



# Storm Water Phase II Final Rule

## Conditional No Exposure Exclusion for Industrial Activity

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### Why Is the Phase I No Exposure Exclusion Addressed in the Phase II Final Rule?

The 1990 storm water regulations for Phase I of the federal storm water program identify eleven categories of industrial activities that must obtain a National Pollutant Discharge Elimination System (NPDES) permit. Operators of certain facilities within category eleven (xi), commonly referred to as “light industry,” were exempted from the definition of “storm water discharge associated with industrial activity,” and the subsequent requirement to obtain an NPDES permit, provided their industrial materials or activities were not “exposed” to storm water. This Phase I exemption from permitting was limited to those facilities identified in category (xi), and did not require category (xi) facility operators to submit any information supporting their no exposure claim.

In 1992, the Ninth Circuit court remanded to EPA for further rulemaking the no exposure exemption for light industry after making a determination that the exemption was arbitrary and capricious for two reasons. First, the court found that EPA had not established a record to support its assumption that light industrial activity that is not exposed to storm water (as opposed to all other regulated industrial activity not exposed) is not a “storm water discharge associated with industrial activity.” Second, the court concluded that the exemption impermissibly relied on the unsubstantiated judgment of the light industrial facility operator to determine the applicability of the exemption. This fact sheet describes the revised conditional no exposure exclusion as presented in the Phase II Final Rule.

### Who is Eligible to Claim No Exposure?

As revised in the Phase II Final Rule, the conditional no exposure exclusion applies to ALL industrial categories listed in the 1990 storm water regulations, except for construction activities disturbing 5 or more acres (category (x)).

### What Is The Regulatory Definition of “No Exposure”?

The intent of the no exposure provision is to provide facilities with industrial materials and activities that are entirely sheltered from storm water a simplified way of complying with the storm water permitting provisions of the Clean Water Act (CWA). This includes facilities that are located within a larger office building, or facilities at which the only items permanently exposed to precipitation are roofs, parking lots, vegetated areas, and other non-industrial areas or activities. The Phase II regulatory definition of “no exposure” follows.

**No exposure** means all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products.

A storm resistant shelter is not required for the following industrial materials and activities:

- Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak. “Sealed” means banded or otherwise secured and without operational taps or valves;
- Adequately maintained vehicles used in materials handling; and
- Final products, other than products that would be mobilized in storm water discharges (e.g., rock salt).

The term “storm-resistant shelter,” as used in the no exposure definition, includes completely roofed and walled buildings or structures, as well as structures with only a top cover but no side coverings, provided material under the structure is not otherwise subject to any run-on and subsequent runoff of storm water. While the intent of the no exposure provision is to promote a condition of permanent no exposure, EPA understands certain vehicles could become temporarily exposed to rain and snow while passing between buildings. Adequately maintained mobile equipment (e.g., trucks, automobiles, forklifts, trailers, or other such general purpose vehicles found at the industrial site that are not industrial machinery, and that are not leaking contaminants or are not otherwise a source of industrial pollutants) can be exposed to precipitation or runoff. Such activities alone would not prevent a facility from certifying to no exposure. Similarly, trucks or other vehicles awaiting maintenance at vehicle maintenance facilities that are not leaking contaminants or are not otherwise a source of industrial pollutants, are not considered “exposed.”

In addition, EPA recognizes that there are circumstances where permanent no exposure of industrial activities or materials is not possible and, therefore, under such conditions, materials and activities can be sheltered with temporary covers (e.g., tarps) between periods of permanent enclosure. The no exposure provision does not specify every such situation, but NPDES permitting authorities can address this issue on a case-by-case basis.

The Phase II Final Rule also addresses particulate matter emissions from roof stacks/vents that are regulated by, and in compliance with, other environmental protection programs (i.e., air quality control programs) and that do not cause storm water contamination are considered not exposed. Particulate matter or visible deposits of residuals from roof stacks and/or vents not otherwise regulated (i.e., under an air quality control program) and evident in storm water outflow are considered exposed. Likewise, visible “track out” (i.e., pollutants carried on the tires of vehicles) or windblown raw materials is considered exposed. Leaking pipes containing contaminants exposed to storm water are deemed exposed, as are past sources of storm water contamination that remain

onsite. General refuse and trash, not of an industrial nature, is not considered exposed as long as the container is completely covered and nothing can drain out holes in the bottom, or is lost in loading onto a garbage truck. Industrial refuse and trash that is left uncovered, however, is considered exposed.

### What is Required Under the No Exposure Provision?

The Phase II Final Rule represents a significant expansion in the scope of the original no exposure provision in terms of eligibility (as noted above) and responsibilities for facilities claiming the exclusion. Under the original no exposure provision, a light industry operator was expected to make an independent determination of whether there was “exposure” of industrial materials and activities to storm water and, if not, simply not submit a permit application. An operator seeking to qualify for the revised conditional no exposure exclusion, including light industry operators (i.e., category (xi) facilities), must:

- Submit written certification that the facility meets the definition of “no exposure” to the NPDES permitting authority once every 5 years.
  - The Phase II Final Rule includes a four-page *No Exposure Certification* form that uses a series of yes/no questions to aid facility operators in determining whether they have a condition of no exposure. It also serves as the necessary certification of no exposure provided the operator is able to answer all the questions in the negative. EPA’s *Certification* is for use only by operators of industrial activity located in areas where EPA is the NPDES permitting authority.
  - A copy of the *Certification* can be obtained from the U.S. EPA Office of Wastewater Management (OWM) web site, the Storm Water Phase II Final Rule published in the *Federal Register* (Appendix 4), or by contacting OWM.
- Submit a copy, upon request, of the *Certification* to the municipality in which the facility is located.
- Allow the NPDES permitting authority or, if discharging into a municipal separate storm sewer system, the operator of the system, to: (1) inspect the facility; and (2) make such inspection reports publicly available upon request.

Regulated industrial operators need to either apply for a permit or submit a no exposure certification form in order to be in compliance with the NPDES storm water regulations. Any permit held becomes null and void once a certification form is submitted.

Even when an industrial operator certifies to no exposure, the NPDES permitting authority still retains the authority to require the operator to apply for an individual or general permit if the NPDES permitting authority has determined that the discharge is contributing to the violation of, or interfering with the attainment or maintenance of, water quality standards, including designated uses.

### Are There Any Concerns Related to Water Quality Standards?

**Y**es. An operator certifying that its facility qualifies for the conditional no exposure exclusion may, nonetheless, be required by the NPDES permitting authority to obtain permit authorization. Such a requirement would follow the permitting authority's determination that the discharge causes, has a reasonable potential to cause, or contributes to a violation of an applicable water quality standard, including designated uses. Designated uses can include use as a drinking water supply or for recreational purposes.

Many efforts to achieve no exposure can employ simple good housekeeping and contaminant cleanup activities such as moving materials and activities indoors into existing buildings or structures. In limited cases, however, industrial operators may make major changes at a site to achieve no exposure. These efforts may include constructing a new building or cover to eliminate exposure or constructing structures to prevent run-on and storm water contact with industrial materials and activities. Major changes undertaken to achieve no exposure, however, can increase the impervious area of the site, such as when a building with a smooth roof is placed in a formerly vegetated area. Increased impervious area can lead to an increase in the volume and velocity of storm water runoff, which, in turn, can result in a higher concentration of pollutants in the discharge, since fewer pollutants are naturally filtered out.

The concern of increased impervious area is addressed in one of the questions on the *Certification* form, which asks, "Have you paved or roofed over a formerly exposed, pervious area in order to qualify for the no exposure exclusion? If yes, please indicate approximately how much area was paved or roofed over." This question has no affect on an operator's eligibility for the exclusion. It is intended only to aid the NPDES permitting authority in assessing the likelihood of such actions interfering with water quality standards. Where this is a concern, the facility operator and its NPDES permitting authority should take appropriate actions to ensure that water quality standards can be achieved.

### What Happens if the Condition of No Exposure Is Not Maintained?

**U**nder the Phase II Final Rule, the no exposure exclusion is conditional and not an outright exemption. Therefore, if there is a change in circumstances that causes exposure of industrial activities or materials to storm water, the operator is required to comply immediately with all the requirements of the NPDES Storm Water Program, including applying for and obtaining a permit.

Failure to maintain the condition of no exposure or obtain coverage under an NPDES storm water permit can lead to the unauthorized discharge of pollutants to waters of the United States, resulting in penalties under the CWA. Where a facility operator determines that exposure is likely to occur in the future due to some anticipated change at the facility, the operator should submit an application and acquire storm water permit coverage prior to the exposed discharge to avoid such penalties.

#### For Additional Information

##### Contact

- ☞ U.S. EPA Office of Wastewater Management
  - Phone: (202) 564-9545
  - Internet: [www.epa.gov/npdes/stormwater](http://www.epa.gov/npdes/stormwater)
  
- ☞ Your NPDES Permitting Authority. (A list of names and phone numbers for each U.S. EPA Region is included in Fact Sheet 2.9. Additional contact names, addresses, and numbers for each State can be obtained from the U.S. EPA Office of Wastewater Management)

##### Reference Documents

- ☞ Storm Water Phase II Final Rule Fact Sheet Series
  - Internet: [cfpub.epa.gov/npdes/stormwater/swfinal.cfm](http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm)
  
- ☞ Storm Water Phase II Final Rule (64 FR 68722)
  - Internet: [www.epa.gov/npdes/regulations/phase2.pdf](http://www.epa.gov/npdes/regulations/phase2.pdf)
  
  - Contact the U.S. EPA Water Resource Center
    - Phone: (202) 260-7786