July 12, 2021

VIA ELECTRONIC SUBMISSION
EPA Headquarters
Office of Water
Office of Wastewater Management (4203M)
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: Joint Comments of the Federal Water Quality Coalition and Federal StormWater Association on the U.S. Environmental Protection Agency's Proposed National Pollutant Discharge Elimination System 2022 Issuance of General Permit for Stormwater Discharges From Construction Activities; Docket ID No. EPA-HQ-OW-2021-0169

Dear Sir or Madam:

The Federal Water Quality Coalition (FWQC) and the Federal StormWater Association (FSWA) appreciate the opportunity to file the following comments regarding U.S. Environmental Protection Agency's (EPA) Proposed National Pollutant Discharge Elimination System (NPDES) 2022 Issuance of General Permit for Stormwater Discharges From Construction Activities (the Proposed 2022 CGP), 86 Fed. Reg. 26023 (May 12, 2021). The FWQC and FSWA set forth comments below regarding a number of the new or modified requirements that are included in the Proposed 2022 CGP. We encourage EPA to make appropriate revisions to the permit, as set forth in these comments. The revisions we are suggesting would ensure that stormwater discharges subject to the permit are regulated with appropriate flexibility to ensure that cost-effective and appropriate stormwater controls can be utilized based on site-specific assessments, while recognizing the challenges EPA faces with this broad-based general permitting scheme.

The Commenters' Interest

The FWQC is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made by EPA and States under the federal Clean Water Act (CWA or Act). FWQC membership includes entities in the aluminum, agricultural, automobile, chemicals, coke and coal chemicals, electric utility, home building, iron and steel, mining, municipal, paper, petroleum, pharmaceutical, rubber, and other sectors. FWQC members, for purposes of these comments, include: The Aluminum

Association; American Chemistry Council; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Iron and Steel Institute; American Petroleum Institute; Association of Idaho Cities; Auto Industry Water Quality Coalition; Cargill, Incorporated; China Clay Producers Association; City of Pueblo (CO); City of Superior (WI); City of Tempe (AZ); Corn Refiners Association; Eli Lilly and Company; Freeport McMoRan Inc.; Hecla Mining Company; Kennecott Utah Copper LLC; Mid America CropLife Association; National Association of Home Builders; National Oilseed Processors Association; Orange County (CA) Sanitation District; Portland Cement Association; Shell; Treated Wood Council; U.S. Tire Manufacturers Association; Utility Water Act Group; and Western States Petroleum Association.

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state permitting authorities under the CWA. FSWA members, for purposes of these comments, include: Airports Council International – North America; American Petroleum Institute; Associated General Contractors of America; Association of American Railroads; Auto Industry Water Quality Coalition; Institute of Scrap Recycling Industries; National Association of Home Builders; Pavement Coatings Technology Council; and Western States Petroleum Association.

Both FWQC and FSWA members own and operate facilities located on or near waters of the United States. Many of these entities conduct land disturbing operations in areas in which EPA serves as the NPDES permitting authority, that generate stormwater from construction activities as defined at 40 CFR § 122.26(b)(14)(x) and are subject to EPA's Construction General Permit (CGP). In addition, FWQC and FSWA members operate in states that have been authorized to issue their own general permit for stormwater discharges from construction activities but that have historically relied extensively on EPA's CGP as the "model" permit that informs the state's general permit. Therefore, FWQC and FSWA and their members have a direct interest in the Proposed 2022 CGP. Beyond the issues raised in these comments, individual members of the FWQC or FSWA may have additional concerns with various aspects of the proposed CGP and may file additional comments separately.

FWQC and FSWA Analysis and Recommendations

EPA Request for Comment 1 (Part 1.1.1 "Operator" Definition)

EPA has requested comment on whether to modify the Part 1.1.1 definition of "operator" to better ensure that all parties with operational control over the project are permitted. Specifically, EPA has proposed adding a clause to the definition stating that an operator includes a "party [that] has operational control over construction plans and specifications including the ability to make modifications to those plans and specifications, or determines acceptance of the work and payment for work performed to ensure compliance with the permit conditions." The Agency has requested comment on whether

this addition should be made, whether the existing definition is sufficiently broad, or whether an alternative modification would be helpful.

FWQC and FSWA Recommendations to EPA Request for Comment 1

The FWQC and FSWA support modifying the definition of "operator" to better ensure that all parties with operational control over the project are subject to the permit, and support clarifying that operational control includes control over the payment for work performed to ensure compliance with the permit. The FWQC and FSWA are concerned that the current definition does not necessarily include certain entities that approve contractor payment for costs necessary to comply with the CWA and CGP. Problems can arise when contractors with "operational control" do not also control the payment for the construction operations, particularly where the permittee may need to incur additional expenditures to comply with the CWA and CGP. Accordingly, the FWQC and FSWA recommend that EPA clarify that operational control incudes control over the contractor payment for work performed.

For example, in both Design-Build (DB) and Engineer-Procure-Construct (EPC) methods of project delivery, the DB or EPC contractor is the head of design and construction once that person is hired by the owner and the project is started. Under these project methods, the contractor generally accepts the "base concept" for schematic design prepared by the owner or the owner's consultant/representative (i.e., performance specifications). Then, the contractor is responsible for preparation and control of detailed specifications and drawings, procurement, construction, and meeting the owner's requirements. In effect, the entities that are controlling expenditures for construction operations (i.e., approving payment for the work) supply project plans and specifications, but they do not control the project plans and specifications or modifications to those plans and specifications. As such, the entities that are controlling expenditures for construction operations are not controlling the day-to-day activities at the project.

Under the Design-Bid-Build (DBB) project delivery system, the design of the project must be completed prior to contractor bidding and selecting, and the owner retains overall responsibility for project management. The contractor bases its bid price on the plans and specifications and the estimated pricing of the units and quantities. The contractor submits a pay application every month that charges by unit quantities installed, as defined in the bid package, and the owner can resist overruns in the quantity specified in the bid (such as for silt fence) because the item would be over budget. Because the owner has such control over payment, schedule, and changes to the project that would require additional BMPs, the owner has significant influence over stormwater management and, consequently, should be recognized as an "operator" for purposes of stormwater permitting. To this end, the FWQC and FSWA request that EPA clarify that the definition of "operator" includes those entities with control over the payment for construction operations.

EPA should incorporate more specific language than the language proposed, however, because "determines the acceptance of work" and "payment for work performed" are too broad. The modification to the "operator" definition should not be so broad to include lenders, grant-funders, or any other entities that are financing the construction project generally, but EPA should clarify that the definition includes those entities that supply the project plans and specifications and control or approve payment for work on the permitted construction project. For example, EPA may consider inserting the term "contractor" before the phrase "payment for work performed" to clarify that the definition would not apply to lenders, grant-funders, or other entities financing construction.

EPA Request for Comment 2 (Part 1.3.6 Dewatering Discharges)

The Proposed 2022 CGP permit language modifies Part 1.3, in part, by prohibiting dewatering discharges from contaminated sites. In addition to the proposed language, EPA has requested comment on:

- Whether any discharges in addition to the proposed prohibited discharges should be prohibited from coverage due to the possibility of those discharges containing contaminants.

- Whether EPA can clarify the term "ground water pollutants" and "contaminated water."

- Whether the prohibition should allow for case-by-case flexibility for Superfund or RCRA cleanup sites where existing controls, such as capping, prevents exposure of surface accumulations of stormwater to buried wastes.

FWQC and FSWA Recommendations to EPA Request for Comment 2

The FWQC and FSWA have a number of concerns about the Agency's proposal to prohibit dewatering from a "contaminated site." As a general matter, we are concerned that the Agency's "contaminated site" proposal could be interpreted to significantly expand EPA's authority beyond the purpose of the CGP. This permit addresses discharges of pollutants in stormwater that result from certain construction activity. *See* 40 C.F.R. § 122.26(b)(14)(x) and (b)(15). Not all dewatering activities result in a "discharge" off site, and not all groundwater that might need to be "dewatered" has come in contact with any construction activity or disturbed soils. Therefore, not all dewatering activities or even dewatering discharges (without contact) are regulated by the CGP.

Also as a general matter, we believe that the concern raised by EPA regarding dewatering groundwater with naturally occurring metals is misplaced. These "naturally occurring" metals are not the result of stormwater contacting disturbed land, so they are not and should not be the focus of the CGP program. Moreover, the issue is largely irrelevant to the CGP, since groundwater with naturally occurring metals will ultimately discharge to the same

rivers or streams receiving the construction stormwater, especially if ground water tables are so high as to create "dewatering" issues at the construction site.

Beyond those general concerns, we believe that the "contaminated site" provision needs to be clarified in several respects. First, we recommend that the Agency define "contaminated site" to include only CERCLA- or RCRA-involved sites; EPA's proposed clarifying language for "contaminated site" creates confusion and is potentially overly-broad. Additionally, the phrase "existing or former remediation activities," which is undefined in the proposal, needs to be defined to help clarify what constitutes a "contaminated site." Further, referring to Superfund or RCRA sites only by way of example, but not by way of definition, does little to narrow the potential breadth of the term "contaminated site;" these need to be defined.

The proposal should expressly state that only those sites currently on the National Priorities List (NPL) or in the RCRA Corrective Action Program are "contaminated sites." The proposal should not include "former" contaminated sites, (i.e., sites that have been deleted from the NPL or are no longer in the RCRA Corrective Action Program). Sites that have been remediated in accordance with federal standards would not be more likely to discharge pollutants to a navigable water than a site that had never been subject to remediation activities. As such, there is no basis to regulate former CERCLA- or RCRA-involved sites, which have been remediated, as "contaminated sites" subject to the proposed prohibition against dewatering.

The fact that a site may meet the definition of a "contaminated site," as proposed, does not necessarily mean that the site discharges pollutants to a water of the United States. Therefore, the permit should allow for case-by-case flexibility in determining whether dewatering should be prohibited from a Superfund or RCRA site. For example, as EPA's request-for-comment highlights, certain response actions, such as capping, at CERCLA- or RCRA-involved sites already minimize exposure of stormwater to pollutants. Accordingly, at sites where removal actions have already occurred, a remedy has been constructed, or long–term institutional controls are in place, there may not be any increased risk of stormwater exposure to pollutants, even though the site may be on the NPL or in the RCRA Corrective Action Program.

EPA Request for Comment 3 (Part 1.4.3 Permit Coverage Waiting Period)

The Proposed 2022 CGP contains a 14-day waiting period between submission of a Notice of Intent (NOI) and authorization. EPA explains that this waiting period is intended to provide the U.S. Fish & Wildlife Service and National Marine Fisheries Service (FWS) with an opportunity to review the potential impacts of the proposed construction on endangered or threatened species. Part 1.4.3 also provides that, for paper NOI, submissions, the 14-day waiting period will not commence until EPA completes manual entry of the NOI in NeT. Regarding the 14-day waiting period, EPA has requested

comment on the possibility of extending the current 14-day waiting period to 30 days to better facilitate FWS' review process.

FWQC and FSWA Recommendations to EPA Request for Comment 3

The FWQC and FSWA oppose extending the waiting period to 30 days. EPA's proposal does not provide any justification for why 14 days is an insufficient amount of time for FWS to conduct its review.[1] EPA's NOI should collect sufficient information to allow both EPA and FWS to make timely determinations. With the available resources, databases, and NOI information, FWS should be able to review and make a timely determination on authorization within 14 days. Unwarranted and unnecessary delays in obtaining permit coverage are likely to unreasonably keep operators from beginning construction, potentially incurring substantial costs for delayed construction absent confirmed permit coverage.

Delays can result in extended field overhead, office overhead, idle labor and equipment costs, and labor and materials cost escalation. Almost all the public construction work in America is accomplished by private sector firms. This work generally is awarded to the lowest responsive bidder through the open competitive sealed bid system. Surety bonds (bid performance and payment bonds) are required by law on public construction projects, in most cases. These bonds secure the general contractor's commitment to perform the work as specified, to the specified schedule, and for the cost estimated by the contractor in its bid package. Generally, the schedule begins with a "notice to proceed" when the contract is signed and awarded to the lowest bidder. The parties to the contract must begin and complete the project within the specified time frames including applicable milestones. An extra two weeks' delay at the front end of starting a project, while waiting for authorization to discharge stormwater runoff from the site, is likely to impact the overall workflow and schedule. There also may be liquidated damages assessed on a daily basis to a contractor for not meeting the owner's schedule.[2] Liquidated damages to cover damages for work not being completed on time generally can range from $1,000 to thousands per day.

In all construction work, lost profits, loss use of the building, or increase in financing costs are all examples of consequential damages that may result from extending the waiting period from 14 to 30 days.

[1] The FWQC and FSWA note that EPA has proposed significant revisions and expansions to Appendix D regarding Endangered and Threatened Species eligibility. Not only do the FWQC and FSWA oppose extending the waiting period to 30 days, we also object to the significant expansion to Appendix D. Merely because EPA could justify such provisions in the MSGP is not a basis for doing so for the CGP, which covers a much different regulated universe than the MSGP.

[2] A contractor can receive compensation in days or dollars for schedule delay or errors in the plans caused by the owner or its engineer. However, no compensation is provided for contractor-caused delay, or weather in many cases.

EPA Request for Comment 4 (Part 2.2.14(a) Stabilizations Deadlines)

The Proposed 2022 CGP specifies that for sites that disturb a total of five (5) acres or less at any one time over the course of a project, the operator must complete the installation of stabilization measures as soon as practicable, but no later than 14 calendar days after stabilization has been initiated. For sites that will disturb more than a total of 5 acres at any one time over the course of a project, the operator must complete the installation of stabilization measures as soon as practicable, but no later than seven (7) calendar days after stabilization has been initiated. EPA explains that it included the 5-acre threshold in the prior CGP to incentivize operators to take a phased approach to construction projects.

The Agency now seeks comments as to whether permittees have found the stabilization requirements that apply to sites disturbing more than 5 acres at a time are effective incentives to phasing construction disturbances so that the disturbances are kept under 5 acres at any one time. Specifically, EPA has asked whether an alternative disturbance threshold would be a more effective incentive for operators to employ a phased approach to construction projects. Additionally, EPA has requested comments on the following alternatives to the current CGP stabilization requirement:

- Require for all operators that no more than 10 acres of land be disturbed at any one time (areas that were disturbed but have been stabilized would not count towards the total);

- Same as the above, but allow for greater disturbances on a case-by-case basis where EPA provides authorization and additional conditions are met, such as requiring one or more of those listed below:

    - Inspections to be conducted more frequently (e.g., two times per week);

    - Stabilization of disturbed areas immediately where construction activity will cease for 7 days or longer; and

    - Identification and documentation in the SWPPP of the construction phases with a maximum amount of disturbance capped for each phase.

FWQC and FSWA Recommendations to EPA Request for Comment 4

If EPA retains the stabilization deadline incentive, the FWQC and FSWA recommend that EPA reconsider the current 5-acre threshold and establish a threshold that truly incentivizes a phased approach. The 5-acre threshold does not reflect industry practice, is not an effective incentive, and has unintended negative environmental consequences. The FWQC and FSWA do not believe that the 5-acre threshold has proven

to be an effective incentive to promote a phased approach to construction, because 5 acres is far too small of an area.

In most circumstances, it would be too costly to split up a large construction project into so many small phases. As such, the increased cost of a phased approach at such a small scale outweighs the benefit of the extended stabilization period. The FWQC and FSWA encourage the Agency to evaluate how many permittees have been able to take advantage of the extended stabilization deadline incentive, because the overwhelming experience of our members is that the incentive has not been effective.

In general, the FWQC and FSWA do not recommend limitations on the amount of land that can be disturbed at a single time. However, if the Agency imposes limitations to encourage a phased approach, it should base the acreage threshold on an acreage that is reasonable in light of the average acreage cleared at a single time for a construction site. For example, we understand that the average acreage cleared by homebuilders and general contractors at a single time for construction sites is at least 25 acres. As such, the 10-acre threshold proposed in the alternative still would not reflect industry practice and would not provide an effective incentive.

If the Agency decides to impose a limit—even one that is more in line with the average acreage of a single clearing at a construction site—the CGP should provide for flexibility to allow for greater disturbances on a case-by-case basis. Establishing a single acreage threshold that incentivizes a phased approach for all construction projects, from homebuilding to infrastructure development, is not feasible. In a case-by-case situation, an operator could clearly document the maximum amount of disturbance for each phase in its SWPPP. EPA also may want to consider a threshold that reflects a percentage of the total project as opposed to a one-size-fits-all acreage value. For example, certain infrastructure projects, such as highway projects, can have much larger footprints, up to 40 miles.

In certain situations, a phased approach to construction may still be environmentally beneficial and worth incentivizing even if the disturbed area exceeds the acreage threshold. Conversely, incentivizing permittees to break up construction sites into small parcels could result in increased use of heavy grading equipment. Transporting heavy grading equipment to and from several small sites, as opposed to a single average-sized site, could potentially increase emissions, pollution, risks to wildlife and habitat, and disruptions to the community. For these reasons, the FWQC and FSWA recommend a threshold of no fewer than 25 acres with the flexibility to allow for greater disturbances on a case-by-case basis.

EPA Request for Comment 5 (Part 2.3.3(e) Storage, Handling, and Disposal Requirements)

The 2022 Proposed CGP incorporates a modification to the Part 2.3.3(e) pollution prevention measure requirements for construction and domestic wastes to clarify the requirements for closing the lids of waste containers. Specifically, EPA's proposal states that where the waste container has a lid, it must be kept closed at the end of the business day and during storm events. In addition, EPA is considering additional flexibilities in how the Part 2.3.3(e) requirement applies to particular types of construction wastes. Specifically, EPA has requested comment on whether certain waste materials may be stored on site prior to disposal or recycling without being subject to the Part 2.3.3(e) requirements because their storage outside without cover, secondary containment, or other stormwater controls will not result in the discharge of pollutants. For example, in subsection 2.3.3.(a) of the permit, minimization of exposure is not required where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination.

FWQC and FSWA Recommendations to EPA Request for Comment 5

The CWA prohibits the "discharge of any pollutant" except discharges that comply with the permitting, water quality, and technology-based standards provisions of the statute. 33 U.S.C. § 1311(a). As used in the CWA, the phrase "discharge of any pollutant" refers to both "any addition of any pollutant to navigable waters from any point source" and "any addition of any pollutant to the waters of the contiguous zone of the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). Accordingly, in order to regulate stormwater discharges pursuant to the CWA, there must be the potential for a discharge from a point source to a navigable water. There are many construction materials that, when exposed to precipitation or stormwater, do not result in a discharge of pollutants to navigable waters. The Agency's proposal must acknowledge and recognize the limits of CWA authority, which extends only to regulation of ground disturbing construction activities that result in certain pollutant discharges to navigable waters.

The FWQC and FSWA agree with EPA that closing lids on waste containers when not in use and at the end of the business day are good management practices. We disagree, however, that the Agency has authority under the CWA to impose permit requirements for lids regardless of whether or not the contents of the waste containers are exposed to precipitation or stormwater. For example, in the arid west where there may be little to no precipitation for weeks or even months at a time, a permittee could be in violation of the proposed Part 2.3.3(e)(ii) lid requirement even when no discharge from a waste container to a navigable water has occurred. Accordingly, the FWQC and FSWA recommend that

EPA revise Part 2.3.3(e)(ii) to better reflect the limits of the Agency's CWA authority to regulate construction activities that result in a discharge to a navigable water.

The FWQC and FSWA support EPA's effort to incorporate additional flexibilities in Part 2.3.3(e) for construction waste materials, whose exposure to precipitation and stormwater will not result in a discharge of pollutants, or whose exposure poses little risk of stormwater contamination. EPA's request for comment describes a number of final products and materials intended for outdoor use—such as wood/lumber, concrete blocks, rebar, unused nuts and bolts, and gravel or rock—whose exposure to precipitation or stormwater would not result in a discharge of pollutants. For these items and others that are intended to be used outside and do not result in the discharge of pollutants, the Agency has no statutory basis to regulate the materials or products. This lack of authority to regulate items that are intended for use outside and whose exposure to stormwater does not result in a discharge of pollutants, is illustrated by the exempted materials in the Construction & Development Effluent Limitations Guidelines (C&D ELGs) set forth at 40 C.F.R. § 450.21(d)(2). The C&D ELGs represent the best available technologies economically achievable.

The C&D ELGs establish an exemption from minimization requirements for final products and materials intended for outdoor use. *See* 40 C.F.R. § 450.21(d)(2) (providing, "Minimization of exposure is not required in cases where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination (such as final products and materials intended for outdoor use).") The language specifying when "minimization of exposure is not required" applies to "building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site. . ." if or when certain conditions are met. *Id.* As the Agency notes, this exemption already appears in the CGP as it relates to building materials and building products in Part 2.3.3(a). The FWQC and FSWA support EPA incorporating a similar exemption in the Part 2.3.3(e) for other construction and domestic wastes to be consistent with the meaning and intent of Section 450.21(d)(2).

As noted above, the Agency only has authority to regulate circumstances that would lead to a discharge of pollutants through a point source to a water of the United States. EPA has already made the determination, as stated in Part 450, that exposure to final products and materials intended for outdoor use poses little risk of stormwater contamination. Accordingly, the FWQC and FWSA recommend that EPA incorporate an exemption for final products and materials intended for outdoor use into Part 2.3.3(e) to reflect the limits on the Agency's CWA authority to regulate such products and materials.

When EPA proposed changes to the ELGs for discharges associated with construction activity pursuant to a settlement agreement to resolve litigation, the Agency offered amendments to 40 C.F.R. § 450.21(d)(2) to "acknowledge that there are certain

circumstances where it may not be necessary or environmentally beneficial to minimize exposure of materials to precipitation and to stormwater." *See* 78 Fed. Reg. 19434 (April 1, 2013). The *Federal Register* notice goes on to provide examples of "those instances where a material is not a source of pollutant discharges:"

> An example would be an inert material that does not leach, erode or otherwise add pollutants to precipitation or to stormwater. The second case would be where the material may contribute negligible quantities of pollutants. An example would be steel members that are part of an electric transmission tower. During construction of the tower, the material may be stored on the site in a staging area or adjacent to the tower pad. Although it may be feasible to provide cover for the material or otherwise minimize exposure of the material to precipitation and to stormwater, doing so may not be cost-effective or beneficial if the material would be expected to contribute little or no pollutants to stormwater. EPA believes that permitting authorities should have discretion and permittees should have flexibility to address site-specific considerations with respect to this requirement. The proposed amendment should provide such flexibility.

EPA solicited comment on these proposed changes and having received none, it finalized the revisions to 40 C.F.R. § 450.21(d)(2) on March 6, 2014, stating: "EPA did not receive any substantive comments on this proposed amended requirement, and therefore EPA did not make any changes to the proposed requirement for today's final rule." *See* 79 Fed. Reg. 12661, 12665. Consistent with both the Part 2.3.3(a) exemption and the ELGs, EPA should recognize an exemption for construction or domestic wastes, where minimization of exposure would not be necessary or environmentally beneficial.

In the context of electric transmission construction projects, for example, specific materials that should be exempt because minimization is not necessary or environmentally beneficial include, but are not limited to, wood poles, steel, demolished concrete, rebar, insulators, crossarms, conductors, and anchors. Similarly, a majority of railroad-related construction materials—such as ballast, rail, timber bridge materials, and crossties—are intended for outdoor use and should not be subject to minimization of exposure requirements.

Regarding the proposal's additional petroleum storage requirements at Part 2.3.3(c), the FWQC and FSWA request the following clarifications. First, because some construction activities requiring a CGP can occur adjacent to or on sites that are already subject to 40 C.F.R. § 112, including Spill Prevent Countermeasure and Control (SPCC) Plan requirements, the proposed requirements for sites storing more than 55 gallons may be duplicative or in conflict with other programs and requirements. While EPA recognizes in the Fact Sheet that these requirements do not replace SPCC requirements, the CGP should include an express statement to that effect, if the additional requirements are

adopted. Additionally, depending on the size and location of the project area, it may not be possible to store containers at the specified distances. Accordingly, the FWQC and FSWA recommend the following revisions to Part 2.3.3(c)(ii):

> ii. If the total volume on site is more than 55 gallons, and the site is not otherwise subject to 40 C.F.R. § 112 requirements:
>
> . . .
>
> (b) Store containers a minimum of 50 feet from waters of the U.S., drainage systems, and stormwater inlets, where feasible;

EPA Request for Comment 6 (Part 3.3 Turbidity Monitoring)

EPA has proposed monitoring requirements for turbidity in dewatering discharges. The Agency has requested comment on two different turbidity monitoring approaches for dewatering discharges, including a benchmark approach and an indicator monitoring approach. Under the benchmark monitoring approach, EPA proposes a 50 NTU benchmark, with the weekly average being reported once per quarter. Although EPA states that the benchmark is not an effluent limit, the exceedance of the proposed 50 NTU benchmark would trigger corrective action to lower the turbidity levels in the discharge. Under the indicator monitoring approach, EPA would require monitoring and reporting of average weekly values but would not set a benchmark for turbidity.

FWQC and FSWA Recommendations to EPA Request for Comment 6

As stated above, the FWQC and FSWA have general concerns related to EPA's proposal to regulate dewatering activities. Further, the focus on dewatering throughout the permit appears to be inconsistent and at times illogical. In Request for Comment 6, EPA is proposing certain monitoring and/or benchmark monitoring mandates as "water quality-based conditions" for discharges to sensitive waters. However, under its technology-based requirements, EPA already is proposing a "no visible turbidity" standard for dewatering discharges. *See* Proposed Section 2.4.1. Arguably, a no visible standard would exceed even a 50 NTU benchmark. The FWQC and FSWA cannot support either of EPA's proposed turbidity regulatory approaches, as explained below.

The FWQC and FSWA have general concerns regarding the value and efficacy of benchmarks, which we have raised in the context of EPA's Multi-Sector General Permit (MSGP). EPA has referred to the MSGP for examples of the benchmark and indicator monitoring approaches. With respect to the benchmarks in the MSGP, the FWQC and FSWA have consistently opposed the MSGP benchmark approach and incorporate their comments on the MSGP benchmark approach by reference. *See* "Comment submitted by Fredric P. Andes, Coordinator and Counsel, Federal Water Quality Coalition (FWQC) and Jeffrey S. Longsworth, Coordinator and Counsel, Federal StormWater Association (FSWA)," EPA Docket No. EPA-HQ-OW-2019-0372 (May 30, 2020), *available at*

https://www.regulations.gov/comment/EPA-HQ-OW-2019-0372-0245 (last visited July 10, 2021).

The MSGP, in contrast with the CGP, covers a wide range of industry and a wide range of pollutants. Therefore, the issues with benchmarks that the FWQC and FSWA raised relative to the MSGP are even more apt here where the permit covers only one type of activity with a limited number of potential pollutant discharges.

Overall, benchmarks have not achieved the intended objectives, and they tend to overstate a lack of compliance with permit requirements. In light of the shortcomings of the MSGP benchmark program and lack of justification for the benchmark monitoring program, the FWQC and FSWA do not recommend a benchmark approach in the CGP. Rather, EPA should focus on visual inspections for most entities subject to the CGP. EPA states that benchmark monitoring provides objective data, but it fails to explain why these data are meaningful or how use of those data translates to improved water quality. Visual assessments, which detail the steps taken to address particular pollutant problems, are more effective in protecting water quality than rote monitoring once per quarter.

Additionally, the C&D ELGs (40 CFR Part 450) already set forth appropriate BMPs for construction activities. These are the technology-based standards that EPA already has determined, based on available technologies and Agency expertise, should apply to construction activities. Given that these technology-based standards exist, EPA has no basis to require corrective action based on benchmark values. In fact, EPA previously attempted to incorporate a turbidity limit of 280 NTU into the early C&D ELGs. *See* 74 Fed. Reg. 62996. Following the promulgation of that rule in 2009, several parties, including FWQC and FSWA members, filed petitions for review of the final rule, identifying potential deficiencies with the dataset that EPA used to support its decision to adopt a numeric turbidity limitation. The parties resolved that litigation on March 6, 2014 pursuant to a settlement agreement wherein EPA agreed to remove the turbidity limit entirely. Since EPA removed the controversial numeric limits for turbidity, the Part 450 ELGs have not included, and do not currently include, a turbidity limit.

Given the fact that EPA could not justify the 280 NTU limit in the ELGs, there is no basis now to establish a benchmark value that is nearly 6 times more stringent. Although the benchmark value is not a numeric limit, it can trigger corrective action. The Part 450 ELGs already set forth the technology-based standards that the Agency has determined are necessary and appropriate. The Agency has not justified the need for a benchmark program that may require corrective action beyond the requirements of the Part 450 ELGs.

In addition, EPA cannot recast turbidity monitoring as a "water quality-based" condition. Section 3.1 sets forth the basic premise that compliance with the technology based requirements presume compliance with water quality mandates, generally. EPA has not established for Section 3.3 that Tiers 2, 2.5, or 3 waters require discharges at 50 NTU

to meet their water quality standards or that all such waters are impaired for turbidity. In fact, many may flow at significantly above 50 NTU.

In sum, the FWQC and FSWA are concerned about the multiple and potentially conflicting mandates related to dewatering in the Proposed 2022 CGP. For all of the reasons laid out here, the FWQC and FSWA recommend against adopting either a benchmark or indicator monitoring approach for turbidity in the CGP. Instead, EPA should revert back to its approaches for dewatering found in the existing CGP.

EPA Request for Comment 7 (Part 6.3 Training Requirements)

The Proposed 2022 CGP includes training requirements for persons conducting inspections, requiring that the inspector either complete an EPA construction inspection course developed for the permit, or hold a valid instruction certification or license that covers certain, specified topics. EPA has requested comment on the training requirements, including recommendations for development of the Agency's own inspection training program.

FWQC and FSWA Recommendations to EPA Request for Comment 7

The FWQC and FSWA have concerns with the Agency's proposal to implement a new federal training program. As a threshold matter, the proposed imposition of requirements for a construction inspection course, which EPA has yet to develop, is premature. Many states already have their own inspector training requirements and programs. EPA need not interfere with the existing and operational state training programs by developing a new federal training program. If EPA intends that this new federal program apply only to the tribes and few states subject to the CGP, then development of an entirely new federal training program seems unnecessary and a poor use of government resources.

Rather than spending limited resources to develop and implement an entirely new construction inspection course for this permit, the Agency should consider developing an inspection manual for the next CGP, like the 2013 SPCC Guidance for Regional Inspectors. Inspector guidance could be developed through input from stakeholders, including regulated parties, Agency personnel, and construction inspectors and could provide helpful insight and guidance on topics that will help ensure effective inspections. The inspections guidance could include the topics outlined in Part 6.3(b) and clarify issues that stakeholders commonly face in the inspection context.

If the Agency does move forward with requiring a valid construction inspection certification or license, EPA should clarify which programs meet the requirements outlined in proposed Part 6.3. Absent specific information regarding which programs meet these requirements, permittees will have to independently evaluate whether or not a certain

program meets the requirements. This situation could result in confusion over whether certain certifications and licenses are valid under Part 6.3.

EPA Request for Comment 8 (Part 8.2.1(a) Photographs of Stabilized Areas)

The Proposed 2022 CGP includes a new requirement that the permittee must take photographs to document compliance with the stabilization requirements and submit those photographs with the Notice of Termination (NOT). EPA has requested comment on its proposed requirement to include photographs of stabilization with the NOT. The Agency has also requested comment on whether any additional criteria should be established relating to the photographs.

FWQC and FSWA Recommendations to EPA Request for Comment 8

Although the FWQC and FSWA believe that documenting stabilization efforts is a good practice, we do not support the requirement to submit photographs as part of the NOT. Photographs of stabilization can be useful for documentation, but relying on photographs from a regulatory perspective is problematic. For example, photographs may not adequately or accurately capture the extent of stabilization efforts. Additionally, technological issues with quality and size of a photograph could affect the accuracy of the photographic documentation of stabilization.

Further, some states also provide for the filing of an NOT without stabilization where the landowner has arranged for a third-party to undertake stabilization. For example, a homeowner may hire a landscaping company to perform what would otherwise be required under the CGP for stabilization. The permit should incorporate flexibility to allow permittees to file an NOT where a third-party has undertaken responsibility for stabilization. Accordingly, the FWQC and FSWA recommend that EPA remove the requirement that a permittee must submit photographs of stabilization with the NOT and add a provision allowing for permittees to certify that a third-party has undertaken stabilization efforts in lieu of submitting documentation or evidence of compliance with the stabilization requirements.

FWQC and FSWA Recommendations to EPA Regarding Part 4.6.1 (Erosion and Sedimentation Inspection)

Although EPA has not requested comment on this particular provision, the FWQC and FSWA recommend that EPA revise Part 4.6.1(d) to remove the requirement relating to downstream sedimentation. The current proposal requires that sites be inspected for signs of sedimentation, including sand bars, at points downstream from the point of discharge. This requirement exceeds the requirements of the Part 450 rules and is unnecessary to protect water quality. The Part 450 rules reflect the applicable technology-based standards applicable to construction activities and do not require downstream inspections for sedimentation. Further, observing sedimentation downstream does not

necessarily mean that the sedimentation is attributable to the upstream permittee. Inspection at the outfall, which is already required under the terms of the permit, is a more direct and sufficient way to identify and address any issues that would potentially cause sedimentation downstream.

Conclusion

The FWQC and FSWA appreciate the opportunity to submit these joint comments concerning the Proposed 2022 CGP. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.

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