



U.S. EPA Rule Targets Construction Site Pollution

by *Daniel W. Gentges and Jennifer Drury Buzecky*

Developers and contractors should be alert to changes in applicable stormwater discharge requirements at both the federal and state levels. State requirements are addressed in more detail on Page 2. With respect to federal requirements, however, a late 2009 federal rule makes it more likely that Wisconsin contractors and developers will add water quality testing to their projects' scope in coming years.

In December 2009, the U.S. Environmental Protection Agency (U.S. EPA) issued a final rule limiting the amount of dirt and pollutants allowed in water runoff from construction sites. 74 Fed. Reg. 62996 (December 1, 2009). U.S. EPA issued the rule in response to litigation commenced in 2004.

Environmental groups asserted for some time that soil and sediment runoff from construction sites contaminates drinking water, negatively impacts

recreational waterways, diminishes commercial fisheries and increases the risk of flood damage. These groups argued that soil and sediment runoff should be regulated under the federal Clean Water Act. In 2006, a federal district court in California agreed, ordering U.S. EPA to issue a final order regulating runoff from construction sites by December 1, 2009.

The federal rule became effective on February 1, 2010. Portions of the rule will be phased in over the next four years.

Owners and operators of all Wisconsin construction sites disturbing one or more acres, and smaller sites that are part of a larger plan of development or sale, will continue to be required to use best management practices to minimize the adverse impact of stormwater runoff from those sites. Best management practices can include soil stabilization and erosion control measures, to ensure that soils that are excavated, moved or otherwise disturbed by construction activity do not pollute nearby bodies of water. At the time of publication, the Wisconsin Department of Natural Resources (WDNR) advised that it is currently updating

Wisconsin Administrative Code Ch. NR 151 to incorporate the new federal best management practice requirements into WDNR's existing best management provisions. A draft rule is anticipated yet this summer. Any Wisconsin developer or contractor overseeing a project disturbing one or more acres should closely monitor the development of Chapter NR 151.

With respect to the construction site stormwater monitoring and numeric discharge limits imposed by the federal rule, the rule will phase in the monitoring and numeric limitation over a four-year period to allow permitting authorities time to develop monitoring requirements and to allow time for the regulated developers and contractors to prepare for compliance with those requirements. For the first time under federal law, owners and operators of construction sites in which 10 or more acres are disturbed will be required to monitor stormwater discharges from their sites and ensure that those discharges do not exceed a specific numeric effluent limitation.

The monitoring and discharge limitation requirements will apply to sites disturbing 20 or more acres beginning August 1, 2011. Owners and operators of sites disturbing 10 or more acres at one time will be required to conduct discharge monitoring and to comply with the numeric effluent limitation beginning February 2, 2014.

The federal rule imposes varying requirements for purposes of calculating the area disturbed by construction activity. As a general rule, the area disturbed will be measured based on the entire development, including non-contiguous areas. Developers and contractors will want to confirm that the proper method of calculation is used for purposes of determining both the applicability of and compliance with the federal rule.

The federal rule is intended to work in concert with existing state and local permitting requirements for stormwater discharges from construction sites. All but four states, the District of Columbia and certain U.S. territories have existing general and individual permitting regimes for stormwater discharges from construction sites. States with their own permitting regimes

U.S. EPA Rule Targets continued on page 3



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Other Stormwater Developments

by Phillip R. Bower

As discussed in the cover article, U.S. EPA has made stormwater permitting a regulatory priority. The following are some other recent stormwater developments:

U.S. EPA Enforcement Priority for 2011–2013.

U.S. EPA has announced that contaminated stormwater runoff will continue to be an enforcement priority for 2011 through 2013. U.S. EPA also set stormwater as an enforcement priority for 2008 through 2010, focusing on issues relating to homebuilding and big box store construction and ready mix concrete with crushed stone and sand and gravel operations. In April 2010, U.S. EPA announced a \$1 million settlement with a nationwide homebuilder for stormwater violations.

Wisconsin Permitting Jurisdictional Change.

On January 1, 2010, the Wisconsin Department of Commerce (Commerce) transferred to the Wisconsin Department of Natural Resource (WDNR) the responsibility for the administration of soil erosion control procedures and requirements for commercial building construction sites that disturb one or more acres of soil (Wis. Admin. Code Ch. Comm 60). Notice of Intent registrations for these sites should now be submitted to WDNR instead of Commerce. WDNR is in the process of modifying its rules to reflect these changes, so it is advisable to check with WDNR for the latest information and procedures before proceeding with a project. Commerce's program for soil erosion control for one- and two-family dwellings was not affected by this change.

Federal Sanitary Sewer Rulemaking.

U.S. EPA is currently seeking stakeholder input on whether and how to modify the National Pollutant Discharge Elimination System regulations as they apply to municipal sanitary sewer collection systems (i.e., systems that handle only wastewater) and sanitary sewer overflows. As part of the process, U.S. EPA is considering whether and how it should address peak wet weather issues. Stormwater can contribute to high volumes of flow that can overwhelm certain parts of the wastewater treatment process and may cause damage or failure of the system. U.S. EPA's position is generally that any overflow of a sewer system, which can send untreated sewage into waterways, is illegal under the Clean Water Act, but system operators contend that it is not possible to operate with "zero overflows."

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New Real Estate Legislation: One Helps Correct Errors and One Helps Brokers



by Hal Karas

In the past session, the Wisconsin legislature adopted two new laws relating to real estate transactions. WHD's Real Estate Team assisted in the drafting and consideration of both.

Wisconsin Statutes Section 706.085

This section addresses a growing problem in real estate records when mistakes are made in the preparation of recorded documents. Mistakes of all types can creep in, the most serious being incorrect legal descriptions, and can include anything from misidentifying buyers and sellers to the omission of notary seals. One thing is certain, however: As long as people are involved in the process, mistakes will be made. Until now, there was no statutory authority for how to fix an error.

While some errors may not sound serious, they do have real-world consequences. The most obvious is an error in a legal description, which could result in a mortgage not being properly recorded so that it could be avoided in a bankruptcy action. The failure to properly record deeds or change tax information also can lead to problems for divorced persons.

With the new law, persons connected with a transaction can now record a "correction instrument," which identifies the problem, the solution, and who is fixing the problem. If a legal description changes, then either the grantor or the grantee must sign the instrument, depending on whose interests are being affected.

Wisconsin Statutes Section 779.32

This section was amended to address some procedural issues that made it nearly impossible for commercial real estate brokers to claim lien rights for leasing commissions. Previously, the law required brokers to give notices of lien claims within certain time periods prior to the completion of transactions. Not only is it difficult to predict the actual completion date in many cases, but such notices were thought to harm the relationships between brokers and their clients.

The new law, however, allows brokers to file claims within certain time periods after the completion of a transaction, in a manner very similar to construction liens.

WHD is proud that WHD attorneys Hal Karas and Brad Dallet assisted in the preparation of these laws prior to their introduction.

For more information regarding issues in both of these areas, please contact Hal Karas at (414) 978-5499 or hkaras@whdlaw.com, or a member of WHD's Real Estate Team.



Enforcing Occupancy Requirements in Your Condominium

by Lydia J. Chartre

If your condominium association documents include restrictions on occupancy (how many people can reside in a unit), be aware of what the federal law states on the issue to avoid potentially costly lawsuits brought

by disgruntled unit owners.

While it is legal for a condominium association to adopt and enforce occupancy policies, those rules (and enforcement of the rules) must be reasonable and in compliance with state laws and local ordinances. If they are not, the rules run the risk of being found discriminatory based on familial status under the federal Fair Housing Act. The act prohibits discrimination on the basis of (among other things) familial status, which means the presence of children in the family.

As you may be aware, the Department of Housing and Urban Development (HUD) is the entity charged with enforcing the Fair Housing Act. In a policy statement issued by HUD regarding occupancy standards, it was emphasized that a “two-people-per-bedroom” policy may be challenged where special circumstances are present. Some of the circumstances that may weigh in favor of a two-people-per-bedroom policy being found discriminatory are: (1) if the bedroom and living area are sufficiently large to allow for the third person; (2) if the child (the third person residing in the unit) is very young; and (3) if state/local ordinances would allow the third person to occupy, despite the housing provider’s rules (here, the condo association’s rules).

Therefore, for example, an association should beware if it

has a two-person-per-bedroom occupancy policy and it seeks to enforce its rules against a couple who recently had a baby. In this example, all three of the circumstances described above would arguably weigh in the owner’s favor if the rule was challenged, although the size of the condo probably could be argued either way. There is a hypothetical within the HUD policy where the child/third occupant in question is an infant, and states that it is more probable that discrimination would be found if the third occupant was a baby.

It is important to note that the applicable State Administrative Code provision looks at two of the HUD factors discussed above (size and age of the occupant), and states:

Every sleeping room shall be of sufficient size to afford at least 400 cubic feet of air space for each occupant over 12 years of age, and 200 cubic feet for each occupant under 12 years. No greater number of occupants than the number thus established shall be permitted in any such room. Wis. Admin. Code, §COMM 79.09.

By considering both the size of the unit and the age of the occupants, the state code provision would probably be found “reasonable” by HUD if challenged.

Associations should also become familiar with any local/municipal ordinances dealing with occupancy and should use those as a guide when adopting or revising its rules.

Of course, HUD policies, as well as the applicable federal, state, and local laws are constantly changing. If you are considering making any changes to your documents regarding occupancy requirements, we would recommend that you consult your attorneys to make sure that the changes will comply with the law.

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U.S. EPA Rule Target continued from page 1

– Wisconsin among them – will *not* be required to reopen their existing general and individual permits for construction site stormwater discharges to incorporate the federal rule’s guidelines until those states’ current permits expire – generally every five years. Wisconsin’s general permit for construction site discharges expires September 30, 2011, shortly after the August 1, 2011 compliance date. As a regional comparison, Iowa’s general permit expires in 2012, and general permits in both Illinois and Minnesota expire in 2013.

At the time of publication, the WDNR intends to proceed with a rulemaking process to update Wisconsin Administrative Code Chapter NR 216 to incorporate the new federal numeric effluent limits. The current WDNR plan is to update applicable permits after the Chapter 216 rulemaking is complete. Projects that may be subject to the new numeric effluent limitation should begin to evaluate permitting and other applicable stormwater requirements, including tracking the WDNR

rulemaking process, to ensure compliance with both state and federal requirements, especially during this transition period.

In any event, the federal rule creates new regulatory requirements for contractors and developers addressing soil erosion issues during construction activity. As the federal rule is implemented, those contractors and developers will be charged with greater responsibilities for stormwater management at their construction sites.

Nationwide, more than 80,000 home builders, commercial and industrial building contractors and civil engineering firms are expected to be covered by the rule. U.S. EPA estimates the rule ultimately will impose more than \$950 million in nationwide compliance costs annually. Those compliance costs must be addressed as owners and contractors develop their project budgets.

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Garbage in, Garbage Out!

by Brad Dallet

Is one man's trash really another man's treasure? Well, that could be true, especially if you are a retail tenant in a shopping center that shares trash facilities with the other tenants. And, if you are the landlord of that center, is trash removal really being handled in a fair and equitable manner?

Let's take the situation where a multi-tenant retail center's end cap is anchored by a fast casual restaurant. If this is a typical center, most likely there are multiple retail tenants, all of which probably contribute much less trash than the restaurant. And, if each tenant has a typical triple net retail lease, each tenant is most likely paying its share of the common trash facilities based on square footage of the premises for each tenant.

If the retail center has a shared trash facility, and each tenant is paying their share based on square footage, is that really fair? Is it fair for a tenant with much less trash to be charged the same as the fast casual restaurant? After all, the restaurant's trash likely results in more frequent visits from waste management, causing an increase in the cost of trash removal. Shouldn't the restaurant pay more? Shouldn't the trash removal be treated more like a utility where each tenant pays for its own usage? That may be a great concept, but unlike gas, electric or water meters, how would you meter trash usage? A landlord who seeks to address this issue

needs to take clear and decisive steps in its leases to fairly and equitably handle the trash.

My suggestion would be to require the restaurant tenant to install, maintain, and be solely responsible for its own trash facility. This is the most clear cut method to ensure the restaurant pays its fair share, and the remaining tenants are left using the shared trash facility and paying their prorata share of its cost. This eliminates any dispute as to whether or not the restaurant user is being charged a reasonable amount, and no issues can arise as to how the landlord calculates the fair share for its tenants.

As an alternative, the landlord and tenant can agree that although the restaurant is using the shared trash facility, it will pay more than its share due to its increased usage. However, I would encourage any such arrangement to be clear and decisive, so both parties understand the method of calculation of costs (i.e. setting a fixed surcharge for the extra use).

Understand that picking a fixed surcharge is not an exact science, but it does have the benefit of being predictable to all parties. Bottom line: Both parties want a fair and predictable arrangement for trash removal with no surprises. If the economics work, and you are specific in your lease, you will avoid unnecessary conflicts.

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