

the EPA and Corps. At the same time, the Guidance has been embraced by conservationists who believe it is a step in the right direction towards restoring protections for small streams and wetlands that are connected to larger bodies of water.

The Guidance will undergo a 60-day comment period ending July 1, 2011. After the Guidance has been finalized, EPA and Corps will undertake rule-making pursuant to the Administrative Procedure Act. (Jeanne Zolezzi)

EPA PROPOSES NEW GENERAL PERMIT FOR STORMWATER DISCHARGES FROM CONSTRUCTION ACTIVITY

The U.S. Environmental Protection Agency (EPA) has issued for public comment a new draft general permit for stormwater discharges from construction activities involving more than one acre. *See, 76 Fed. Reg. 22,882.* EPA is developing this draft Construction General Permit (CGP) to implement the EPA's new Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Industry. Because the existing permit is set to expire on June 30, 2011, EPA also is proposing to extend that permit until January 31, 2012. When EPA finalizes the new CGP, likely in early-January 2012, operators of construction activities will be subject to significantly more stringent erosion and sediment control, inspection, and monitoring requirements.

Background

Pursuant to § 402 of the Clean Water Act (CWA), EPA prohibits any person from discharging pollutants to navigable waters without a permit. Beginning in 1990, EPA established regulations under the National Pollutant Discharge Elimination System (NPDES) program for owners and operators to obtain permits for stormwater discharges associated with construction activity. Since that time, EPA has carried out the NPDES program, first by promulgating permit application requirements, and later by creating a series of general permits for construction stormwater discharges. The current CGP took effect in 2008.

When EPA develops an NPDES permit, the CWA requires the agency to incorporate into it conditions for meeting technology-based effluent limits established under §§ 301 and 306 of the statute. Prior to the promulgation of an Effluent Limitations Guideline (ELG), EPA permit writers establish these

technology-based limitations using their "Best Professional Judgment." It was their exercise of that Best Professional Judgment that supported the effluent limitations (primarily expressed as Best Management Practices) contained in the agency's 2008 CGP.

On December 1, 2009, EPA issued its Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Industry (C&D Rule). *See, 74 Fed. Reg. 62,996.* EPA designed the C&D Rule, which took effect February 1, 2010, to control sediment pollution from construction for all sites that disturb one or more acres and, for the first time, to impose nationally-applicable numeric effluent limitations on stormwater discharges from sites that disturb greater than 20 or ten acres based on a schedule established by the rule. Under the C&D Rule construction sites must implement Best Management Practices (non-numeric effluent limits) to control stormwater discharges, such as erosion and sediment controls, soil stabilization requirements, dewatering requirements, pollution prevention measures, prohibitions on certain discharges, and use of surface outlet structures.

The C&D Rule was challenged before it took effect on February 1, 2010. During the course of litigation, EPA discovered that the data it had used to calculate the numeric limit for turbidity were misinterpreted. Ultimately, EPA sought a voluntary remand of the numeric turbidity limit so it could recalculate the limit. All other portions of the C&D Rule remained in effect and subject to implementation in any new permit. Since the remand took effect on January 4, 2011 EPA has been working to develop a recalculated limit with the goal of proposing and promulgating that revised limit in time for it to be incorporated into a reissued CGP along with the un-remanded, non-numeric requirements of the C&D Rule.

The New Draft Construction General Permit

On April 25, 2011, EPA published notice of its new draft CGP. As proposed, the draft permit incorporates the C&D Rule's non-numeric effluent limits as prescriptive requirements and design standards, but includes only a placeholder for inclusion of the numeric effluent limit for turbidity, which EPA continues to develop. Even without the numeric limit, however, the proposed CGP's requirements are significantly more stringent than those of the current permit.

The new proposed CGP includes a number of changes to the 2008 CGP, as well as a suite of wholly new requirements. The proposal would require operators to:

- Establish at least a 50-foot undisturbed, natural buffer area around any waters of the U.S., including wetlands, occurring on or adjacent to their sites, or achieve an equivalent level of protection by implementing alternative measures. The operator must maintain the selected alternative for the duration of permit coverage.
- Before beginning earth-disturbing activities, install and make operational all stormwater controls required under § 2 of the permit and identified in the site's Stormwater Pollution Prevention Plan (SWPPP). This requirement does not apply to earth disturbances related to initial site clearing and establishing entry, exit, and access of the site, for which stormwater controls may be installed immediately after the earth disturbance if necessary. Notably, the draft permit does not differentiate in this requirement between controls scheduled in a SWPPP to be phased in over the course of construction and controls the SWPPP requires to be installed for project commencement.
- Immediately initiate stabilization on exposed portions of the site where earth-disturbing activities have permanently or temporarily ceased, and will not resume for a period exceeding 14 calendar days, or for a period of seven or more calendar days if (a) earth-disturbing activities occur within 50 feet of a water of the U.S. located on or immediately adjacent to the construction site, (b) the site discharges to sediment- or nutrient-impaired wa-

ters, (c) the site discharges to high quality waters (*i.e.*, Tier 2, 2.5, or 3 waters), or (d) the activity disturbs slopes of 15 percent or greater. A host of new stabilization criteria must be met under all stabilization scenarios.

- Remove sediment deposited on the site, tracked out of the site, or accumulated near sediment controls before it compromises the effectiveness of onsite controls and/or is discharged to surface waters.
- Stabilize all entrance and exit points created on the site for a minimum of 50 feet into the site so that no soil is left exposed and no sediment is discharged during storm events.
- Avoid earth-disturbing activities on steep slopes (*i.e.*, slopes of 15 percent or greater), unless infeasible or inconsistent with the requirements of the project.
- Install and maintain controls to protect any storm drain inlets to which the site discharges and the operator has access.
- Design, install, implement, and maintain effective pollution prevention measures to minimize the discharge of pollutants. At a minimum, these measures must minimize (a) 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 with equivalent treatment), (b) the exposure of building materials, wastes, and other materials to precipitation and stormwater, and (c) the discharge of pollutants from spills and leaks (operators also must implement prescribed chemical spill and leak prevention and response procedures).
- Visually assess the quality of site discharge (*e.g.*, color, odor, floating, settled, or suspended solids) if a site inspection occurs during a discharge-generating precipitation event.
- Undertake corrective actions for addressing erosion and sediment control installation, maintenance, and repair issues and for addressing sediment discharges within an allotted timeframe

(typically seven days) and in accordance with specific procedures.

Beyond these non-numeric effluent limits set forth in the proposed CGP, EPA plans to incorporate into the permit the numeric effluent limit for turbidity after it is re-promulgated later this year. Once the numeric limit is recalculated and added to the new CGP, EPA will implement the limit in a phased approach. Construction sites that disturb 20 or more acres at once must monitor discharges from construction areas and comply with the numeric effluent limitation beginning August 1, 2011 (or when EPA incorporates the limit into the final new CGP). Construction sites that disturb between ten and 20 acres at once must begin monitoring discharges from the site and comply with the numeric effluent limitation on February 2, 2014. Operators on sites subject to the numeric limit will be required to perform sampling during all discharge-generating precipitation events. The first sample will be required to be taken within the first hour after the discharge begins, and a minimum of three samples will be required to be taken for each event. If any one sample exceeds the turbidity limit, specified corrective actions will be required.

Conclusion and Implications

When it finalized the C&D Rule in 2009, EPA anticipated that the Rule would affect over 81,000 entities, including residential and commercial construction companies and civil engineering firms involved in highway, street, and bridge construction. A similar number of entities likely will feel the effects of the new CGP when it becomes final. This widespread effect can be attributed to the fact that the requirements of the C&D Rule and the recalculated numeric limit for turbidity will apply in all states

nationwide, not just those in which EPA remains the permitting authority (*i.e.*, Idaho, Massachusetts, New Hampshire, New Mexico and Washington, D.C.). Indeed, the states that administer their own permitting programs will be required to adopt the C&D Rule's requirements and the forthcoming numeric limit when they next reissue their general or individual permits (though the states may adopt their own variations of those requirements). If opponents have their way, however, the controls and practices set forth in those requirements may not appear on construction sites anytime soon.

The feasibility and legality of implementing enforceable numeric limits for turbidity on storm-water discharges from construction sites have been questioned repeatedly by prospective permittees. Opponents argue that turbidity is a measurement of a conventional pollutant, total suspended solids, and, therefore, that it should be subject to less stringent conventional pollutant control requirements, rather than the more stringent non-conventional pollutant controls chosen by EPA. Relying, in part, on that argument, the legality of the numeric turbidity limit already has been challenged in court. After EPA issued the C&D Rule, the National Association of Homebuilders challenged it in U.S. Court of Appeals for the Seventh Circuit. The court did not vacate the numeric limit but, on the EPA's request, ruled to hold the matter in abeyance until EPA recalculated the numeric limit. As a result, once finalized and implemented, the new CGP and the forthcoming numeric effluent limitation for turbidity almost certainly will be the subject of further litigation. In the meantime, interested parties should voice their concerns about the proposal to EPA before the June 24, 2011 deadline for comments. (Parker Moore, Richard Davis)

**Reprinted with permission from the *Eastern Water Law & Policy Reporter*. Copyright 2011, Argent Communications Group. All rights reserved. Further electronic or hard copying requires additional written consent:
P.O. Box 506, Auburn, CA 95604 OR E-mail: reprints@argentco.com.**