

Client Alert

March 2012

EPA Issues Final Construction General Permit

On February 16, 2012, the Environmental Protection Agency ("EPA") issued the Final 2012 Construction General Permit ("CGP"). The CGP was published in the Federal Register on February 29, 2012. The 2012 CGP replaces the 2008 CGP and includes new requirements to implement the Effluent Limitation Guidelines and New Source Performance Standards for the construction and development industry, which were issued by EPA on December 1, 2009.¹ Construction projects of greater than one acre must obtain a National Pollutant Discharge Elimination System ("NPDES") permit for discharges of stormwater. EPA and most approved NPDES programs have adopted general permits for stormwater discharges from construction sites. The CGP applies only in states, territories or Indian lands which do not have an EPA-approved NPDES program², and it is immediately effective in those jurisdictions. States and other jurisdictions with EPA-approved NPDES programs may implement the federal CGP, in whole or in part, in the course of renewing stormwater general permits for construction sites, but until or unless they do, the CGP is not binding in those jurisdictions.³ However, the CGP may provide a model in EPA-approved NPDES jurisdictions for their construction stormwater general permits.

Eligibility Conditions to Obtain Permit Coverage Under the CGP

The permittee in a jurisdiction subject to a federally-administered NPDES program must demonstrate that it satisfies certain conditions in order to obtain coverage under the CGP:

Authorization Process/NOIs. Coverage under the CGP is still obtained by filing a Notice of Intent ("NOI") with EPA. EPA has increased the "waiting period" from 7 to 14 days for construction site operators seeking coverage under the CGP. CGP § 1.4.2. New projects that commence activities after February 16, 2012, will be covered by the 2012 CGP 14 days after receiving EPA's acknowledgement of the NOI filing, unless EPA notifies the operator of a delay or denial. EPA expanded the 14-day notice period from the 7-day period under the 2008 CGP to provide itself more time to perform endangered species-related reviews when evaluating NOIs. For projects that are still proceeding under the 2008 CGP and now must comply with the 2012 CGP, an NOI must be filed no later than May 16, 2012.

Eligibility for Emergency-Related Construction Activities. The CGP now provides immediate authorization for construction activities required for response to public emergencies (e.g., natural disaster, widespread disruption in essential public services). The construction operator must submit an NOI within

¹ Although this regulation's numeric limitation, 40 C.F.R. § 450.22, has been stayed indefinitely, the remainder of the regulation is still in effect and must be incorporated into newly issued permits.

² EPA is the NPDES-permitting authority in American Samoa, District of Columbia, Guam, Idaho, Johnston Atoll, Massachusetts, Midway Islands, New Hampshire, New Mexico, Northern Mariana Islands, Puerto Rico and Wake Island. CGP at B-1. In numerous other states, EPA is the NPDES-permitting authority for Indian country only and/or for federal facilities only.

³ Upon the renewal of stormwater general permits those jurisdictions will have to implement the Effluent Guidelines and New Source Performance Standards for the construction and development industry.

30 calendar days after commencing earth-disturbing activities, whereas typically operators must submit NOIs 14 days prior to commencing earth-disturbing activities. CGP § 1.2.1.

Endangered Species and Historic Properties Requirements. Construction operators are required to follow the revised procedures for determining eligibility related to the protection of listed endangered or threatened species and their critical habitat and to the consideration of impacts to historic properties. CGP at D-1, E-1. These procedures often involve the retention of experts and may require consultation with state and tribal historic preservation offices.

Sediment and Erosion Controls Required by the CGP

The CGP requires permittees to design, install and maintain erosion and sediment controls that minimize the discharge of pollutants from earth-disturbing activities. The CGP contains the following relevant sediment- and erosion-control requirements:

Area of Disturbance. The CGP requires permittees to minimize the amount of soil exposed during construction activities. CGP § 2.1.1.1. The CGP does not provide any specific guidance on the extent to which minimization of soil exposure must be performed or how compliance will ultimately be assessed.

Natural Buffers of Equivalent Sediment Controls. The CGP requires permittees to provide and maintain natural buffers around surface waters,⁴ unless infeasible.⁵ CGP § 2.1.2.1. Permittees must ensure that any discharges to surface waters through the area between the disturbed portions of the property and any surface waters located within 50 feet of the site are treated by an area of undisturbed natural buffer and/or additional erosion and sediment controls to achieve a reduction in sediment loads equivalent to that achieved by 50 feet of undisturbed natural vegetation. There are several ways that the permittee can comply with the requirements of this provision: (i) provide a 50-foot undisturbed natural buffer; (ii) provide a natural buffer that is less than 50 feet and supplement with additional erosion and sediment controls; or (iii) implement erosion and sediment controls if it is infeasible to maintain a natural buffer of any size.

There are certain exemptions to this requirement based on feasibility considerations. For “linear construction projects,” permittees are not required to comply with the natural buffer requirement explained above if site constraints (e.g., limited right-of-way) prevent the permittee from implementing one of the compliance alternatives. Rather, the linear construction project permittee must, to the extent practicable, limit disturbances within 50 feet of the surface water and/or provide supplemental erosion and sediment controls to treat stormwater discharges from earth disturbances within 50 feet of the surface water. The permittee must also document, in the Stormwater Pollution Prevention Plan (SWPPP), why it is infeasible to comply with the provision as well as any buffer width retained and/or supplemental erosion and sediment controls installed.

Install Perimeter Controls. The CGP requires operators to install sediment controls along those perimeter areas of the site that will receive stormwater from earth-disturbing activities. CGP § 2.1.2.2. Examples of perimeter controls include, but are not limited to, filter berms, silt fences and temporary diversion dikes. For linear projects with rights-of-way that restrict or prevent the use of such perimeter controls, the permittee must maximize the use of these controls where practicable and document in the SWPPP why use of perimeter controls is impracticable in other areas of the project.

⁴ “Surface waters” are defined as “waters of the United States.” CGP at A-10. EPA does not consider stormwater control features (e.g., stormwater conveyance channels, storm drain inlets, sediment basins) to constitute “surface waters” for the purpose of this section. CGP § 2.1.2.1.

⁵ Under the CGP, “infeasible” means “not technologically possible or not economically practicable and achievable in light of best industry practices.” CGP at A-6.

Minimize Sediment Trackout. The CGP requires operators to minimize trackout of sediment onto streets and other paved areas from vehicles exiting the construction site. CGP § 2.1.2.3.⁶ To comply with this requirement, the operator must: (1) restrict vehicle use to properly designated exit points; (2) use appropriate stabilization techniques (e.g., aggregate stone with an underlying geotextile or nonwoven filter fabric, or turf mats) and other controls, as necessary, at all points that exit onto paved roads; (3) where necessary, use additional controls, such as wheel washing, rumble strips and rattle plates, to remove sediment from vehicle tires prior to exit; and (4) remove tracked-out sediment from paved surfaces by the end of the workday in which the trackout occurs or by the end of the next workday if trackout occurs on a non-workday. Although EPA does not specifically explain how these requirements would apply to a large linear project that could have hundreds of road crossings or access points, EPA clarifies that “exit points” are defined as “any points of egress from the construction site to be used by vehicles and equipment during construction activities.” CGP at A-5. EPA also limits the requirement for stabilization techniques to points that exist on paved roads and requires additional controls, such as wheel washing, only “where necessary.” CGP § 2.1.2.3.

Minimize the Disturbance of Steep Slopes. The CGP requires the permittee to minimize the disturbance of “steep slopes.” CGP § 2.1.2.6.⁷ EPA notes that the permit does not prevent or prohibit disturbances on steep slopes, as they may be necessary for construction. However, where steep slope disturbances are required, the permittee must minimize the disturbances through the implementation of standard erosion and sediment control practices, such as phasing disturbances to these areas and using stabilization practices designed to be used on steep grades.

Preserve Topsoil. The CGP requires the permittee to preserve topsoil on the site, unless infeasible. CGP § 2.1.2.7. EPA notes that preserving topsoil at the site might not be feasible in some cases, such as projects that are designed to be highly impervious where little or no vegetation is intended to remain or sites that do not have space to stockpile topsoil for later use. Although the CGP does not provide a specific definition of “preserve” or explain what steps or measures must be implemented to satisfy this requirement, EPA notes that stockpiling of topsoil at off-site locations, or transfer of topsoil to other locations, is an example of a practice that is consistent with this requirement.

Dewatering Practices. Under the CGP, specific controls and discharge restrictions apply to sites that will discharge groundwater or accumulated stormwater removed from excavations, trenches, foundations, vaults or other similar points of accumulation. See CGP § 2.1.3.4. Permittees are prohibited from discharging groundwater or accumulated stormwater removed from these points of accumulation unless such waters have been managed by appropriate controls, such as sediment basins or sediment traps, sediment socks, dewatering tanks, tube settlers, weir tanks or filtration systems.

Stabilization Requirements Under the CGP

Under the CGP, permittees are required to stabilize exposed portions of the site. CGP § 2.2. The CGP includes modified stabilization requirements that define more specifically what EPA requires for temporary and final stabilization: **Deadline to Initiate and Complete Stabilization.** The 2012 CGP retains the 2008 CGP’s 14-day stabilization period. Under the CGP, permittees must initiate soil stabilization measures immediately⁸ whenever earth-disturbing activities have permanently or temporarily ceased (i.e.,

⁶ Under the CGP, “site” means “for construction activities, the land or water area where earth-disturbing activities take place, including construction support activities.” CGP at A-9.

⁷ Where a state, tribe, local government or industry technical manual (e.g., stormwater BMP manual) has defined what is to be considered a “steep slope,” the CGP automatically adopts that definition. CGP at A-10. Where no such definition exists, the CGP automatically defines “steep slopes” as those that are 15 percent or greater in grade.

⁸ In the context of this provision, “immediately” means “as soon as practicable, but no later than the end of the next work day, following the day when the earth-disturbing activities have temporarily or permanently ceased.” CGP § 2.2.1.1.

construction has stopped for a period of 14 calendar days but will resume in the future) on any portion of the site. CGP § 2.2.1.1. The permittee must complete stabilization activities as soon as practicable, but no later than 14 calendar days after their initiation. CGP § 2.2.1.2.

Vegetative Stabilization. To be considered adequately stabilized under the CGP, the permittee must meet certain criteria for vegetative and non-vegetative stabilization. CGP § 2.2.2. However, disturbed areas of land used for agricultural purposes (e.g., pipelines across crop or range land, staging areas for highway construction) that are restored to their preconstruction agricultural use are not subject to the permit's final vegetative stabilization criteria. CGP § 2.2.2.1(c).

Pollution Prevention Measures

Under the CGP, permittees are required to design, install and maintain effective pollution prevention measures to ensure pollutant discharges are eliminated or minimized, depending on the source. CGP § 2.3. The pollution prevention requirements restrict the discharge of a wide range of construction-related chemicals and materials:

Washing of Equipment and Vehicles. The CGP requires the permittee to provide an effective means of minimizing the discharge of pollutants from equipment and vehicle washing, wheel wash water and other types of washing. CGP § 2.3.3.2. Effective controls include locating activities away from surface waters and stormwater inlets or conveyances and directing wash waters to a sediment basin or sediment trap, using filtration devices such as filter bags or sand filters or using other similarly effective controls. Moreover, to comply with the requirements for washing of equipment and vehicles, the permittee must provide cover to prevent these detergents from coming into contact with rainwater or a similarly effective means to prevent the discharge of pollutants from these areas.

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