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July 11, 2011

Water Docket  
U.S. Environmental Protection Agency  
Mail Code: 2822T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: Comments on EPA's Draft NPDES General Permit for Stormwater Discharges Associated with Construction Activities; Docket ID No. EPA-HQ-OW-2010-0782**

Dear Sir or Madam:

On April 25, 2011, the U.S. Environmental Protection Agency (EPA) published a notice in the *Federal Register* requesting comments on its Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges Associated with Construction Activities (hereinafter "Draft"). See 76 *Fed. Reg.* at 22,882. In response, the Associated General Contractors of America (AGC) is pleased to submit the following comments on the Draft for the record of this administrative proceeding.

**I. Introduction**

AGC is the leading trade association in the construction industry, representing over 33,500 firms with a combined record of over \$1.5 trillion in construction activity. AGC is committed to the highest standards of safety, quality, and environmental stewardship. We are pleased to provide our comments on the Draft NPDES General Permit for Stormwater Discharges Associated with Construction Activities.

AGC shares EPA's interest in protecting the waters of the United States, and in crafting a Construction General Permit (CGP) that will serve that purpose. At the same time, AGC has to insist on transparency, sound science and reasoned decision-making that accounts for economic and other relevant factors. To its regret, AGC finds that many provisions included in the Draft are neither required by law nor justified by any information that EPA has provided to the public. Nor is there any explanation for much of what EPA has proposed. If EPA has assessed the costs and benefits of the many unique features of the Draft, as required by both the Clean Water Act (*see* 33 U.S.C. § 1314(b)(1)(B)) and Executive Order 13563, it has yet to subject that assessment to any kind of public review. In summary, AGC urges EPA to take the time it requires to put itself on a sound and defensible course. The agency should do this in accordance with the following comments and all relevant requirements for public participation in its decision-making process, for the protection of small businesses and to meet the desired objective of limiting any excessive costs of federal regulatory requirements.

**II. EPA is far from ready to impose a strict numeric limit on the turbidity of construction stormwater runoff, much less dictate related requirements for monitoring such runoff, or reporting test results.**

EPA's first effort to set such a numeric limit was unsuccessful, and as AGC writes these comments, EPA remains far behind its original schedule for proposing — much less finalizing — a new limit. It follows that EPA is not under any immediate obligation to implement the Construction & Development Effluent Limitations or reporting test results. Ts. .3





configuration.” *See* 74 *Fed. Reg.* at 63,018. EPA should continue to take this more flexible and reasonable approach to the control practices necessary to address any track-out concerns.

Part 2.3 would prohibit certain discharges that the C&D ELG allows, such as concrete washout, provided only that it is managed by appropriate controls. This is another example of the Draft depriving operators of the flexibility that EPA has already determined to be necessary and appropriate, and trying to undue decisions already made, on a proper rulemaking record. While EPA has a certain amount of discretion, it cannot go so far as to rewrite the C&D ELG on which its revisions to the CGP are based.

Part 2.1.2 of the Draft, where it mandates a 50-foot buffer (or equivalent), is another problem. From the C&D ELG, EPA omitted many of the specific requirements for vegetated buffers because the agency could not justify its initially prescriptive approach. Instead, EPA simply required site operators to “provide and maintain natural buffers around surface waters ...” to “increase sediment removal.” *See* 40 CFR § 450.21(a)(6). Now, EPA proposes two pages of prescriptive permit language, a 17-page explanation or “fact sheet,” and an additional 16-page permit “appendix” to mandate in excruciating detail exactly how site operators must implement the buffer requirement. After a dozen years of studying technology controls to support the C&D ELG rulemaking, during which EPA concluded that a flexible approach is appropriate, EPA is now proposing — without reasoned explanation — to take an approach even more prescriptive than the originally proposed C&D ELG. EPA should require precisely and only what it kept in the C&D ELG. If necessary, it can then issue non-mandatory guidance that may assist site operators to more knowledgeably implement that buffer requirement.

The Draft would also set a site stabilization standard based on the C-factor associated with the Revised Universal Soil Loss Equation (RUSLE) regression formula. *See* explanation in proposed CGP Fact Sheet at 62. EPA rejected such an approach for the C&D ELG, explaining that it would be difficult to calculate an area-weighted C-factor. Once again, EPA can require appropriate stabilization requirements, but it should reserve the lengthy discussion included in the Draft, proposed CGP Fact Sheet and Appendix H for subsequent guidance that would provide insight and assistance for site operators, but not fundamentally change the legal requirements that the C&D ELG establishes.

Historically, EPA’s CGP has recognized and provided sufficient flexibility to address the stochastic nature of precipitation and the variability of other site attributes (such as soil types and topography) by allowing discretion in the design and implementation of BMPs. This approach has fostered the implementation of appropriate controls on a state and regional basis, while guarding against inappropriate and/or excessive requirements. AGC continues to support such a flexible approach and does not agree that the C&D ELG requirements support such a dramatic departure from that approach in its implementation into the CGP. AGC encourages EPA to delete its overly-prescriptive requirements for erosion and sediment controls from the Draft, limiting itself to the requirements found in the C&D ELG, and then, as appropriate, issuing non-mandatory guidance on such controls.

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In addition, AGC urges EPA fully to comply with the CWA. Ostensibly, the Draft sets forth the “best practicable control technology” that the agency has found necessary to meet the technology-based effluent limits that the agency has established under CWA section 301 (33 U.S.C. § 1311) and section 306 (33 U.S.C. § 1316). *See 76 Fed. Reg.* at 22,885. There is, however, no evidence the agency has “considered the total cost of the application of this technology in relation to the efflu

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inconsistency in the way the states express such criteria has yielded both inconsistent and unverifiable results (*e.g.*, “some criteria for turbidity are expressed as a single limit, such as 25 NTU, whereas other criteria are expressed as a certain amount above background levels of turbidity”). The second problem is the one to which AGC has already pointed out: EPA did not have access to established natural background levels for each of the impaired waters. Thus, the agency failed to correlate benchmark levels to natural background pollutant levels (*i.e.*, failed to account for natural variability in stormwater discharges). By assigning a value of “0” to the natural background level of each pollutant, EPA set very stringent and probably unachievable benchmarks. A third problem is that the specific benchmarks in Appendix J are based on low-flow conditions rather than conditions likely to be present during a rain event. Finally, AGC is concerned that the use of nitrogen or phosphorous fertilizer to establish the required vegetative cover for stabilization would impact the ability to achieve benchmark levels.

EPA has not provided any justification or scientific rationale for its benchmark, though it could have costly consequences. Any exceedance would require prompt corrective action, forcing the permittee into a perpetual cycle of action to enhance and upgrade its stormwater controls, ultimately leading to over-engineered sites. *See* Draft CGP Part 6. What is more, failure to take prompt corrective action would be a permit violation and subject to enforcement action. In addition, multiple exceedances of a benchmark could result in EPA requiring the permittee to apply for a rarely used, costly and time-consuming individual stormwater discharge permit.

The benchmark monitoring provisions would introduce a potentially insurmountable array of complicated and costly analytical methods and test procedures for analyzing stormwater runoff. Under the Draft, it is likely that many contractors would be subject to separate monitoring programs and protocols for turbidity (*i.e.*, both a benchmark requirement and numeric compliance limit), which would cause confusion and impose excessive recordkeeping and paperwork obligations. EPA predicts that turbidity would be measured in the field. Some contractors would, however, find that they also need to send samples to a laboratory to monitor for phosphorus or nitrogen and perhaps even for turbidity. This is clearly excessive in light of EPA’s decision to regulate turbidity using numeric standards based on the fact that turbidity merely is an “indicator pollutant” the control of which helps to reduce the discharge of other pollutants, such as metals and nutrients, from construction sites. *See* C&D ELG Final Rule at 74 *Fed. Reg.* at 62,996 and 63,006-07 (Dec. 1, 2009).

It is also worth noting that in certain instances, EPA has set benchmark values for turbidity that are not appropriate water quality objectives for some naturally turbid waterways. An influx of unnaturally clear water could have an adverse impact on ecosystems in such waters; fauna and flora have developed that are dependent on high sediment loads and dark waters and indigenous species have become dependent on turbid waters to avoid predators.

The benchmark limits and the associated monitoring and reporting requirements in the Draft are unnecessary and unproven requirements that would do more to fuel private litigation than to protect the environment. Water quality based effluent limits and TMDLs should be written at the state level and in close coordination with proper monitoring programs that will yield appropriate





**VI. EPA should permit its current permit for stormwater runoff from construction sites to run its natural course. Such a permit normally has a five-year term. EPA should permit its current permit to run until 2013. If the agency can demonstrate that sound science and a reasoned review of environmental benefits justify new and more stringent requirements, it can then consider such requirements. At this point, EPA remains far from making such a demonstration.**

EPA should extend the 2008 CGP for its full five-year term, which ends on June 30, 2013. EPA has the authority to extend the CGP through the entire five-year time period set forth in its NPDES regulations for such permits. *See* 40 CFR § 122.46. EPA needs the additional time to complete and defend its C&D ELG and to incorporate that rule's requirements into the CGP in a clear and reasonable way that will ensure the long-term success of its effort to regulate stormwater runoff.

As of today, EPA has yet to propose *any* revisions to C&D ELG. If it published a proposal this month, EPA would still find it next to impossible to complete a new C&D ELG in the limited period (six to seven months) that it has already decided to extend the 2008 CGP. And EPA would find it well beyond impossible to wrap up the related litigation. EPA has been working on a proposal to revise the C&D ELG for nearly one year. That proposal is certain to require and/or include new analyses and assessments, and to raise new issues (such as linear construction). Give the complexity of the anticipated proposal, any comment period of less than 90-days would be unreasonable and unfair to the affected stakeholders (including AGC and its members).

EPA requires a substantial period of time to review the public comments on most of its proposals, and to develop its options for a final rule. AGC knows of no reason to expect the rulemaking on the C&D ELG to be any exception. The long history of this rule suggests that, if anything, EPA will require more and not less than the usual amount of time. Ninety days would seem to be the minimum that the agency will require to complete those tasks. Then, the Office of Management and Budget will have another 90 days to review and then either approve or reject EPA's final package. EPA would be fortunate to complete its unfinished work on the C&D ELG package in another nine months.

And then, it will need to give the Seventh Circuit whatever time the court requires to fully adjudicate all issues associated with the pending litigation. The court is holding several of the issues that industry has raised in "abeyance" until at least February 15, 2012. Many of them will bear on whether the new requirements included in the C&D ELG are consistent the Clean Water Act. These issues must be fully litigated before EPA inserts them into a new CGP.

Reissuing the CGP also provides an opportunity for EPA to clarify and streamline the permit process and provide ways to improve overall compliance with EPA's stormwater program. For example, introducing the Qualifying Local Program (QLP) would simplify the permitting process by allowing construction site operators to obtain and comply with one stormwater permit throughout their communities, instead of the multiple and often duplicative permits issued at the federal, state and local levels. Not only does implementation of the QLP reduce burdens on

builders, it can also significantly reduce the administrative burdens of the state and local governments.

## **VII. EPA should rectify the draft permit's inconsistency with the Administration's Improving Regulation and Regulatory Review Executive Order.**

On January 21, 2011, President Obama issued Executive Order 13563, Improving Regulation and Regulatory Review. *See 74 Fed. Reg.* at 3,821. That order provides: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It adds that regulatory agencies must (1) base their requirements on the best available science, (2) promote predictability and reduce uncertainty, and (3) propose or adopt regulatory requirements only upon a reasoned determination that their benefits justify their costs. *See Executive Order 13563* at §§ 2, 5. Also, the President has commanded the EPA to tailor its regulations to impose the least burden on society, consistent with obtaining its regulatory objectives, taking into account the costs of cumulative regulations, and to identify and assess available alternatives to direct regulation. *See id.* at § (1)(b).

In putting the Draft together, it appears that the agency chose to ignore or avoid its obligations under Executive Order 13563. Specifically:

- There is no evidence that the EPA has made a reasoned determination that the Draft's environmental benefits (if any) will justify its jobs, development and consumer cost burdens.
- There is no evidence that the EPA has tailored the Draft to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account, among other things, and to the extent practicable, the costs of cumulative regulations affecting developers, builders and consumers.
- There is no evidence that the EPA has considered alternative approaches, much less selected the measures that maximize net economic and environmental benefits.
- There is no evidence that the EPA has, to the extent feasible, used the Draft to specify performance objectives and not the specific behaviors or manners of compliance that regulated entities must adopt.
- There is no evidence that the EPA has identified and assessed available alternatives to the measures specified in the Draft for the purpose of developing the least burdensome permit possible.
- There is no evidence that the EPA has considered or specified metrics for determining the efficacy of the Draft in order to facilitate retrospective review and evaluation.

Indeed, the proposed CGP is riddled with inefficiencies and prospective implementation problems. As EPA has yet to complete and defend its C&D ELG, the Draft necessarily rests more on guesswork than any "reasoned determinations." To craft a permit that "imposes the



five-year term, until June 30, 2013, as it will require at least that much time to complete its C&D ELG, resolve the related litigation and sort through all of the preceding and following issues.

**A. Section-By-Section Comments on Part 1 of the Proposed CGP**

1. Part 1.2. Person(s) Responsible for Obtaining Permit Coverage.

AGC notes that the definition of “operator” in this part is different from the definition of “operator” provided in Appendix A on page A-8. AGC prefers the definition in Appendix A because it adds the phrase: “The party possesses the title of the land where the construction activity will take place ...” in the first part of the definition, as shown below.

“Operator” - for the purpose of this permit and in the context of stormwater associated with construction activity, any party associated with a construction project that meets either of the following two criteria:

1. The party possesses the title of the land where the construction activity will take place and has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications; or
2. The party has day-to-day operational control of those activities at a project which are necessary to ensure compliance with a SWPPP for the site or other permit conditions (e.g., they are authorized to direct workers at a site to carry out activities required by the SWPPP or comply with other permit conditions)... (*emphasis added*).

The extra language in Part 1 helps to clarify that the property owner has responsibility for obtaining permit coverage.

Of concern, however, is that Appendix A (as currently drafted) goes on to state: “This definition is provided to inform permittees of EPA’s interpretation of how the regulatory definitions of ‘owner or operator’ and ‘facility or activity’ are applied to discharges of stormwater associated with construction activity.” AGC finds this sentence to be completely misplaced and confusing. The above-referenced definition does not help permittees understand the role of the owner or how that term varies from “operator” or whether the two terms are to be considered one and the same for purposes of determining who is to obtain permit coverage. AGC recommends that EPA delete this sentence.

AGC also requests that EPA clarify where the owner fits into the newly-proposed definitions of “primary operator” and “secondary operator.”

In addition, AGC asks that EPA clarify that it does not intend for “subcontractors” to obtain permits. As EPA stated in its Stormwater Question and Answer Guidance:

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28. What are the responsibilities of subcontractors at the construction site under EPA's storm water construction general permits?

A. EPA storm water construction general permits require subcontractors to implement the measures stated in the pollution prevention plan and to certify that he/she understands the terms and conditions of the permit requirements. Under EPA's general permits, subcontractors are not required to submit NOIs.  
*See NPDES Storm Water Program Question*

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requirements in Part 1.3.3 are the same as the corresponding requirements in Part 1.3.C.4 of the 2008 CGP.” However, the exact same page of the Draft references proposed Appendix J, which AGC believes is an inappropriate complication of the 2008 CGP approach (*see* AGC’s comments, Section IV above).

Also, Part 1.3.4 of the Draft appears to unnecessarily expand the application of antidegradation requirements to Tier 2 and 2.5 waters. EPA should not unnecessarily encumber construction in such watersheds. AGC recommends that EPA follow the general approach that compliance with the CGP presumes compliance with Tier 2 or 3 antidegradation requirements.

3. Part 1.5. Submitting Your Notice of Intent (NOI).

The Draft would require NOI submission at least 30 days prior to commencing earth-disturbing activities. This is a significant change from the 2008 CGP which includes a 7-day waiting period. Specifically, EPA proposes to increase the “waiting period” from 7 days to 30 days to accommodate the endangered species and historic properties-related reviews that must take place  
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In addition, AGC is very concerned that EPA has not identified the specific criteria that would require an individual permit. This lack of specifics would likely result in unnecessary project delays and illegitimate claims. EP

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In addition, AGC believes that a majority of the sediment removal values presented in the tables in Appendix M are unrealistically high for many rain events. For most of these tables, the fine clay sediment is being predicted to be removed at over 80%. This is a completely impractical estimate. EPA appears not to have given any consideration as to the type of rain event intensity or duration in making these % removal predictions, even though these factors will have a significant impact on removal efficiencies. EPA also has acknowledged that not every vegetation, soil type, and slope condition is covered.

4. Part 2.1.2.3. Exceptions to the Natural Buffers and Equivalent Sediment Control Requirements.

AGC recommends that EPA expand subsection (a) of this part to include the maintenance and repair of water crossings authorized under a CWA section 404 permit (where required) for water lines, sewer lines, utility lines, and roadways.

5. Part 2.1.3. Requirements Applicable to All Construction Sites.

Part 2.1.3 proposes to use flowrates and stormwater volume as primary criteria in designing construction stormwater controls. However, stormwater flowrate and volume on their own (absent “pollutant” control considerations) are not appropriate “parameters” for regulation under the NPDES permit program. While retention/detention ponds and other control devices must be sized to handle an appropriate volume to become effective at removing pollutants, EPA cannot otherwise merely regulate flowrate or total volume of stormwater that otherwise meets appropriate technology-based or water quality-based pollutant-related effluent limitations.

Part 2.1.3 also proposes mandatory street cleaning and wheel wash requirements to control “track out.” In doing so, it creates an unreasonable standard of “no visible signs” of sediment being present on impervious surfaces. However, the December 2009 C&D ELG rejected proposed provisions associated with mandatory wheel washing and “same-day” street cleaning because appropriate implementation of such provisions must be based on the particular “site’s configuration.” *See 74 Fed. Reg.* at 63,018. EPA should develop more flexible and reasonable control practices to address any track-out concerns.

6. Part 2.1.3.1.a. General Design Requirements - Required Design Factors.

EPA has asked for comment on whether or not it should require a 2-year, 24-hour design storm standard for stormwater controls, which would need to be met unless it was infeasible to achieve at the particular site. EPA has proposed a 2-year, 24-hour design storm standard for stormwater controls. Many state CGPs currently require ponds to be sized to contain (and allow reasonable settling time for) a 2-year, 24-hour rain event if practical. AGC stresses the importance of the feasibility clause. Many sites do not have the area for such a large pond. And for some sites, especially roads or other linear projects, there is no room to install ponds at all.





10. Part 2.1.3.4. Good Housekeeping Requirements - Remove Deposited Sediment.

This part would require contractors, at the end of each workday, to sweep, shovel or vacuum the streets, sidewalks, and other paved areas around the construction site to remove track-out material or other sediment deposits. In addition, it would require contractors to immediately start to remove sediment that has been deposited in or near any stormwater conveyance channel or storm drain inlet and complete the removal by the close of the next full work day. AGC is concerned about these new requirements — that are not part of the 2008 CGP — would indirectly require daily site inspections, which – as stated elsewhere in these comments – AGC believes is inappropriate.

11. Part 2.1.3.4(b). Good Housekeeping Requirements - Control Discharges from Sediment or Soil Piles.

According to this part of the Draft, “For any stockpiled or land clearing debris composed, in whole or in part, of sediment or soil, you must ... [p]rovide cover or other appropriate temporary or permanent stabilization to avoid direct contact with precipitation or to prevent sediment discharge ... [and to] the extent possible, contain and securely protect from wind unless actively being used ... .” On a highway project, many of the resulting soil stockpiles are so large that it would not be possible to cover or contain them. From a business operations standpoint, it makes more sense to have one large pile to control versus many small ones. It also may not be feasible to provide final stabilization to these stockpiles if their product is to be re-incorporated into the project at a later date. AGC recommends that EPA delete these provisions and instead require perimeter controls around any stockpiles.

12. Part 2.1.3.4(c). Good Housekeeping Requirements- Minimize Dust.

The Draft also attempts to regulate “dust” leaving construction sites. To the extent that stormwater collects dust as sediment, appropriate controls can be implemented to control dust-generating activities or treating the dust-laden stormwater. To the extent that EPA is proposing to use the NPDES permit program to regulate airborne dust clouds that may leave a construction site aloft, AGC does not believe that airborne dust clouds are subject to permitting under the NPDES program. That program only regulates pollutants associated with certain construction operations that are discharged from a property via stormwater through a point source to a water of the U.S. General dust dispersion that settles off site is not subject to such permitting.

13. Part 2.1.3.5. Use of Native Topsoil.

The Draft states: “As a guideline, soil should be mounded no higher than 4 feet high for less than 1 year, and preferably for less than 6 months.” This timetable is problematic because many construction projects, especially large infrastructure projects such as highways, last for more than a year. At the conclusion of the project, it is common practice to reuse topsoil stockpiles to expedite vegetative growth on disturbed areas.

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This Part goes on to require contractors to completely install all vegetative and non-vegetative cover “[w]ithin 3 work days of initiating stabilization.” This final (as opposed to temporary) stabilization requirement will add huge expense to highway projects because seeding subcontractors would need to be brought to the jobsite multiple times. For a large slope, three days may not be sufficient time to complete these activities. Moreover, it may not be feasible to stabilize a partial slope as EPA assumes by this provision.

For the reasons outlined above, AGC recommends that EPA retain the 2008 CGP requirement or 14-day deadline for achieving final stabilization. In addition, EPA should consider including language pertaining to weather, such as: “Where stabilization by the [insert date] is not possible due to snow cover or frozen ground conditions, stabilization measure shall be initiated as soon as practicable.” In the alternative, EPA should consider adding permit language that would allow the contractor to maintain temporary stabilization until the end of the project — at which time the seeding contractor would come in and seed the entire area at one time.

19. Part 2.1.4.3. Storm Drain Inlet Protection.

The Draft states: “For any storm drain inlets that are located on your site or that receive stormwater discharges from your site, and for which you have access, you must comply with the following ... .” Municipalities’ jurisdiction may prevent addressing a BMP that a city has established, yet are still within a contractor’s project area/access. The simple fact that a contractor has access, does not provide permission to address the property of a separate party(ies). AGC suggests that EPA consider changing the word “access” to “jurisdiction,” “authority,” or “easements.”

20. Part 2.1.4.5. Chemical Treatment.

AGC anticipates that polymers, flocculants, or other treatment chemicals to enhance sediment removal will be required on construction sites that must comply with any numeric turbidity limit. Given the wide array and variations among chemical products on the market, it is not practicable for EPA to issue broad permit restrictions on the use of chemical treatments. Restrictions should be limited to the manufacturer’s specifications for application. The manufacturers should get EPA approval and then EPA can have an approved list with guidelines for their use. This is particularly relevant to chitosan, which is made from the shells of crustaceans, is one of the most abundant biodegradable materials in the world, and is marketed in many forms as a natural plant growth enhancer and a human health supplement.

21. Part 2.1.4.6(a). Dewatering Practices - Discharge Requirements.

AGC recommends that EPA consider adding language to inform permittees that separate permits and/or monitoring conditions may be required to cover “dewatered” discharges to “waters” based on TMDL limits or designated drinking water intake stream reaches, such as Aquifer Protection Permits or Department of Water Resources notification.

22. Part 2.2. Stabilization Requirements.

EPA proposes to institute a site stabilization standard based on soil loss C-factor associated with the Revised Universal Soil Loss Equation (RUSLE) regression formula. *See* proposed CGP Fact Sheet at 62. However, EPA rejected such an approach in the December 2009 C&D ELG (“EPA [believes] it would be difficult to calculate an area-weighted C-factor. Permitting authorities may want to adopt such an approach in their permits, but EPA has chosen not to implement such a requirement in the national rule.”) However, the proposed CGP is essentially national in scope. Once again, EPA can require appropriate stabilization requirements, but it should reserve its lengthy discussion in the Draft CGP, proposed Fact Sheet and Appendix H for a subsequent guidance document that would provide insight and assistance for site operators for implementing the final C&D ELG and subsequent CGP.

In several parts of the Draft pertaining to the stabilization requirement, EPA states: “You must immediately initiate stabilization . . . .” This language appears in every stabilization scenario in the CGP as written (section 2.1.2.2.b.i, 2.1.4.2.c.i, 2.2.1.1). It is completely impractical and infeasible, and more importantly technical compliance with such a standard is often not really practical. Any EPA inspector or any environmental watchdog group could claim that stabilization was not started “immediately,” and this generally cannot be disproved, because technically, even a minor delay is not “immediate.”

23. Part 2.2.1.2. Deadline to Complete Stabilization Activities.

AGC finds it unreasonable for EPA to require contractors to complete final stabilization seven (7) days after initiating stabilization on exposed portions of the job site (and three (3) days after initiating stabilization practices on slopes in excess of 15% and for projects impacting sensitive areas or discharging to impaired waters). First, the industry standard for construction scheduling, particularly on large projects, is to schedule out work in one-week increments. This means schedules are updated on a weekly basis. The seven- and three-day standards would routinely place an operator in violation of the CGP if he completes work ahead of schedule because the stabilization deadline may elapse prior to the next schedule update or because the contractor may not have enough response time fulfill the permit requirements. Similarly, if construction on an area is completed in the middle of the week, the stabilization deadline may expire over a weekend. Secondly, it is common for operators to use subcontractors for stabilization. Stormwater contractors tend to be small business. The seven-day requirement would not provide enough time for a subcontractor to mobilize and complete the stabilization. This would force operators to eliminate the use of these subcontractors in favor of self-performing this work which would place a disproportionately negatively impact on small and disadvantaged business. Third, when sod is required, at times there are limits on the receipt of sod (the fields are wet, transportation challenges, etc). These items are not in the control of the contractor. Fourth, the language in the Draft is far more prescriptive than the language in the final C&D ELG. Overall, EPA has removed the language from the C&D ELG that allows for stabilization initiation ‘as soon as practicable’ and instead



option for complying with the permit's stabilization requirements, as opposed to allowing permittees to choose either the C-factor method or the 70% area cover approach.

AGC finds that the C-factor approach should not be the only criteria for stabilization. As stated above, EPA rejected such an approach for the C&D ELG, explaining that it would be difficult to calculate an area-weighted C-factor. ("EPA [believes] it would be difficult to calculate an area-weighted C-factor. Permitting authorities may want to adopt such an approach in their permits, but EPA has chosen not to implement such a requirement in the national rule.") However, the Draft is essentially national in scope. EPA can require appropriate stabilization requirements, but it should reserve its lengthy discussion in the Draft, proposed CGP Fact Sheet and Appendix H for subsequent guidance that would provide insight and assistance for site operators for implementing the final C&D ELG and subsequent CGP.

AGC is concerned that the specific C-factors chosen by EPA are not explained and seem to be arbitrarily chosen. They seem to be extremely conservative, and would limit the choices of BMPs found in Table H-1. Under the Draft, EPA would require three levels of C-factor. A factor of 0.05 or less would be required for all final stabilizations, which appears to be basically equal to fully mature vegetative cover or sod. (The only other choice from Table H-1 with a C-factor "less than 0.05" is a rock surface cover.) Vegetative cover equal to a 0.05 C-factor may not be achievable during winter in many areas of the country. In fact, for arid and semi-arid areas, a 0.05 C-factor could never be achieved with native cover, and non-native grass would require constant and permanent irrigation to maintain, which may not be practical at many construction sites. For temporary stabilization, a factor of 0.1 or less would be required for all disturbed areas of slopes less than 15%, where disturbance activities would not resume within 14 days. A factor of 0.3 or less would be required for temporary stabilization of slopes greater than 15%. Only two similar BMPs — "straw fiber with netting" or "straw fiber with tackifier" — are able to meet these requirements according to Table H-1. These specific choices of required C-factors need to be thoroughly vetted by the construction community as to the reasons for the specific "C" factor requirements EPA has chosen.

What is more, contractors working on or constructing sites are not familiar with all the various C-factors and would have to rely on someone else to tell them if they are in compliance. Also, there is a lot of disparity between various manufacturers on the C-factor of their products. According to some of the research conducted, C-factor does not stay constant over time or with various runoff conditions such as high runoff or spring runoff.

The 70% cover approach is much easier to use. The main drawback is on semi-arid areas where it takes a long time for vegetation to establish. On semi-arid sites (e.g., less than 17 inches annual rainfall) the amount of cover could be reduced to 30%.

#### 26. Part 2.3. Pollution Prevention Requirements.

Part 2.3 proposes to prohibit certain discharges otherwise allowed by the December 2009 C&D ELG. For example, EPA specifically allowed concrete washout to be discharged, as long as it is

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managed by appropriate controls. The Draft creates an absolute prohibition. EPA provided necessary flexibility in promulgating the C&D ELG, and EPA should not be quashing that flexibility in any implementing CGP.

EPA also unnecessarily proposed a strict and overly-broad prohibition in Part 2.3.1.6 (“Waste, garbage, floatable debris, construction debris, and sanitary waste.”). The purpose of obtaining a NPDES permit for stormwater associated with construction activity is to obtain authorization for pollutants that are expected to be present in such stormwater discharges, such as construction waste or debris. “Construction waste” is defined to include many likely and mostly harmless pollutant discharges (in reasonable quantities), including “soil generated by construction activity.” (Appendix A at 3). Obviously, EPA cannot expect to prohibit the discharge of some soil particles from construction operations.

The term “construction debris” is not defined, but arguably might be interpreted to include saw dust, wood chips or other possible floatable materials that are mostly environmentally benign. EPA must remove or clarify this prohibition and each subsequent mention of the term “construction waste” throughout this Part, and eliminate the unreasonable or illogical obligations it has proposed to impose site operators.

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this is recognized by the SPCC rules that exempt “motive power” sources. Fueling and maintenance activities do not always occur in centralized areas; larger projects rely on mobile refueling/maintenance trucks to service construction vehicle at their working location. The common practice of conducting maintenance and fueling at the equipment’s current location limits the potential volume of spills at any one location and reduces fuel consumption and exhaust emissions by eliminating the need to transfer equipment to centralized locations. The use of spill kits at a site is a good practice that is adequate in preventing spills from becoming an issue.

In addition, AGC maintains that it is not reasonable for EPA to require contractors to “cover” a fueling location.

29. Part 2.3.2.3.a-b. Pollution Prevention Standards for Staging and Storage Areas - Location Restrictions and Design Requirements for Stormwater Controls.

EPA has requested comment on the practicability of providing secondary containment or cover for staging and storage areas on the site. These parts state: “You must also clearly flag off and designate areas to be used for staging and storage of building materials, equipment, or vehicles... and conduct such activities only in these areas” and “you must install secondary containment structures or similarly effective means to eliminate discharges of stormwater from these areas.”

AGC opposes this language because it would make it easier for vandals/thieves to target equipment and materials. In addition, it would not be possible for contractors to move all of their heavy equipment to one area because some large machines are not mobile and must remain in place on the project to perform their intended function.

In addition, it is not practical to provide cover for all construction equipment and materials. Covering staging areas is not necessary and is impractical for large projects which tend to have multiple large staging areas. Also, the vast majority of material stored within staging areas is inert material such as lumber, iron, etc that do not represent a stormwater pollution threat. Elsewhere, the Draft would address the stock piling of any materials that could represent a stormwater pollution threat, such as soil stock piles, which are required to be protected with stormwater controls.

As stated above, EPA should continue to rely on the SPCC requirements in 40 CFR 112 and Section 311 of the CWA and avoid creating a duplicate program.

30. Part 2.3.2.5(c). Storage, Handling, and Disposal of Construction Waste.

EPA should remove all of the “On a daily basis ...” references in this Part. AGC recommends that EPA revise the language to say “During work days ... .”













For example, the Washington state Department of Ecology handbook “*How to do Stormwater Monitoring: A guide for construction sites*” states that permittees are “require[d] to collect samples that are representative of the discharge from the construction site. A **representative sample** means the sample is similar in flow and characteristics (such as color, suspended soil, etc.) to the stormwater running off the site.” The state CGP allows permittees to choose how to take the representative sample: 1) a single grab, 2) a time-proportional or 3) a flow-proportional sample.

In addition, AGC is concerned about a provision in the part of the Draft that states “you must clearly mark all discharge points on your site with flags, stakes, tape, or other visible markers that will last for the duration of your construction activity.” AGC recommends that such markers be used only to mark area of the site that should be avoided; overuse of flags will cause them to lose their impact. (This is a problem in other parts of the Draft as well; there are numerous instances where EPA would require the use of flags.) AGC suggests that the site operator clearly label on the site plan within the SWPPP all of the discharge points that will be monitored.

7. Part 3.3.8. Actions Required if You Violate Numeric Turbidity Limit.

AGC strongly opposes the permit requiring an immediate notification (e.g., 24 hours) of EPA for extremely high turbidity levels for the reasons explained below and in Section V of AGC’s comments above.

An exceedance of a turbidity limit is not an emergency condition that poses an immediate threat to life or safety and does not warrant an immediate response to, or by, EPA. Collecting and responding to this type of data would divert EPA resources and dilute its ability to effectively manage the program, which should be focused on reviewing regularly reported data to identify compliance trends and centering attention on projects exhibiting a history of compliance difficulties.

Under the Administrative Procedure Act (APA), agencies must provide interested persons with a meaningful opportunity to comment on proposed rules. *E.g. American Radio Relay League, Inc. v. Federal Communications Commission*, 524 F.3d 227, 237 (D.C. Cir. 2008). “It is not consistent with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [to a] critical degree, is known only to the agency.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 379 (D.C. Cir. 1973). Currently, the EPA has not published a numeric turbidity limit for stormwater discharges from construction sites and therefore the limit that the agency is contemplating “is known only to the [EPA].” *Id.* Therefore, AGC has no basis to determine what constitutes an “extremely high” limit. For example, EPA’s previous turbidity limit was 280 NTU.

Furthermore, AGC questions whether Congress provided the agency with the authority to “immediately” collect information on “extremely high” turbidity discharges. In certain circumstances, CWA section 308 allows EPA to require dischargers to collect data and provide that data to the agency. *See* 33 U.S.C. § 1318(a). However, Congress only required “immediate”

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notification to the government when the discharge consists of oil or hazardous substances. *See* 33 U.S.C. § 1321 (b)(5). Therefore, unless the agency is creating the immediate notification requirement pursuant to CWA section 311(b)(5), it is acting outside its authority.

Finally, many of AGC's members operate their businesses as sole proprietorships. Thus, the Fifth Amendment protects them from self-incrimination. *United States v. Doe*, 465 U.S. 605 (1984). The proposed obligation to immediately notify the EPA is in actuality a notification that the permittee is in violation of the CWA. Therefore, sole proprietors should be "free to refuse to create" and provide such incriminating "records on fifth amendment grounds." Alito, *Documents and the Privilege Against Self Incrimination*, 48 Univ. Pitt. Law Review 27, 65-78 (Fall 1986).

Thus, EPA's proposed requirement to immediately notify the agency of extremely high turbidity measurements implicates the Fifth Amendment rights of certain small businesses, is outside of EPA's authority under the CWA, and currently does not contain enough detail to allow the regulated community to provide meaningful comments. Consequently, AGC strongly urges that the agency not include the requirement in the final CGP.

8. Part 3.3.9. Reporting Turbidity Sample Results to EPA.

AGC believes that EPA should set up a structured and simplified reporting system for permittees who are required to meet the numeric effluent limit. The Draft requires permittees to submit turbidity sampling data to EPA once a month and report to EPA within 24 hours any exceedance of the numeric turbidity limit. This reporting scheme is too onerous and aggressive. As allowed by EPA's regulations, it is more appropriate to require quarterly reporting of the numeric turbidity values and corrective action within a certain period of time if any exceedances occur. *See* 40 C.F.R. § 122.44(i)(3) and 40 C.F.R. § 122.44(g).



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2. Part 5.1.4.2 Inspection Requirements When No Discharge Is Occurring.

According to the Draft, during site inspection, the site operator would be required *at a minimum* to “[c]heck for the presence of sediment that is deposited in sufficient quantities and in locations on the site ... if left there, would likely be discharged ... [and] ... initiate corrective action.” AGC is concerned that the phrase “sufficient quantities” is too subjective and will lead to inconsistent enforcement determinations.

3. Part 6.3.2.4. Timeframe to Install and Make Operational Corrective Action Stormwater Controls.

AGC maintains that a seven-day period to install and make operational corrective action stormwater controls is not reasonable. First, corrective action may require engineering design to meet EPA's proposed two-year storm criteria and turbidity standards. Seven days is inadequate to design, procure materials and install corrective actions beyond rudimentary controls such as silt fencing. Second, operators often contract out stormwater compliance to a stormwater management sub-contractor. These sub-contractors typically inspect, install, and maintain BMPs for multiple customers and perform this service effectively by scheduling inspections and maintenance on specific days for each project. Requiring corrective action seven days after discovery as opposed to following the established weekly inspection schedule will result in sub-contractors having to limit their customer base to provide for the added burden, or more likely for operators to self-perform this work. EPA must consider the fiscal impact to small business when contemplating these requirements.

The seven-day deadline may also be problematic because it would not give the construction site operator sufficient time to seek assurance of compensation from the owner of the project for changed conditions.

4. Part 6.6. Reporting to EPA.

AGC strongly opposes the permit requiring an immediate notification (e.g., 24 hours) of EPA for any exceedance of the numeric turbidity limit for the reasons explained in Section V of AGC's comments above. See also AGC's comments at Section IX on Draft CGP Part 3.3.8, Actions Required if You Violate Numeric Turbidity Limit.

**G. Section-By-Section Comments on Part 8 of the Proposed CGP**

1. Part 8.1.2. Person(s) Responsible for Developing SWPPP.

The owner should develop the SWPPP. Likewise, the owner should have the responsibility to modify the plan throughout project construction to completion to ensure compliance with turbidity limits and other regulatory requirements.

EPA is correct in its finding that on large transportation and commercial construction projects, where the contract is awarded to the lowest bid, and the site design may have been developed without sufficient regard for stormwater management and CGP compliance, it is very difficult to then later develop a SWPPP that complies with the permit, due to potential conflicts with the site plans. The result of these conflicts can be that the owner and the general contractor are forced to negotiate changes to the site plan, which arguably should have been part of the original design.



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AGC appreciates the opportunity to comment. Thank you for taking our concerns into account. If you have any questions, please contact me at [pilconisl@agc.org](mailto:pilconisl@agc.org) or (703) 837-5332.

Sincerely,

A handwritten signature in black ink, appearing to read "Pilconis Leah", is positioned above a solid black horizontal line.

Leah F. Pilconis  
Senior Environmental Advisor to AGC of America

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