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Memo

TO: Greg Schaner, Office of Water, U.S. Environmental Protection Agency (EPA)

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SUBJECT: AGC Response to EPA Request for Clarification of Issues Raised in the July 11, 2011, AGC Comment Letter on EPA's Draft Construction General Permit (CGP) for Stormwater Discharges (*76 Federal Register 22,882*)

1. APPLICATION FOR PERMIT COVERAGE

The Draft CGP would require Notice of Intent (NOI) submission *at least* 30-days prior to commencing earth-disturbing activi

responsibility on to the general contractor – so AGC members are concerned that under EPA’s Draft CGP, they would lose 30 days on the start of the project.

Second, many projects require by contract that work commence within 30 days of notice of award (timeframe could be anywhere from immediately to XX number days). It is common in the private construction arena that the general contractor must be on the jobsite the day after the contract is signed. AGC members report that when they get a contract for work, the project will start the day the financing gets approved by the owner. Industry is concerned that general contractors could face breach of contract (and the possibility of liquidated damages) for not adhering to the specified work schedule or for not meeting deadlines.

Third, in the northern states where the construction season is short due to harsh winters or a season of heavy precipitation, a 30-day wait at the beginning of every project would jeopardize the ability for contractors to complete many projects on time. The 30-day wait would take up an unreasonable percentage of the working days available. This puts pressure on projects with completion dates and those with working days assigned for completion. *See also* breach of contract concerns discussed above.

Fourth, AGC members point out that on many projects, the required protected species and historic properties issues already have been addressed prior to breaking ground. For example, there are many expansion-type projects in urban areas where the owner is just adding new facilities on existing sites. In addition, for projects involving some sort of federal action (e.g., all federally-funded highway work), a

controls. AGC commented (based on feedback from the membership) that linear transportation projects typically have a 3:1 slope (33%) over the majority of the project. AGC requested that EPA require specialized controls for very steep slopes only – i.e., outside what is typical on a highway projects. EPA Response: If EPA were to proceed with defining steep slopes as 33% or 3:1 – how would the Agency substantiate that this will work for most states?

AGC Response:

For the reasons listed below, even if EPA defines steep slopes in the CGP as 33%, many linear projects would still be subject to enhanced requirements, which would unnecessarily increase the cost of construction.

First, when the Interstate highway system was being designed and constructed, the Federal Highway Administration sent out guidance to all the states that in general, side slopes and back slopes on the interstate system should not be steeper than 3:1 or 33%. They did allow exceptions to this rule in mountainous terrain or in specific situations where steeper slopes had to be used.

Second, the standard slope of a swale is 3:1 (33%) – these are very common as they are often used to carry stormwater from roadways and into treatment systems. In addition, a stormwater retention/detention pond typically has a slope of 3:1 or 2:1.

Third, AGC members report that many municipalities already define steep slopes as greater than 3:1 (e.g., throughout Colorado). AGC cautions EPA against implementing a federal permit requirement that would conflict with municipal laws.

4. USE OF LEVEL SPREADERS

The Draft CGP would require the “use of level spreaders.” AGC members reported – and AGC’s letter explained – that level spreaders are rarely installed correctly or effectively. Contractors have found that “true level” is never achieved in rills/gullies and this BMP is ineffective and costly. EPA Response: If these don’t work well, what are AGC members’ suggestions on ways to level out the land above and below sediment controls?

AGC Response:

AGC members have found that level spreaders work to trap sediment when the depth of the water is uniform – typically 3 inches or less – over the whole surface area and the flow is very slow. The water stagnates and the sediment drops. Level spreaders have to be designed and constructed to tolerance in order to work or be effective. It is hard on most construction sites to find locations to build a level spreader and also to have the right water flow regime over the spreader.

General practice is to try to make the stormwater entering above BMPs as

5. STABILIZATION DEADLINES

In several parts of the Draft CGP pertaining to stabilization requirements, EPA would require the construction site operator to “immediately initiate stabilization” whenever activities stop and will not resume within 14 days. In addition, EPA would require contractors to “complete stabilization activities” seven (7) days after initiating stabiliza

most of their projects, erosion control is a continuous practice and is an integral part with all the other operations. There is no start and end time... it is continuous. The 14- day time period in the draft permit provides a window and gives contractors an objective. Erosion control is then weaved into the project as a continuous operation. A completion time is not needed... application of erosion control is continuous over the project as areas are graded until the project is completed.

6. STABILIZATION CRITERIA

EPA requested comment on whether the C-factor stabilization criteria should be used as the sole option for complying with the CGP's stabilization requirements (for both vegetative and non-vegetative cover methods)– as opposed to allowing permittees to choose either the C-factor method or the 70% area cover approach. AGC commented that the C-factor approach should not be the only criteria for stabilization, for a host of reasons. EPA Response: What are AGC's alternative suggestions for gauging the performance of non-vegetative measures like hydro-mulch or straw/fiber with netting, gravel, riprap, etc.?

AGC Response:

AGC recommends that EPA leave it up to the states to define the criteria that would achieve final stabilization. For example, in Nevada, Arizona, SE Utah, SW Colorado, Wyoming, Eastern Montana, and New Mexico, AGC members report that it generally takes up to three growing seasons to establish the 70% background vegetal cover required for filing the Notice of Termination due to the extreme arid climate that exists in that region of the country no matter how elaborate the design seed mix. Using vegetative cover as the sole means for achieving “final stabilization” is not a viable option in this circumstance. Retaining permit coverage for three years or more after earth disturbing activities cease would prove to be very cumbersome economically and presents many other contractual issues. Reportedly, some of those permitting authorities consider the application of soil stabilizers/tackifiers (i.e. M-Binder, Soiltac®, Fisch-Stik, etc.) in combination with seeding as an equivalent permanent stabilization measure whereby filing the Notice of Termination is accepted without relying solely on the vegetal cover value. Soil types are of course considered in this example. Individual state permitting authorities know best what works in their regions and should be given the discretion to specify state-specific criteria for stabilization.

Turning to the C-factor equation: The C- factor, as used in the soil loss equation, is only one of the factors in the formula. $[A=R K LS CP]$ “A” is the average annual soil loss. “R” is the rainfall factor. “K” is the soil erodibility factor. “LS” is the slope length and steepness and “P” is the practice factor. These factors are used in combination. **C-factor is used to predict soil loss** and sediment generation. It is used to describe the amount of erosion control. It does nothing to predict the murkiness of water discharge.

If the present term “stabilization” is changed to “erosion control” in much of the permit, the use of C-factor may make more sense. **Stabilization** is measured by permanent vegetation (that is rooted in) or by some form of permanent surface protection (e.g., rock riprap). The amount of **erosion control** obtained on a surface could be referred to in terms of cover C-factor.

AGC members report that construction site operators typically would use a BMP with a higher C- factor in instances where, for example, the site has highly erodible soil, or it is located in a high rainfall area or it includes slopes that are steep.

could bury equipment or needlessly stir up a lot of dirt and create channels. EPA should allow the operator the opportunity to document in his SWPPP an explanation for not meeting the seven-day deadline.

8. CORRECTIVE ACTION RE: ADDITION OF NEW BMPS

Under the Draft CGP, if you determine that you need to install a new stormwater control or replace an existing control in order to meet the terms/conditions of your permit, you must “install the new or modified control, and make it operational, by no later than seven days from the time of discovery of this [noncompliant] condition at your site.” EPA’s intention was to address situations that require a significant redesign and reconstruction or replacement. AGC commented that a seven-day period is not reasonable because such corrective action measures (1) may require engineering design to meet EPA’s proposed two-year storm criteria and turbidity standards and the proposed seven-day deadline is inadequate to design, procure materials and install anything more than rudimentary controls; (2) are typically contracted out to subcontractors who work for multiple customers and need flexibility in coordinating their clients’ work; and (3) would not give the site operator enough time to seek assurance of compensation for the owner of the project for changed conditions. EPA Response: EPA would like AGC members to suggest an alternative to seven-day timeframe that would work for industry and provide support.

AGC Response:

The situation of adding more or more rigorous BMPs on projects is very involved and involves **approvals that are beyond the contractor’s control**. The draft CGP purports to require more rigorous BMPs or design modifications when the existing BMPs prove to be inadequate or fail. More rigorous BMPs cost more money and redesign means changed conditions.

The following is an example on a commercial site where a school was under construction and existing controls needed to be upgraded:

Engineering analysis and design of two comparative alternates took 3 days; it took 2 additional days to develop quantities, estimate work hours and develop costs for the two alternates, and about a week to get approvals from the district school administration. Once approvals were obtained it took two days to order materials and get equipment on the job site and another three- four days to complete the work.

When changes are done on state-administered Federal Highway projects, it frequently takes at least 2-3 weeks to get approvals. Another issue is if additional monies have to be encumbered on state or federally funded projects. Then it takes at least a month.

Many times there are joint projects such as state/city projects where a highway is reconstructed through a city and the city work of doing new water mains and sewer which the city pays for is bundled with the total project. Approvals and estimating the cost splits of extra erosion control work on these projects takes a lot of time.

The bottom line is that it takes longer to do an engineering and cost analysis and get approvals than it does to do the actual work.

If, in the permit, EPA insists on specifying an exact deadline for contractors to add new/enhanced BMPs, AGC recommends that it be 7-10 days after approval from the owner. However, AGC maintains that an exact “one-size-fits-all” deadline could never be met in all instances.

9. STORMWATER POLLUTION PREVENTION PLAN DOCUMENT

EPA requested public comment on whether the owner of the site should bear the initial requirement to develop the Stormwater Pollution Prevention Plan (SWPPP) for the jobsite. AGC commented that the owner should develop the SWPPP and have responsibility for modifying the SWPPP throughout project construction to completion. AGC reasoned that this approach is essential to ensure that the owner (and architect/engineer) address stormwater compliance during the project planning stage and the contractor(s) is informed up front (i.e., as part of the bid package) of his/her stormwater responsibilities. EPA Response: EPA would like to know if it would address AGC’s main concerns if it were to draft the new CGP to make the owner responsible for the design components of the SWPPP, but leave the procedural elements to be the “operators” responsibility.

AGC Response:

The SWPPP must be designed early on in the project and include all costly/permanent controls, such as permanent ponds and/or permanent water treatment BM

the owner take responsibility for the design part of the SWPPP. What follows is a pattern where the owner would typically be the first party to file for permit coverage. [This scenario has NOT played out successfully in the past, because – as explained above – the owner eaPor th