

By Matthew P. Coglianesse,
Peckar & Abramson, P.C.

EPA PUBLISHES NEW EFFLUENT GUIDELINE RULE, RAMPS UP ENFORCEMENT OF CWA STORMWATER REQUIREMENTS



The U.S. Environmental Protection Agency (EPA) and delegated states have stepped up enforcement of stormwater regulations at construction sites. EPA has stated that construction activities like clearing, excavating and grading significantly disturb soil and sediment and that, if not managed properly, soil can easily be washed off the construction site during storms and pollute nearby water bodies. Last year, four consent decrees were lodged with the Federal District Court for the Eastern District of Virginia for alleged violation of the Clean Water Act (CWA) and analogous state statutes and regulations. All four consent decrees resolved enforcement actions against developers of large-scale properties that encompassed several states. All of the consent decrees involved enforcement of stormwater management regulations on construction sites. The consent decrees not only involved rectifying the alleged violations, but also required the payment of large civil penalties (up to \$1.5 million) and the implementation of Supplemental Environmental Projects (SEP).

Stormwater discharges associated with

construction projects that affect more than one acre of land require a permit under the CWA's National Pollutant Discharge Elimination System (NPDES). The NPDES is the major framework regulating discharges of pollutants from "point sources." The Construction General Permit (CGP) is part of the NPDES system. The CGP authorizes stormwater discharges from large and small construction activities that result in a total land disturbance of equal to or greater than one acre. In 2008, EPA reissued its CGP essentially "as is" for a two-year time period. However, EPA added a couple of new stormwater management requirements, including:

1. A requirement to educate employees or subcontractors so that they understand their role in implementing stormwater controls
2. A requirement to remove sediment from silt fences before the deposit reaches 50 percent of the above-ground fence height

While EPA and the states have ratcheted up enforcement of stormwater regulations, the

most significant regulatory development for road builders and other contractors occurred very recently. That is, on Dec. 1, 2009, EPA published its final rule for "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category" (40 CFR Part 450). Among other things, the rule sets Effluent Limitation Guidelines (ELG) for turbidity from stormwater runoff for all permitted construction and development (C&D) sites. The rule has been several years in the making. EPA has estimated that more than 10,000 highway, street and bridge construction firms will be affected by the new rule.

While not as stringent as the proposed rule, EPA has imposed new nationwide monitoring requirements and enforceable numeric limits on the amount of sediment that can run off any construction site that impacts 10 or more acres of land at any one time. The rule also specifies the types of erosion and sediment controls that contractors must use (i.e. best management practices, or BMPs) in requiring the control of stormwater runoff on all construction sites that disturb one or more acres of land. The new rule will take effect in February 2010, and will

be phased in over approximately four years. EPA did not address post-construction issues in the construction and development ELG; rather, EPA has initiated a separate rulemaking to develop post-construction ELGs by November 2012.

You can read EPA's lengthy rule, but, it is comprised of numeric and non-numeric ELGs. Essentially, the ELG establishes minimum-control technologies that must be incorporated into every construction stormwater permit issued by EPA and states authorized to administer the NPDES permit program. Specific requirements include:

For all construction stormwater permits – Mandatory BMPs using the best practicable control technology currently available relating to *Erosion and Sediment Controls* (40 CFR §

450.21(a)), *Soil Stabilization BMPs* (40 CFR § 450.21(b)), *Dewatering BMPs* (40 CFR § 450.21(c)), *Pollution Prevention Measures* (40 CFR § 450.21(d)), and *Prohibited Discharges* (40 CFR § 450.21(e)). These include the following set out in the rule:

(a) **Erosion and Sediment Controls.**

Design, install and maintain effective erosion controls and sediment controls to minimize the discharge of pollutants. At a minimum, such controls must be designed, installed and maintained to:

1. Control stormwater volume and velocity within the site to minimize soil erosion
2. Control stormwater discharges, including both peak flow rates and total stormwater

volume, to minimize erosion at outlets and to minimize downstream channel and streambank erosion

3. Minimize the amount of soil exposed during construction activity
4. Minimize the disturbance of steep slopes
5. Minimize sediment discharges from the site. The design, installation and maintenance of erosion and sediment controls must address factors such as the amount, frequency, intensity and duration of precipitation, the nature of resulting stormwater runoff and soil characteristics, including the range of soil particle sizes expected to be present on the site

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6. Provide and maintain natural buffers around surface waters, direct stormwater to vegetated areas to increase sediment removal and maximize stormwater infiltration, unless infeasible
7. Minimize soil compaction and, unless infeasible, preserve topsoil

(b) Soil Stabilization. Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth-disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. Stabilization must be completed within a period of time determined by the permitting authority. In arid, semi-arid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, alternative stabilization measures must be employed as specified by the permitting authority

(c) Dewatering. Discharges from dewatering activities, including discharges from dewatering of trenches and excavations, are

prohibited unless managed by appropriate controls

(d) Pollution-Prevention Measures. Design, install, implement and maintain effective pollution-prevention measures to minimize the discharge of pollutants. At a minimum, such measures must be designed, installed, implemented and maintained to:

1. Minimize the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters. Wash waters must be treated in a sediment basin or alternative control that provides equivalent or better treatment prior to discharge
2. Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and stormwater
3. Minimize the discharge of pollutants from spills and leaks and implement chemical spill and leak prevention and response procedures

(e) Prohibited Discharges. The following discharges are prohibited:

1. Wastewater from washout of concrete, unless managed by an appropriate control
2. Wastewater from washout and cleanout of stucco, paint, form-release oils, curing compounds and other construction materials
3. Fuels, oils, or other pollutants used in vehicle and equipment operation and maintenance
4. Soaps or solvents used in vehicle and equipment washing

(f) Surface Outlets. When discharging from basins and impoundments, utilize outlet structures that withdraw water from the surface, unless infeasible

For all construction sites that disturb 20 or more acres of land at one time (whether contiguous or not), the average turbidity for any discharge for any day may not exceed a numeric effluent limit of 280 NTU (turbidity measurement

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units). The deadline for complying with this numeric limit will be about August 2011 (40 CFR § 450.22(a)). The 280 NTU effluent limit is expanded to include all construction sites that disturb 10 or more acres of land at one time (whether contiguous or not) in about January 2014. The turbidity effluent limit is limited to the two-year, 24-hour storm event. As most states implement the federal stormwater rules, they will be responsible for establishing and implementing the new regulations and standards.

EPA will include the new ELG provisions in a new five-year Construction General Permit (CGP) to be reissued no later than July 2011. Most states issue their own construction general permits, and the new ELG requirements must be incorporated into any new general permits issued after the effective date of the regulation (60 days after publication in the *Federal Register*). The requirements also apply to individual permits issued by states or EPA. (EPA currently issues permits for construction activities in four states, the District of Columbia and in certain U.S. territories and tribal areas.)

The new rule will require new responsibilities on new construction activities covered by the rule. On all projects where the numeric limit applies, the rule requires contractors to collect numerous stormwater runoff samples from all discharge points during every rain event and calculate the NTU level(s). The data is then averaged. If that average reading exceeds the "daily maximum limit of 280 NTUs," the site will be in violation of the new ELG.

The new ELG requirements will not directly apply to construction site "operators" until the requirements are incorporated into an individual or general NPDES stormwater permit that applies to their project(s), as described above. That is, the construction stormwater permit language is what will become the legally enforceable requirement that construction site "operators" must meet or face potential fines

and penalties. Therefore, the implementation date of the new requirements will vary from state to state, depending on when states re-issue their permits and whether projects are covered by individual or general permits.

EPA expects compliance with the new regulation to reduce the amount of sediment and other pollutants discharged from construction and development sites by approximately 4 billion pounds per year. EPA puts the annual cost of the rule at about \$959 million, once fully implemented.

Therefore, with increased regulatory scrutiny of construction projects and the new ELG rule, it is imperative that in the pre-planning stages of a project the designated responsible party should fully identify and understand the applicable NPDES program and Rule requirements. For the EPA CGP, the "operator" of the construction site

is responsible for obtaining a stormwater permit. There can be a single-site operator, or multiple operators. That depends on the relationship between the owner, architect, general contractor, or any other team members, who may have contractual responsibility or similar duties. What is important is that from a regulator's perspective there is overlap on the definition of "operator." That is, the regulator may be able to seek penalties from both the owner and contractor, and, perhaps, others, for not obtaining a permit or for violation of permit conditions. So, it is important for the project team to communicate on the stormwater issue upfront and designate responsibility

for obtaining the stormwater permit, including addressing all the permitting protocol such as producing a stormwater pollution prevention plan and daily compliance with the plan during the construction process.

Overall, the "operators" at a construction site, even if they did not obtain the permit, will be responsible for compliance and implementation of the conditions of the permit.

Matthew Coghianese specializes in environmental law and employment law. Prior to entering the private practice of law, he served as an assistant regional counsel with the U.S. EPA in Atlanta.




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