's "Essential Principles for Reform of Chemicals Management Legislation," developed to assist Congress in drafting new legislation, can be found at <http://www.epa.gov/oppt/existingchemicals/pubs/principles.html>.

**ADEM Awards Alabama Recycling Fund Grants** – During the first year of the Alabama Recycling Fund, a program created by fees imposed on solid wastes deposited in Alabama landfills under the Solid Wastes and Recyclable Materials Management Act, ADEM awarded over \$700,000 in grant funding. The awards serve to encourage the growth of recycling programs established by local governments.

**Federal Court Ruling Allows States to Sue Utilities Over Global Warming** – On September 21, the U.S. Court of Appeals for the Second Circuit ruled that a group of eight states, New York City, and three land trusts may bring suit against six electric utilities to force the utilities to reduce emissions of carbon dioxide, a major greenhouse gas. The plaintiffs claim that the utilities create a public nuisance by emitting gases that some scientists believe contribute to global warming.

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<sup>1</sup> This is merely an overview of some of the major provisions, rather than an exhaustive list of ADEM's NPDES stormwater program requirements. Please refer to Chapter 335-6-12 of the ADEM Administrative Code for a complete listing of applicable requirements.

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**Richard E. Davis** is a partner with Starnes & Atchison LLP. Richard's practice is primarily devoted to environmental litigation and regulatory compliance. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's practice includes CERCLA, Clean Air, Clean Water, and RCRA litigation; natural resource and property damage claims; and land and water use issues. He also defends personal injury actions based on chemical exposure. Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary, was listed in the 2008 and 2009 editions of *Alabama Super Lawyers*<sup>®</sup> magazine for Environmental Litigation, and is active in public service endeavors as well.

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