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News Alert

EPA Releases 2022 Construction General Permit for Public Comment

Key Takeaways

- **What Is Happening?** The U.S. Environmental Protection Agency (EPA) published for public comment its proposed 2022 National Pollutant Discharge Elimination System (NPDES) Construction General Permit (CGP), which authorizes stormwater discharges from construction activities in jurisdictions where EPA is the NPDES permitting authority. Public comments are due July 12, 2021.

- **Who Is Impacted?** Short term: construction activity operators in jurisdictions where EPA is the NPDES permitting authority, including Massachusetts, New Hampshire, New Mexico, and the District of Columbia. Longer term: construction activity operators in states that model their NPDES stormwater construction general permits after EPA's CGP.

- **What Should I Do?** Building contractors, companies that commission substantial numbers of construction projects, and related trade associations are potentially affected by the proposed changes and should consider submitting public comments by the July 12 deadline.

EPA's proposed 2022 CGP contains several significant changes from the current CGP, which EPA issued in 2017. This alert provides a high-level overview of the proposed changes.

Background

The CGP, as a general permit, allows operators to discharge stormwater associated with construction activities in jurisdictions where EPA is the permitting authority, including Massachusetts, New Hampshire, New Mexico, and the District of Columbia. Many

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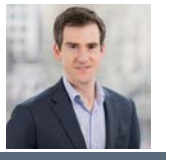

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NPDES-authorized states have historically modeled their own construction general permits on the federal permit. One can expect states with permits modeled after the CGP to revise their respective permits, when they are up for renewal, to incorporate revisions in the final 2022 CGP. As a result, operators across the country—not just in states where EPA is the permitting authority—must closely watch changes to this federal permit.

Significant Changes from the 2017 CGP

The proposed CGP changes the 2017 MSGP in a number of respects, including the following:

- **Differentiation between routine maintenance and corrective action.** The proposed CGP seeks to clarify the difference between routine maintenance and corrective action. Under the proposed permit, routine maintenance involves repairs or replacements that can be completed within 24 hours. If an otherwise routine maintenance activity must be performed "repeatedly (i.e., 3 or more times)," the activity becomes corrective action. EPA is also proposing that any repair or replacement activity that takes longer than 24 hours to complete is corrective action.

  These amendments would increase the burden on operators to document otherwise routine maintenance activities, like cleaning silt fences or sedimentation basins. These activities, which occur routinely and are consistent with the normal functioning of these controls, would have to be performed consistent with the permit's deadlines and documentation requirements for corrective action.

- **Clarification regarding flexibilities for arid and semi-arid areas.** The 2017 CGP provided exceptions to stabilization and site inspection requirements during a "seasonally dry period," an undefined term. EPA now proposes to define a "seasonally dry period" as "a month in which the long-term average total precipitation is less than or equal to 0.5 inches."

- **Requirements for inspections during snowmelt conditions.** The proposed 2022 CGP would clarify that a site inspection is required within 24 hours of "discharge from snowmelt caused by an accumulation of 3.25 inches or greater of snow." The CGP previously did not contain a numeric threshold for determining when to conduct inspections after snowmelt.

- **Availability of key documents in electronic form.** The proposed 2022 CGP includes permit text explicitly providing that electronic versions of the Stormwater Pollution Prevention Plan, inspection reports, and corrective action logs may be used.

- **Endangered Species Act (ESA) eligibility determinations.** When completing the Notice of Intent (NOI) for permit coverage, an operator must certify that the project meets at least one of six eligibility criteria for endangered species protection. EPA has proposed several updates to clarify the process for making these eligibility determinations. Most updates relate to determining whether a species listed in the ESA or designated critical habitat are located within the "action area" of the site. For example, EPA would not allow reliance on state resources in making such a determination. EPA finalized similar changes when it issued its 2021 Multi-Sector General Permit for discharges from industrial activity.

- **Perimeter control requirements.** The CGP requires a number of erosion and sediment control measures, including that an operator must install sediment controls around the perimeter of a site (*e.g.*, silt fencing). The proposed 2022 CGP clarifies that when there are natural buffers (*e.g.*, vegetation), perimeter controls must be installed upgradient of the natural buffer.

- **Documenting signs of sedimentation.** The proposed 2022 CGP would require operators to check for sedimentation downstream of the point of discharge and assess whether sedimentation could be attributable to discharges from the site. If downstream sedimentation exists, it must be documented by the operator.

This proposed expansion of inspection requirements is important because EPA and other enforcers frequently view such sedimentation to be evidence of a water quality standards violation, although that is not universally the case. Issues with the proposed expansion of in-stream inspection obligations include (1) the potential presence of other sources, both natural and anthropomorphic, for any downstream sediment deposits; (2) inspectors' inability to access or assess other potential sources of sedimentation; (3) inspectors' competence to assess the site's relationship to downstream sedimentation; (4) the need to specify how far downstream this obligation attached; and (5) a lack of clarity that inspectors should record conditions but not attempt to ascribe those conditions to discharges from the site.

- **NOI Updates.** The NOI form, which operators must submit when seeking coverage under the CGP, would include new questions aimed at addressing whether: (1) dewatering water will be discharged at the site; (2) there are other operators covered by the CGP at the same site; and (3) personnel conducting site inspections will meet the proposed updated training requirements discussed below.

EPA is also requesting comment on several potential changes:

- **Revised scope of permit coverage eligibility.** In order to be eligible for coverage under the CGP, a potential permittee must be an "operator" of construction activity as defined in the CGP. EPA seeks comments regarding whether it should expand the definition of "operator" to expressly encompass "parties that determine acceptance of work and pay for work performed." EPA posits that the potential revision would "better ensure that all parties with operational control over the project are permitted."

  EPA also requests comment on whether the current definition of operator already covers "those parties intended to be addressed by the new language, or if a different modification to the definition of operator would be helpful to clarify the types of parties that should be permitted as operators."

- **Prohibition on dewatering discharges from contaminated sites.** The 2017 CGP allows for non-stormwater construction dewatering water discharges conducted. EPA is seeking comments on whether it should carve out from this authorization, and expressly prohibit, dewatering discharges from contaminated sites (i.e., "sites subject to existing or former remediation activities [such as] Superfund/CERCLA or RCRA sites"). EPA further seeks public comment on "whether certain sites should be given case-by-case flexibility if stormwater contact with underground contamination has been prevented through [the] implementation of cleanup controls, such as capping."

- **Turbidity monitoring requirements for dewatering discharges to "sensitive waters."** EPA is considering requiring either turbidity benchmark monitoring or turbidity indicator monitoring of dewatering discharges to sediment-impaired waters or Tier 2, Tier 2.5, or Tier 3 designated waters. Under the former approach, a weekly average benchmark level for turbidity would be set; exceedances would trigger necessary corrective action to "determine the source of the problem and to make any necessary repairs or upgrades to the dewatering controls to lower the turbidity levels." Under the latter approach, operators would monitor and report turbidity, but no benchmark or corrective action would apply.

- **Waiting period for discharge authorizations.** EPA is seeking comment on whether it should expand from 14 to 30 days the waiting period between the date a NOI is submitted and the date an operator is authorized to discharge. This timeframe is intended to allow for interagency review of the operator's certifications regarding potential impacts on endangered or threatened species.

- **Phased approaches to disturbances.** EPA seeks feedback on whether the stabilization deadlines previously established in the 2017 CGP are "effective in incentivizing the phasing of [] construction projects so that no more than 5 acres are disturbed at any one time." EPA further seeks comment on whether it should alternatively prohibit disturbing more than 10 acres of land at a time, with or without case-by-case exceptions.

- **Exclusion of some types of construction waste from pollution prevention requirements.** EPA is seeking comments on whether some types of construction wastes should be excluded from pollution prevention requirements (*i.e.*, be permitted to be stored outside, uncovered, without any secondary containment or other stormwater controls) applicable to construction waste because their exposure to stormwater would not result in the discharge of pollutants.

- **Training requirements.** EPA is proposing several changes to the training requirements, including a new requirement for personnel conducting inspections to have either passed an EPA inspection training course and final exam or hold a certification from a third-party training course. EPA is seeking comments on how it should design its training program and the "criteria used to describe the minimum requirements for third-party training programs."

- **Photographic documentation of site stabilization.** The proposed CGP includes a requirement that operators provide photographic evidence of compliance with site stabilization requirements when seeking to terminate coverage. EPA is requesting comments on what additional criteria, if any, should be required for such photographs.

Public Comment

The draft 2022 CGP and its associated fact sheet with supporting documentation is available for public comment through July 12, 2021. Interested persons may also request a public hearing on the proposed changes. Operators and trade associations impacted by the proposed changes may want to consider submitting public comments. For more information on, or assistance with, the public commenting process, please contact the authors.

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