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OFFICE OF THE ASSISTANT SECRETARY
(INSTALLATIONS AND ENVIRONMENT)
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WASHINGTON, D.C. 20350-1000

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Comment Clerk
Water Docket (4101) No. W-02-06
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category; Proposed Rule; 67 FR 42644 (24 June 2002)

Dear Sir or Madam:

Enclosed are comments on the Construction and Development Point Source Category proposed rule from the Department of Defense (DoD) Clean Water Act Services Steering Committee, which represents the Departments of the Navy, Air Force, and Army and other DoD components and agencies. In general, DoD supports EPA's efforts to regulate a complex source category. However, we believe that currently there is no need for EPA to propose additional regulations regarding storm water runoff from construction and development sites. We are concerned with the purpose and timing of such regulations.

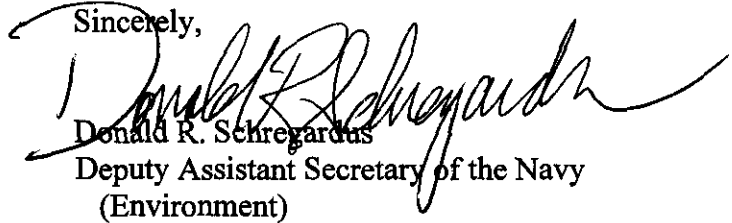
Before EPA promulgates into regulation the provisions outlined in the Construction General Permit, EPA should evaluate the effectiveness of these provisions when implemented in compliance with the Storm Water Phase II regulations, which must be complied with no later than 10 March 2003. With this evaluation, EPA would then be able to determine if additional regulation is needed and promulgate only those provisions that proved to work effectively. In addition, effluent limitation guidelines and standards (ELGs) traditionally have been associated with "numerical standards." EPA should not attempt to develop an ELG based on Best Management Practices for an industry when the general permit provisions are still in the working stage.

If, however, EPA decides to pursue a regulatory option, we recommend that the rule be revised to: 1) Exclude restoration activities from regulated activities; 2) provide clarification on the definition of "qualified professional"; 3) modify the sediment depth and removal criteria; 4) require plans to meet only *applicable* federal, state, tribal, and local controls; 5) authorize States

to establish site inspection frequencies; 6) eliminate the new source definition; 7) revise the industry profile as described in the preamble; 8) include a dry-season exemption; and 9) be consistent with municipal separate sewer systems regulated acreages.

My point of contact for this issue is Ms. Kathy Ellis at (703) 602-2568.

Sincerely,



Donald R. Schregardus
Deputy Assistant Secretary of the Navy
(Environment)

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Department of Defense (DoD) Clean Water Act Services Steering Committee

**Comments on the
Effluent Limitation Guidelines and New Source Performance Standards for the
Construction and Development Category; Proposed Rule;
67 FR 42644 (24 June 2002)**

1. Adopt Option 3, No Regulation

Comment: Given the apparent overlap of existing Construction General Permit (CGP) requirements and the fast approaching implementation date for Storm Water Phase II, Option 3 is preferable to Options 1 or 2.

Discussion: Neither Option 1 nor Option 2 seems appropriate.

- a. Option 1 would modify 40 CFR 122 and bring Storm Water Phase I construction activities under effluent limitation guidelines and standards (ELGs) .
- b. Option 2 adds language to 40 CFR 122.44(i)(4) on monitoring and adds an ELG, at 40 CFR 450, that addresses Storm Water Phase I construction activities.

Neither of these options contributes a substantial or meaningful addition to the already existing Storm Water Phase I CGP provisions. Section III.B.1.b of the preamble provides the dates on which EPA promulgated various segments of the CGP regulation. The "national" CGP and the Region-specific CGPs are valid for five years, with the "national" permit due for renewal in February 2003; the Region 4 permit, in April 2005; and the Region 6 permit, in July 2003. Although EPA has had experience with permit transition issues, such as those associated with the Baseline General Permit and the Multi-sector General Permit, EPA has not addressed the transition or phase out program that would be necessary when the ELG, finalized in 2004, overlaps, in large part, the requirements already in place under the general permit program. EPA should advise the regulated community how EPA will handle this "transition" period. The potential for duplicate regulation, particularly for federal facilities, seems likely, given the existing structure of the ELG and the existing Region 4 permit, which is authorized through 2005. Those transitions can be awkward for the regulated community.

Recommendation: EPA should adopt Option 3.

References:

- a. Preamble Section III.B.1.b, NPDES Storm Water Permit Program, page 42647
- b. 40 CFR 122.44(i)(4), page 42683
- c. 40 CFR 450, page 42684

2. Exclude Restoration Activities from Regulated Activities

Comment: If EPA goes forward with an ELG (Option 2), EPA should state clearly that environmental restoration activities (CERLCA, RCRA, WRDA, etc.) are specifically excluded from these provisions. Restoration activities have little in common with development and/or “heavy construction” activities and are adequately addressed under existing CGP provisions and environmental protection measures inherent in individual programs.

Discussion: Under Option 2, EPA has proposed an ELG (40 CFR 450) to address traditional construction activities. The substantive requirements of the CGP, however, adequately address adjacent surface waters and protect the environment when restoration activities are conducted under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Moreover, the addition of an ELG to the corrective action process under the Resource Conservation and Recovery Act (RCRA) will only add an additional regulatory burden to a program that another branch of EPA is trying to streamline. Under the Water Resources Development Act (WRDA) and associated aquatic habitat programs, the combination of the CGP, the CWA 404 program, and 401 certifications adequately addresses issues targeted by the proposed ELG (Option 2). These programs address sediment and erosion control and the fate and transport of contaminants partitioned on fine particles.

Recommendation: Exclude environmental restoration activities associated with CERCLA, RCRA, and WRDA from the requirements of 40 CFR 450.

References:

- a. Preamble, Section IX.A.2, Development of Effluent Limitation Guidelines and Standards, page 42656
- b. 40 CFR 450.10, page 42684

3. Clarify “Qualified Professional”

Comment: The regulated community needs clarification on what constitutes a “qualified professional,” including a defined means of ascertaining whether any given individual is a “qualified professional.”

Discussion: In Section X.D.3 of the Preamble, EPA recommends that, for Option 1, a Certified Professional in Erosion and Sediment Control (CPESC), licensed Professional Engineer (PE) or similarly qualified person conduct the inspection. DoD is concerned with the meaning of the term, “qualified professional.” How will EPA or the regulated community determine whether any particular individual is “qualified”? If a person is required to be certified, or if an outside contractor is needed, then DoD will have to incur that extra cost. We believe that hiring an engineer or qualified professional to certify a BMP does not solve the problem if EPA has not identified standards for the BMP in the rule. Such standards could be used to “qualify the professional” for evaluating the BMP.

Recommendation: Standards for the BMP should be outlined by EPA in the rule so that those standards can be used to “qualify the professional” for evaluating the BMP.

References:

- a. 40 CFR 122.44(t)(1)(iii), page 42683
- b. Preamble Section X.D.3, Inspection and Certification Provisions, page 42664

4. Modify the Sediment Depth and Sediment Removal Criteria

Comment: An evaluation of whether sufficient capacity remains in sediment traps and ponds to satisfy the design intent is more appropriate than determining the percentage of initial capacity that has been filled with sediment. In some cases, it may not be possible to readily determine sediment depth, such as when ponds are inspected immediately following a storm event while the water is still turbid due to suspended clay particles.

Discussion: For Option 1 in 40 CFR 122.44(t)(2)(D), EPA proposes inspection of all sediment control practices to include recording the approximate degree of sediment accumulation as a percentage of the sediment storage volume (for example 10 percent, 20 percent, 50 percent, etc.). Similar requirements are proposed for Option 2 in 40 CFR 450.21(g)(1)(iv) with the addition of a requirement in 40 CFR 450.21(i) to remove sediment from sediment traps or sediment ponds when “design capacity” has been reduced by 50 percent.

Furthermore, to ensure sediment controls such as silt fences constructed with filter fabric, straw bale dikes, sediment traps, and basins remain effective, EPA is proposing periodic and post-storm event inspections, and (in Option 2) requiring removal of sediment when sediment trapping measures reach 50 percent full. DoD has two concerns about this proposed approach: that the 50% full criterion for sediment cleanout is arbitrary, and that under some conditions, it will be difficult to estimate the amount of accumulated sediment.

If sediment controls such as basins are designed and constructed with sufficient capacity, they can still be effective, meeting their design intent, even when 50 percent or more of the initial volume has been filled. When an inspection is conducted after a storm event, turbidity of accumulated water may make determination of the volume of accumulated sediment difficult.

With regard to silt fences and similar barriers, on a slope that is uneven and variable, it may be difficult to gauge the degree of sediment accumulation as a percentage of the volume available for accumulation behind a barrier such as a silt fence. For silt fences and similar barriers, the height of sediment accumulation at the barrier would be a more appropriate measure than volume. Nevertheless, DoD believes that requiring silt removal when 50 percent of capacity is reached is arbitrary and unnecessary.

Recommendation: Under Options 1 and 2, EPA should require the regulated community to note the degree of sediment accumulation as a percentage of sediment storage volume or to remove sediments when a certain percentage of storage capacity is exceeded only where feasible. For example, 40 CFR 122.44 (t)(2)(i)(D) should read: “Inspect all sediment control practices and where feasible note the approximate degree of sediment accumulation...” Similarly, the inspection requirement at 40 CFR 450.21(g)(1)(iv) should be modified to read: “Record the depth, where practical, of sediment within containment structures...”

Under Option 2, change the proposed 40 CFR 450.21(i) to read: “(i) Maintenance. Sediment shall be removed from sediment traps or sediment ponds when, based on professional judgment or on criteria specified by the designer of the control measure, a determination is made that these control measures are no longer capable of operating as designed.”

References:

- a. 40 CFR 122.44(t)(2)(D), page 42683
- b. 40 CFR 450.21(g)(1)(iv), page 42686
- c. 40 CFR 450.21(i), page 42686
- d. Preamble Section X.D.4, Maintenance, page 42664

5. Require That Plans Meet Only Applicable Federal, State, Tribal, and Local Controls

Comment: The site log book requirement, 40 CFR 122.44(t)(1)(ii) and 40 CFR 450.21 (f)(2), does not take into consideration the regulated position of a Federal facility.

Discussion: In the Proposed Rule, Option 1, in 122.44(t)(1)(ii), requires the permittee to certify that any plans required by the permit meet **all** Federal, State, Tribal, and local erosion and sediment control requirements. Option 1, in 450.21(f)(2), includes a similar requirement.

Federal facilities may not always be subject to State or local erosion and sediment control requirements because of sovereign immunity issues or because the differences between State statutes and local ordinances.

Recommendation: EPA should add the word “applicable” between “all” and “Federal” so that the proposed rule reads “...plans required by the permit meet all applicable Federal, State, Tribal, and local erosion and sediment control requirements...”

References:

- a. 40 CFR 122.44(t)(1)(ii), page 42683
- b. 40 CFR 450.21 (f)(2), page 42686

6. Allow Permitting Authorities to Establish Site Inspection Frequencies

Comment: Permitting authorities should be allowed to establish site inspection frequencies.

Discussion: Under 40 CFR 122.44 (4)(t)(2)(i) and 40 CFR 450.21(g)(1), EPA requires that the permittee conduct site inspections at least every 14 calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater.

DoD believes that delineating a specific timeframe for inspections or a specific storm event is not a one-size-fits-all requirement because of climatic variations nationwide and corresponding differences in State requirements. Due to the huge differences in climate between places such as Hawaii, Florida, and Arizona, a one-size monitoring requirement is inappropriate. The requirement for site inspections should be left to the best professional judgment of the permitting authority. EPA provides no evidence of increased benefit with a standardized Federal requirement.

Recommendation: Allow permitting authorities to establish appropriate site inspection frequencies based on localized climate conditions and regulatory experience.

References:

- a. 40 CFR 122.44(4)(t)(2)(i), page 42683
- b. 40 CFR 450.21(g)(1), page 42686
- c. Preamble Section IX.B.1, Overview of Regulatory Options: Erosion and Sediment Controls and other Temporary BMPs, page 42658
- d. Preamble Section X.D.3, Inspection and Certification Provisions, page 42664

7. Eliminate the New Source Definition

Comment: Classifying some construction projects as “new sources” leads to confusion.

Discussion: Option 2, in 40 CFR 450.11, defines a “new source” as any source from which there may be a discharge associated with construction activity pursuant to 40 CFR 122.26(b)(14)(x) that will result in a building, structure, facility, or installation from which there may be a discharge of pollutants regulated by new source performance standards (NSPS) elsewhere under subchapter N. DoD believes that the designation of some construction projects as “new sources” (for the purposes of erosion and sediment control during construction) based on the type of facility being constructed is pointless and confusing.

Section X.C of the preamble to the rule states:

Because EPA has co-proposed to set NSPS equivalent to Best Practicable Control Technology (BPT), the Agency expects that this would not result in any substantive increase or decrease in the limitations imposed on any C&D activity.

As discussed in Section X.C of the preamble, EPA recognizes that under the Clean Water Act (CWA), a source is not a “new source” under Section 306(a)(3) unless there is or may be a discharge of pollutants from the constructed activity. Industries regulated under subchapter N, however, cannot discharge pollutants until provided with a permit to discharge. Given these realities, designation of some construction and development activities as “new sources” is essentially pointless and merely serves to confuse any readers not intimately familiar with the CWA regulatory programs.

Recommendation: Delete section 40 CFR 450.24 and the definition of “new source” in 40 CFR 450.11.

References:

- a. Preamble Section X.C, Best Available Technologies (BAT) and NSPS, page 42661
- b. 40 CFR 450.11, page 42684
- c. 40 CFR 450.24, page 42686

8. Revise the Industry Profile

Comment: The profile of affected industry sectors provided by EPA in Section VI of the preamble does not fully match the activities captured by the applicability criteria of the proposed rule.

Discussion: Section VI.A of the preamble to the rule states:

The construction and development category covers establishments classified by the Census Bureau into two subsectors:

- The Building, Developing and General Contracting subsector (North American Industry Classification System (NAICS) 233) includes land subdivision and development, and building construction (residential and nonresidential). Land developers select construction sites, conduct site planning and design activities, and carry out other tasks such as financing and marketing. General contractors build residential, industrial, commercial, and other buildings.
- Heavy Construction contractors (NAICS 234) build sewers and other utilities, roads, highways, bridges, and tunnels.

The two NAICS sector codes cited as the affected industry sectors—NAICS 233 and 234—appear to be a subset of the regulated activities. For example, Federal facility construction would not be covered within these NAICS sectors.

Recommendation: EPA should consider revising the affected industry sectors and other preamble discussion of the rule's impact.

Reference: Preamble Section VI.A, Affected Industry Sectors, page 42652.

9. Dry-Season Exemption

Comment: Short-term projects that are completed during periods of low anticipated rainfall face an unreasonable administrative burden given the very limited potential benefit.

Discussion: Operators subject to this subpart are required to compile Storm Water Pollution Prevention Plans prior to ground breaking at all construction sites. In addition, operators are required to maintain site logbooks, perform site inspections, and initiate stabilization measures where construction activities are temporarily or permanently ceased. These requirements apply regardless of location and time of year, whether or not rainfall is statistically probable. An important factor for determining the potential for erosion from a construction site is the amount and force of precipitation expected during the time the earth will be exposed. While it is impossible to predict the weather several months in advance of construction, for many areas in the Western United States, there are definite dry seasons, during which the potential for erosion is greatly reduced. As indicated in EPA's Construction Rainfall Erosivity Waiver Guidance (EPA 833-F-00-014), "when feasible this is the time to disturb the earth, so that the site is stabilized by the time the seasonal wet weather returns."

California and portions of the desert Southwest experience substantial dry seasons with little or no expected rainfall. For example the average rainfall in the Los Angeles area is less than 0.25 inches in the months of June, July, August and September. As a result, disturbed land areas during this period normally do not experience storm water runoff. The construction erosion waiver authority provided in 40 CFR 122.26(b)(15)(i)(A) accounts for regional variations in erosion potential and the projected project start and completion dates by allowing local regulators to exempt low impact projects.

By allowing a waiver for projects that are scheduled in a way that significantly reduces their potential discharge of sediments in storm water, EPA provides a strong incentive for completing the land disturbing portions of projects during the dry season thus reducing the potential for sediment releases. Although the current waiver only applies to small construction projects, we believe it would also be appropriate for larger projects.

Recommendation: EPA should exempt *construction projects* from the proposed regulation if the project would meet requirements for the construction rainfall erosion waiver contained in 40 CFR 122.26(b)(15)(i)(A).

References:

- a. EPA, January 2001, Storm Water Phase II Final Rule – Construction Rainfall Erosivity Waiver, EPA 833-F-00-014.
- b. Storm Water Phase II Rule, 40 CFR 122.26

10. Consistency with Municipal Separate Storm Sewer Systems (MS4s) Regulated Acreages

Comment: The site size regulatory threshold of this rule should be consistent with that under the existing MS4 National Pollutant Discharge Elimination System (NPDES) requirements at 40 CFR 122.34(b)(4)(i).

Discussion: Proposed Options 1 or 2 would regulate sites of one acre and up and five acres and up, respectively. Existing MS4 NPDES requirements at 40 CFR 122.34(b)(4)(i) require municipalities or other owners of municipally separate storm systems to implement and enforce a storm water program for construction that disturbs one acre or more. Reduction of storm water discharges from construction activity disturbing less than one acre must be included if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more.

By adopting a one acre regulatory limit in the proposed regulation EPA would significantly ease the regulatory burden by eliminating the need for MS4s to implement separate and distinct storm water programs that would apply to sites between one and five acres. Additionally, earthwork contractors would be relieved of the burden that would be created by a patchwork of inconsistent local ordinances that may force changes to standard operating procedures on each construction project.

Recommendation: EPA should adopt a construction area size threshold for the proposed regulation that is consistent with the MS4 regulation proposed rule in sizes of areas covered. Once a nationwide standard for construction is in place, the MS4 regulations addressing *construction (at 40 CFR 122.34(b)(4)) should be deleted.*

Reference: 40 CFR 122.34(b)(4)(i)