



**U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
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April 30, 2004

Mr. Jim Mathews
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P. O. Box 1568
Austin, Texas 78768-1568

Dear Mr. Mathews:

This letter responds to your letter of February 6, 2004 concerning violations of an NPDES storm water general permit allegedly committed by the City of Irving in connection with the Delaware Creek construction project.

The City contends that, though it submitted a notice of intent (NOI) to Region 6 and thereby became subject to the storm water general permit, it was not legally required to submit the NOI because it was not an “operator” of the construction activity. Since it was not required to have a permit, the City should not be held liable for any violation of the permit, which may have occurred.

The City further contends that as the property owner it assigned its legal responsibilities for complying with storm water permitting requirements to the general contractor, Earth Builders, Inc. As the sole “operator” of the project, Earth Builders was the only entity required to obtain permit authorization for the discharge of storm water during the Delaware Creek project.

EPA disagrees with the City’s position for the reasons stated below.

1. The City as an “Operator” of the Construction Project

a. Storm Water Regulations-1990

The major premise supporting the City’s position is the assertion that under the storm water regulations and general permit the operator of a construction activity and not the owner of the property is responsible for submitting an NOI and complying with the permit and regulations. In support of the premise, the City contends that EPA has recognized a “longstanding distinction” between owner and operator with respect to permit application requirements and “preserved” that distinction in the preamble to the 1990 regulations establishing requirements for storm water permit applications. The supposed distinction is that property owners are *per se* not responsible for applying for a permit or complying with the regulations and that operators of the construction activity (e. g., general contractors) alone bear that responsibility. In the context of

the argument the term “operator” apparently means the on-site entity, which is actually performing construction work and no other entity.

EPA did make a distinction between owners and operators in the 1990 rulemaking but not in the absolute terms you suggest. In response to public comments raising questions as to the parties responsible for submitting NOIs, EPA said that “the operator will *generally* be responsible for submitting the permit application.” 55 Fed. Reg. 48034 (emphasis added). EPA did not say that owners are never required to apply for a permit or that operators are always required to apply. The Agency made it clear that parties other than operators may be required to submit an NOI, e. g., a property owner when there is the potential for storm water to be discharged from the property in connection with construction activity.

The 1990 rulemaking required that “dischargers of storm water” associated with construction activity resulting in the disturbance of five or more acres apply for either an individual, group or general permit. 55 Fed. Reg. 48066. “Discharger” was not defined in the 1990 regulations but, according to its common meaning, could include the owner of real property from which storm water is discharged to waters of the United States.

b. Storm Water General Permit-1992

In 1991 EPA began the process of developing the permit which evolved into the general permit in effect today. Throughout the process, EPA consistently said that property or construction activity owners with control over job specifications are required to submit an NOI and are responsible for compliance with the storm water permit and regulations.

The first proposed general permit was noticed for public comment in August, 1991. 56 Fed. Reg. 40948. The draft permit published at that time required that “owners or operators of storm water discharges associated with industrial activity” submit an NOI.

The final permit was published on September 9, 1992, and issued that day by Region 6 and eight other regions. 57 Fed. Reg. 41176. The final version changed the party responsible for submitting an NOI from “owners and operators” to “discharger.” See Part I. C. 1. of the permit at 57 Fed. Reg. 41218. In response to questions concerning which parties were responsible for applying for a permit, EPA announced the following criteria for determining who was an “operator” for NOI purposes and explained the rationale for the criteria:

. . . today’s permits require the “operator” of a construction site to submit the NOI for coverage under a permit. For the purposes of submitting NOIs under these general permits, the Agency wants to clarify that the “operator” is the party or parties that either individually or taken together meet the following two criteria: (1) They have operational control over the site specifications (including the ability to make modifications in specifications); and (2) they have the day-to-day operational control of those activities at the site necessary to ensure compliance with plan requirements and permit

conditions (e. g., are authorized to direct workers at the site to carry out activities identified in the plan).

Control over site specifications is necessary to ensure that the site plan allows for the design of storm water management measures and other controls necessary to comply with the permit. In addition, control over site specifications is necessary to modify specifications based on information obtained during the construction process or as otherwise required by EPA. Day-to-day operational control over activities at the site is necessary to ensure that plans are effectively implemented. This is particularly true in the construction industry where conditions and activities are continually changing.

EPA anticipates that different types of parties (e. g., owners, developers, general contractors, etc.) will satisfy the two criteria for the operator that must submit the NOI at different projects. In addition, the Agency anticipates that in many instances, more than one party will have to submit an NOI for the same project in order to satisfy both criteria. For example, at a given site, the property owner may have operational control over site specifications, while a general contractor may have day-to-day control over activities at the site. In this situation, both the property owner and the general contractor must submit an NOI. EPA believes that this approach is necessary to ensure that the relevant parties are aware of their responsibilities under the permit.

* * *

EPA believes that the approach taken to NOI requirements in today's permits will have a number of benefits. First, the Agency believes that it is critical that the parties with operational control over both site specifications and day-to-day activities at the site be identified in the NOI. This will assist in identifying responsible parties, provide for an opportunity for the various parties involved to clarify the terms and responsibilities of the plan among themselves, and ensure that effective enforcement may take place.

57 Fed. Reg. at 41190-91.

c. Reissuance of the General Permit-1997

In June, 1997, EPA proposed a revised general permit to replace the original permit which would expire in September of that year. 62 Fed. Reg. 29786. The new permit required that NOIs be submitted by "parties with operational control over project specifications, (e. g., owner

or developer)” and “parties defined as operators solely due to their day-to-day operational control over those activities at a project which are necessary to ensure compliance with the storm water pollution prevention plan or other permit conditions (e. g., general contractor, erosion control engineer, etc.).” Proposed General Permit, Part II. A. 1. and 2., 62 Fed. Reg. 29808. In Part IX the permit defined “operator” as :

. . . any party associated with the construction project that meets either of the following criteria: (1) The party has operational control over project specifications (including the ability to make modifications in specifications), or (2) the party has day-to-day operational control of those activities at a project site which are necessary to ensure compliance with the storm water pollution prevention plan or other permit conditions (e. g., they are authorized to direct workers at the site to carry out activities identified in the storm water pollution prevention plan or comply with other permit conditions).

62 Fed. Reg. at 29818.

In proposing the renewal permit EPA affirmed the criteria rationale for an “operator” provided by EPA in 1992 when the original permit was issued and added the following comments:

To ensure effective implementation of the requirements of the permit, the permit must directly regulate each entity with control over the critical functions identified above in the definition of an operator. Control over project specifications is necessary to ensure that a project design includes appropriate sediment and erosion control measures and post construction storm water management measures. Day to day operational control is necessary to ensure effective implementation of permit requirements at the project site.

The entities who are considered operators will commonly consist of the owner or developer of a project (the party with control of project specifications) and the general contractor (the party with day to day operational control of the activities at project site which are necessary to ensure compliance with the permit).

62 Fed. Reg. 29793.

The changes proposed with respect to those parties required to submit NOIs and the definitions of operator were retained in the final version of the renewed permit issued in February, 1998. 63 Fed. Reg. 7858. At that time EPA made it clear that several parties may have

“operational control” of a site and that operational control of a site does not require presence at the site:

There may be more than one party at the site performing the tasks relating to “operational control” as defined above. Depending on the site and the relationship between the parties (e. g., owner, developer), there can either be a single party acting as site operator and consequently be responsible for obtaining permit coverage, or there can be two or more operators with all needing permit coverage. The following are three general operator scenarios (variations on any of the three are possible as the number of “owners” and contractors increases):

* * *

Owner and contractor as co-permittees. The owner retains control over any changes to site plans, SWPPPs, or storm water conveyance and control designs; but the contractor is responsible for overseeing actual earth disturbing activities and daily implementation of SWPPP and other permit conditions. In this case, both parties may need coverage.

63 Fed. Reg. at 7859.

Region 6 issued the new general permit on July 6, 1998, and included the comments quoted above regarding multiple parties having operational control of a construction project. 63 Fed. Reg. 36490. This permit was in effect on September 3, 2002, when the City submitted its NOI to the NOI processing center.

4. City’s Control of the Deleware Creek Project

_____The City created the plans and specifications for the project with the assistance of an engineering consulting firm, Graham Associates, Inc. Bid proposals were submitted on the basis of the plans and specifications and the City’s other contract requirements. The job was awarded to Earth Builders, and on May 9, 2002, the parties entered into a written contract.

The contract defined in detail the responsibilities and authority of each party with respect to the project. It provided that the City would have operational control over every aspect of the project from start to finish. This included exclusive control over the project plans and specifications throughout the project and the sole authority to modify the plans and specifications at any time. More particularly, the contract provided that:

- a. the City reserved the right “to alter quantities of the work to be performed or to extend or shorten the improvements at any time when and as found necessary” (§ G. 4. 3., p. G-9);

b. the City reserved the right “to make such changes in the plans and specifications and in the character of work as may be necessary or desirable to insure completion in the most satisfactory manner, provided such changes do not materially alter the original plans and specifications or change the nature of the work as a whole” (§ G. 4. 4., p. G-9);

c. the “Engineer” (i. e., Director of Public Works)¹ had the right to inspect all work and stop work whenever such stoppage was necessary to insure proper execution of the contract (§ G. 5. 1., p. G-10);

d. Earth Builders was required to submit all shop drawings and schedules to the Engineer for approval (§ G. 5. 8., p. G-11);

e. the City had the authority to reject materials furnished by Earth Builders (§ G. 5. 5. 10., p. G-12);

f. the City had the authority “to make such changes and alterations as the City may see fit, in the line, grade, form, dimensions, plans or materials for the work herein contemplated, or any part thereof, either before or after the beginning of the construction” (§ G. 5. 11., p. G-12);

g. the Engineer had the authority to require Earth Builders’ testing of materials (§ G. 5. 16., p. G-13);

h. the Engineer had the authority to order Earth Builders to redo work not supervised or inspected by the Engineer or to remove and replace materials used without being supervised or inspected by the Engineer (§ G. 5. 18., p. G-13);

i. the Engineer had the authority to make a final inspection of the work for acceptance (§ G. 5. 20., p. G-15);

j. the Engineer determined whether Earth Builders was storing material and performing work so as to not cause unnecessary obstruction to the traveling public (§ G. 6. 4., p. G-15);

k. the Engineer had the authority to direct or approve the sequence of all construction operations (§ G. 7. 2., p. G-22);

l. the Engineer had the authority to require Earth Builders to finish sections of work to minimize inconvenience to the public (§ G. 7. 3., p. G-22);

¹ The contract defined “Engineer” as the Director of Public Works. See § G. 1. 1., p. G-1.

m. the Engineer had the authority to direct the timing of Earth Builders' performance of the contract to avoid conflicts with other City construction projects (§ G. 7. 4., p. G-22);

n. the Engineer had the authority to determine if Earth Builders' delay in completing the work was justified and whether an extension would be granted (§ G. 7. 5., p. G-23); and

o. the Director of Public Works was the sole judge of whether Earth Builders devoted sufficient resources to complete the project according to the contract (§ G. 7. 6., p. G-23).

These contract provisions plainly established that the City had complete operational control over the Delaware Creek project specifications and plans, including the authority and ability to modify the specifications and plans. The roles of the City and Earth Builders, as delineated by the contract, fit squarely within EPA's scenario where the owner and contractor are both required to have a permit, i. e., where "the owner retains control over any changes to site plans, SWPPPs, or storm water conveyance or control designs; but the contractor is responsible for overseeing actual earth disturbing activities and daily implementation of SWPPP and other permit conditions." 63 Fed. Reg. 7859.² The City, then, was an "operator" as defined by the 1998 general permit and thus was required to submit an NOI.

5. Earth Builders as the Sole Permittee Under Region 6's Scenario

_____ On page three you state that in the preamble to the promulgation of its general permit Region 6 "explained that under the permit's definition of 'operator' the contractor would be the sole permittee if the property owner hired a construction company to design the project, prepare the SWPPP, and supervise implementation of the plan and compliance with the permit (e.g., a 'turnkey' project)." Earth Builders did not design the project and did not prepare the SWPPP. The Delaware Creek project was not a turnkey project. Thus, the scenario described in the preamble where a contractor is the sole permittee does not apply to this case.

6. Requiring Owners to Submit NOIs Without Rulemaking

_____ On page three also you contend that, "In light of the distinction between 'owner' and 'operator' recognized in EPA's 1990 rulemaking, EPA cannot require an 'owner' to obtain NPDES permit authorization without additional rulemaking to impose this obligation." To the contrary, as shown by the history set forth above, the storm water regulations have never excluded owners from the permit application requirements, and EPA has never said in a preamble that owners as a class are excluded from those requirements. Their inclusion as

² The City also qualified as an "operator" under the second prong of the definition in the 1998 permit because, through the contract provisions and the on-site presence and authority of Public Works Department and other City personnel, the City exercised daily control of the activities which were necessary to ensure compliance with a SWPPP or other permit conditions.

“dischargers” in the 1990 regulations and “operators” as defined by the 1992 general permit did not effect a change in the law and, therefore, did not require additional rulemaking.

7. Owner’s Assignment of Storm Water Responsibilities to Contractor

_____ We disagree with your contention that a construction activity owner who is an “operator” under the 1998 general permit definition may properly delegate or assign its legal responsibilities as an operator to the general contractor who would then be the sole permittee and the only party required to comply with the permit and regulations. Such a delegation or assignment would defeat a crucial element of the storm water discharge regulatory scheme.

As explained in the 1992 notice of the final general permit, the Agency’s control over site specifications through a permit issued to the party having control of project specifications “is necessary to ensure that the site plan allows for the design of storm water management measures and other controls necessary to comply with the permit.” Additionally, “control over site specifications is necessary to modify specifications based information obtained during the construction process or as otherwise required by EPA.” 57 Fed. Reg. 41190. These important regulatory controls would not be in place where the only permittee is a general contractor who does not have the legal authority to control project specifications.

In sum, EPA’s position is that the City was required to submit an NOI because it was an “operator” under the 1998 general permit and that the City could not properly assign its legal responsibilities under the permit and storm water regulations to Earth Builders.

Very truly yours,

//s//

John C. Emerson
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Water/RCRA Enforcement Branch