



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

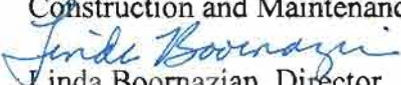
WASHINGTON, D.C. 20460

AUG 24 2009

MEMORANDUM

OFFICE OF
WATER

SUBJECT: Applicability of 2008 MSGP to Gravel Pits Associated with Road and Bridge Construction and Maintenance

FROM: 
Linda Boornazian, Director
Water Permits Division

TO: Water Division Directors
Regions 1-10

This memorandum clarifies the applicability of the recently issued 2008 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (2008 MSGP) to gravel pits that supply material to road and bridge construction and maintenance projects. EPA issued the notice of the availability of the 2008 MSGP for Regions 1, 2, 3, 5, 6, 9 and 10 in the *Federal Register* on September 29, 2008 (73 FR 56572) and February 29, 2009 (74 FR 8789).

Region 10 has asked my office to confirm whether the 2008 MSGP applies to stormwater discharges from gravel pits and their associated material processing operations that are used to support road and bridge construction and/or maintenance activities. After carefully examining the permit language and supporting documents, we conclude that the 2008 MSGP does apply to discharges from these activities.

Under the Clean Water Act (CWA) and its implementing regulations, discharges of pollutants to surface waters are prohibited unless they are in compliance with other provisions of the CWA. Section 402 establishes a National Pollutant Discharge Elimination System (NPDES) permitting program to authorize discharges that are otherwise prohibited, including stormwater discharges associated with industrial activity. CWA section 402(p)(2)(B). The definition of stormwater associated with industrial activity is found in 40 CFR Part 122.26(b)(14) and includes some facilities classified under the Standard Industrial Classifications (SIC) Codes established by the Occupational Health and Safety Administration. SIC Code group 14 (i.e., establishments primarily engaged in mining or quarrying, developing mines, or exploring for nonmetallic minerals, except fuels) is among these CWA-regulated industries. See 40 C.F.R. 122.26(b)(14)(iii). Thus, EPA's regulations require operators of facilities with stormwater discharges from industrial activities, including discharges from activities classified within SIC Code 14, to obtain authorization under an NPDES permit.

Part 1.1.1 of the 2008 MSGP specifies that the permit covers an operator who has a stormwater discharge from its facility associated with a primary industrial activity included in Appendix D. Appendix D identifies SIC Code 1442, a subset of SIC code 14, among the industrial categories whose stormwater discharges are eligible for coverage. Appendix D then

makes reference to the *Handbook of Standard Industrial Classifications*, Office of Management and Budget, 1987 (SIC Manual), which lists and defines the sectors referred to in EPA's stormwater regulations and permits. SIC Code 1442, referred to in Appendix D as the "Construction Sand and Gravel" industry, is described in the SIC Manual to include establishments primarily engaged in operating sand and gravel pits and dredges, and in washing, screening, or otherwise preparing sand and gravel for construction uses. The manual also includes street and highway maintenance activities among the construction activities that may be supplied by Construction Sand and Gravel operations. Consequently, stormwater discharges from gravel pits are among those eligible for coverage under the 2008 MSGP.

We are aware of an incorrect comment response relating to this issue in the administrative record for the 2008 MSGP. During the permitting proceedings, a commenter stated that since "highway maintenance stations" should be classified under SIC Code 16 (Heavy Construction Other Than Building Construction Contractors), and thus would not require coverage under the 2008 MSGP, "gravel pits or material sources associated with these maintenance stations" also would not require coverage under the 2008 MSGP as their industrial activity would be secondary to the activities of the highway maintenance stations they served. Little description was provided of these "highway maintenance stations," other than their characterization as "primarily engaged in the construction and maintenance of highways, streets, and bridges." EPA responded that highway maintenance stations do not require coverage under the 2008 MSGP. For certain limited situations where highway maintenance stations are locations at which maintenance of vehicles used for highway construction occurs, EPA continues to agree with this statement.¹ In such cases, the stations would not meet the definition of any 2008 MSGP-regulated sectors. In the response to comments however, EPA went on to say that "if a gravel pit is being used to support routine road maintenance, de-icing or similar activities, then the gravel pit is merely an auxiliary operation of the SIC Code 16 primary activity and would not need industrial permit coverage." This response requires clarification as it was partially inconsistent with EPA's regulations at 40 CFR 122.26(b)(14)(iii) and may have been based on a misunderstanding of the nature of these gravel pits.

There are instances in which former gravel mining sites are shut down, reclaimed and the locations put to other use. It is conceivable that the typical "highway maintenance station" activities described above could occur in such locations and be exempt from 2008 MSGP eligibility. However, active, inactive, and temporarily inactive gravel mining sites and their associated material processing operations are indeed covered by the 2008 MSGP regardless of their association with such "road maintenance stations."

The SIC Manual contains general classification guidelines that apply across all industrial sectors, including definitions of what constitutes an "establishment" vs. an "auxiliary establishment" for the purpose of determining a facility's primary SIC Code. Under "Auxiliary Establishments," the manual explains that in contrast to a true auxiliary support activity, "a unit that performs auxiliary functions and is located physically separate from the establishment or

¹ Highway maintenance stations may be subject to other storm water permit requirements, particularly municipal separate storm sewer system (MS4) permit requirements applicable to State Departments of Transportation.

establishments served... is treated as a separate establishment.” This physical separation characterizes a majority of facilities within the Construction Sand and Gravel sector serving both road construction and road maintenance projects. As for co-located activities, the manual explains that “some establishments that meet the general definition of auxiliaries are nevertheless treated as operating establishments,” meaning that their industrial activity must always be treated as the primary one for the purpose of establishing a primary SIC Code. The list of such establishments in the manual includes mines (Division B). In short, mining (including gravel pits) is not considered auxiliary to another industrial activity. Based on the above, it is clear that coverage under the 2008 MSGP is necessary to authorize stormwater discharges from Construction Sand and Gravel operations, including gravel pits, which serve “highway maintenance stations.”

EPA’s comment response also addressed permit coverage for gravel pits serving construction activities. EPA notes that the eligibility section of the 2008 Construction General Permit (2008 CGP) describes how discharges from borrow pits can be covered under that permit.

For these reasons, and the plain text of EPA’s regulations defining stormwater from industrial activity as including SIC Code 14, stormwater discharges from gravel pits are clearly prohibited unless covered by the general permits described above, or by an individual permit.

Please contact Bryan Rittenhouse (202-564-0577) of my staff if you have any further questions.

cc: EPA Regional Branch Chiefs