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COVID-19 And Construction Stormwater Discharge Permits

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Pursuant to the Clean Water Act, most construction projects in the U.S. that will disturb one or more acres of earth are required to be covered by a National Pollutant Discharge Elimination System, or NPDES, construction stormwater discharge permit, either from the U.S. Environmental Protection Agency or a delegated state authority.

As some state and local jurisdictions have begun to direct that construction projects shut down due to COVID-19 concerns, questions have arisen about contractors' obligations under their projects' NPDES construction stormwater discharge permits, also known as construction general permits, or CGPs.

It is important to realize that CGP obligations do not cease simply because construction has stopped temporarily or even permanently. Instead, obligations continue until the permit coverage is formally terminated. Coverage termination usually requires permanent stabilization of the site or a transfer of site ownership or permit responsibility to another party.

All CGPs require periodic site inspections of stormwater measures, typically every two weeks or every week plus after any precipitation event. Depending on the wording of the shutdown order, inspections may be permitted because they are not "construction" per se. However, if inspections find a need for maintenance, repair or replacement of stormwater measures, those activities likely would be subject to a construction shutdown order.

A problem then arises because CGPs require that maintenance, repair or replacement must be initiated and completed within specified time limits. These limits are shorter than the initial length of most COVID-19 shutdowns thus far.

In addition, CGPs also require initiation of stabilization measures promptly when construction activities have permanently ceased or will be temporarily inactive for 14 or more days. The stabilization activities typically must then be completed within seven to 14 days after initiation — again, likely shorter than COVID-19 shutdowns.

Most CGPs have provisions for instances when stabilization cannot be initiated or completed within the time limits. These may apply to shutdown situations, so they should be read carefully.

The CGP requirements to inspect sites, maintain stormwater measures, and initiate and complete stabilization may all conflict with directives to shut down construction sites. The wording of the directive should be examined closely. In the worst case, a contractor may face a choice between violating the shutdown order and violating the CGP. With potential fines of over \$50,000 per day per violation, plus other potential civil and criminal penalties, Clean Water Act violations are serious business.

The federal EPA has already acted, by issuing a memorandum on March 26 essentially stating that the EPA temporarily will not enforce its regulations and permits to the extent compliance is prevented by the COVID-19 pandemic. However, the EPA states that permittees should use existing procedures to report noncompliance with routine monitoring requirements, including stormwater inspections.

The EPA's CGP (and most states' CGPs) requires reporting of instances of noncompliance. In the context to a mandated COVID-19 shutdown, a permittee's report to EPA should include: (1) a statement that you are unable to conduct stormwater inspections and maintenance per the NPDES construction stormwater discharge general permit at the specified projects (list them); (2) a description of the cause of the inability (e.g., governor's order dated xx/xx/2020 shutting down all construction activities); (3) a statement of when the cessation of stormwater inspections and maintenance began and how long it is expected to last (e.g. the end date of the order); (4) a statement that the projects were in compliance with permit requirements at the time of shutdown; and (5) a statement that inspections and maintenance will resume promptly as soon as permitted.

The federal EPA's temporary policy does not bind delegated state authorities, who are free to take a different approach. In non-EPA permit states, it would be wise to engage the state agency that issued the permit coverage. The state may put in place similar procedures to temporarily relieve permittees of certain permit responsibilities in light of the extreme circumstances. We have seen this previously in instances of local flooding.

If you cannot get relief from the state permitting authority, a potential solution is to petition the public official responsible for the shutdown to exempt the activities necessary to comply with NPDES construction stormwater discharge permit requirements. Alternatively, clarification can be sought that such activities fall outside the definition of the activities subject to the shutdown. Since the point of the NPDES program is to prevent pollution of public waters, the state or local official may decide to allow continuation of compliance activities as a public health and safety issue. Local industry groups such as the Associated General Contractors of America may help contractors amplify these concerns.

Depending on jurisdiction, note that the contractor may not be the party legally responsible for NPDES permit compliance. If all else fails, this may provide the contractor with an out — and leave legal responsibility with the owner. However, even where the owner is the party responsible under the permit, the contractor is likely still contractually bound to the owner for ensuring permit compliance.

The COVID-19 virus is creating unique issues for the construction industry, of which stormwater permit compliance in the face of mandatory shutdowns is just one. But awareness, preparation and some prompt action may help minimize the disruptions.