AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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ELECTRONIC DELIVERY: ow-docket@epa.gov

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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. It dates back to 1918, and today, it represents 33,000 firms in nearly 100 chapters across the United States. AGC's members include 7,500 of the nation's leading general contractors, nearly 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry.

These members engage in the construction of commercial buildings, hospital and laboratories, schools, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, levees, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development. These important construction projects are frequently in or near waters of the United States and when there are wet weather events they generate "stormwater associated with construction activity," as defined by the relevant federal regulations. *See* 40 CFR § 122.26(b)(14)(x) and (15)). AGC members are therefore required to obtain and comply with NPDES permits for sites equal to or greater than one acre, and directly affected by the way that federal and state NPDES craft and enforce those permits, in accordance with the Clean Water Act (CWA).

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 Guidelines (C&D ELG) that it promulgated on December 1, 2009. *See* 74 *Fed. Reg.* at 62,995-63,058 (C&D ELG final rule); *See* 75 *Fed. Reg.* at 68,215-68,217, Nov. 5, 2010 (direct final rule staying EPA's numeric limitation in C&D ELG); *See* 76 *Fed. Reg*. at 22,885, April 25, 2011 (notice of draft CGP).

When EPA finalizes a new limit, and if that limit survives the litigation already pending in the U.S. Court of Appeals for the Seventh Circuit, EPA will certainly have to take the steps necessary to implement the C&D ELG. To that end, EPA also will revise its CGP. But EPA has not yet reached that point, and indeed, it remains far from it.

EPA's first effort to set a strict numeric limit on the turbidity of construction stormwater runoff failed very shortly after industry mounted a legal challenge to that limit and its associated monitoring and reporting requirements. The litigation forced EPA to reexamine its work on the C&D ELG. To its credit, however, the agency did volunteer that this process had revealed miscalculations; and the agency did agree to put the limit on hold, pending a new rulemaking. *See* 75 *Fed. Reg.* at 68,215 (Nov. 5, 2010) (EPA discussing reasons for seeking a stay of the 280 nephelometric turbidity unit (NTU) limit and other issues surrounding ongoing litigation in the Seventh Circuit Court of Appeals in the case *Wisconsin Builders Association v. EPA*, Case No. 09-4113). EPA originally planned to complete that rulemaking on February 15, 2012, but nearly one year later, the agency has yet to even complete its proposal.

In addition to the limit itself, this new rulemaking will provide an opportunity for EPA to reconsider the feasibility of meeting a numeric effluent limit on cold weather sites, small sites that are part of a common plan of development, and on linear gas and electric utility projects. EPA has already committed itself to reviewing these issues, as well as other issues that may come to the surface, as the new rulemaking proceeds. At this point, it is quite obviously impossible to know what those other issues might be.

Proceeding immediately to revise the CGP to the extent that EPA has proposed unnecessarily threatens great confusion. To bring everything into alignment, AGC fears that EPA would require yet another string of extended deadlines and corrective rulemakings, much like the several that have already plagued its effort to regulate construction stormwater runoff. Indeed, even in December of 2009 — when it reached what it thought was the end of its rulemaking on a C&D ELG, and believed that all of the relevant issues had already surfaced —EPA recognized that implementing that ELG would be difficult, and take time and closer examination. In the preamble to the final C&D ELG rule, the agency contemplated a lengthy (18-month) implementation process that would "allow permitting authorities to develop any necessary training or certification programs." *See* 74 *Fed. Reg.* at 63,050. As the agency further explained:

> An important factor in the effective implementation and compliance with this rule will be the permitting authority being able to digest the numeric limitation and monitoring requirements and developing guidance and outreach to the regulated community to provide assistance so the requirements are understood and can be effectively met by owners and operators of C&D sites. This will provide the regulated industry with the guidance, knowledge and tools necessary in order to effectively monitor their discharges in order to ensure they are meeting the numeric limitation. *Id.*

In December of 2009, EPA was right, and today, it is equally — and inexplicably — wrong. If EPA hopes to succeed, it must wait for all of the issues to surface, for the new rulemaking to come to a close, and for both the permitting authorities and the regulated community to digest its unprecedented provisions. Only then should the agency undertake the difficult task of revising the CGP.

At this point, there is simply is no way to determine which monitoring requirements will be appropriate for a revised permit to include, or which outfalls might require monitoring, or what the final limit (if any) will necessitate, in terms of compliance. EPA must promulgate and defend a complete C&D ELG, and give both permitting authorities and the regulated community time to assess its requirements, before it can determine the most efficient and effective monitoring protocols and related requirements.

III. EPA should abandon its one-size-fits-all approach to stormwater controls, including its rigid requirements for erosion and sediment control. These new requirements go well beyond anything required by law, and in some instances, they may be impossible to meet. In proposing such requirements, EPA wrongly disregards the total cost of the technology in relation to the benefits.

The C&D ELG includes non-numeric requirements for erosion and sediment control, stabilization, and pollution prevention (*see* 40 CFR § 450.21(a) thru (f)). And now, according to EPA, the CGP "must incorporate the C&D rule requirements." *See* 76 *Fed. Reg.* at 22,885. The C&D ELG does require site operators to implement several specified best management practices (BMPs) to control erosion and the runoff of sediment from construction sites. And at an appropriate point, EPA and the state permitting authorities will have to incorporate these requirements into their CGPs. The Draft, however, is far more prescriptive than the C&D ELG, and does not merely incorporate its non-numeric requirements.

From the final version of the C&D ELG, EPA properly excluded the overly-prescriptive requirements that had made their way into its proposal (such as the requirement for sediment basins on all large construction sites), and the agency sought to respond to the great variation in construction sites, often stating, for example, that the "need for these controls is dictated by site-specific considerations," that they are "not always feasible," or that "implementing the requirement would be cost-prohibitive." *See* 74 *Fed. Reg.* at 63,018. In the process of revising its CGP, EPA now improperly attempts to reverse its reasoned decision to exclude such requirements. The Draft inappropriately reverts back to the type of overly-prescriptive BMP mandates that it eliminated from the final C&D ELG.

If, in fact, many BMPs are best assessed on a site-specific basis or may, in certain cases, prove to be cost-prohibitive, then EPA should simply provide non-mandatory guidance for implementing those BMPs and give site operators the latitude to assess and determine the BMPs they require to meet the standards set forth in the C&D ELG. The CGP should, for example, mandate only the controls that the C&D ELG requires for slopes (i.e., "minimize the disturbance of steep slopes") and then give the site operator the latitude to develop a stormwater management plan that includes the appropriate steps it will take to achieve that end. The operator will still have and retain the obligation to justify whatever plan it develops. This more flexible approach is preferable to Part 2.1.1.2 of the Draft, which would add that the operator must "[a]void earth-disturbing activities on steep slopes (i.e., slopes of 15% or greater), unless infeasible or inconsistent with the requirements of the project."

Other provisions of the Draft are similarly overreaching. Part 2.1.3 of the Draft would mandate street cleaning and wheel wash requirements to control "track out." In doing so, it would create an unreasonable requirement for "no visible signs" of sediment being present on impervious surfaces. In December of 2009, when it took what it thought would be final action on the C&D ELG, EPA rejected such mandates for wheel washing and "same-day" street cleaning, because the appropriate implementation of such provisions must be based on the particular "site's

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 knowledgably 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.

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 effluent reduction benefits to be achieved from such application," in accordance with the Act. The relevant subsection of the statute, 33 U.S.C. § 1314(b)(1)(B), provides in part:

> Factors relating to the assessment of best practicable control technology currently available to comply with…section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application , and shall also take into account…the engineering aspects of the application of various types of control technology, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate… .

Unless and until EPA properly calculates and considers both the total costs and the effluent reduction benefits of the very prescriptive measures that it has included in the Draft, the Draft will not only go well beyond anything the C&D ELG requires, but also conflict with the CWA.

IV. EPA has no reason to ratchet up its separate requirements for stormwater discharges into impaired waterbodies, or to dictate a second set of rigid performance requirements (i.e., costly benchmark limits) for all discharges into such waterbodies. These new requirements are unrealistic and unsupported by science, and deprive the states of the opportunity to tailor the required controls to the nature or scope of the problems that their particular waters are having.

Both the language and the legislative history of Section 302 of the Clean Water Act make it clear that NPDES stormwater permits should include water quality limits only when national technology-based standards fail to produce the desired level of water quality in a given watershed. Now, for the first time, EPA proposes to include such a technology-based standard in its CGP. At this point in the process, it is quite clearly impossible for EPA to know whether that standard will or will not be sufficient to meet the water quality standards for any one waterbody. EPA cannot possibly justify the additional water-quality based effluent limits (WQBEL) found in the Draft (i.e., the new stabilization, inspection and monitoring requirements for construction discharges to sediment- or nutrient-impaired waters). According to 33 U.S.C. § 1303 (40 CFR § 122.44(d)(1)(i)-(iii), (vii)), EPA may impose additional NPDES permit conditions *only if* EPA has *determined* — based on specific factors set forth in EPA regulations — that the terms are necessary to avoid an "excursion" above a specific water quality standard. As far as AGC is aware, EPA has not made the required determinations nor provided any justification or scientific

rationale for these additional conditions, particularly for the benchmark levels, which are not tied to any specific water quality standard.

AGC believes that EPA should continue to rely on its Total Maximum Daily Load (TMDL) program to protect impaired waterbodies. That program provides a well-established process for states to meet their water quality standards and/or to address threats to those standards. It enables the states readily to require NPDES stormwater permittees to comply with appropriate TMDLs — which may include numeric benchmarks, in addition to stringent controls — if these permittees discharge pollutants to waters impaired for those pollutants. This is a logical and effective way to use the general permitting scheme to address water quality requirements. It is an approach that that EPA has long considered effective, and EPA has yet to produce any information that would justify the proposed change in course.

After closely reviewing of the Draft, AGC is particularly concerned that EPA seeks to establish a water quality-based effluent limitation (WQBEL) even for stormwater discharged into sewer systems <u>if those systems eventually drain into impaired waterbodies subject to TMDLs</u>. Part 4.2 of the Draft provides: "For discharges that enter a stormwater sewer system prior to discharge, the first water of the U.S. to which you discharge is the waterbody that receives the stormwater discharge from the storm sewer system." By redefining the point of discharge to mean the end of a sewer rather than the end of a property line, EPA is expanding controls across the board without any evidence that the regulated discharges cause or contribute to harm or impairment. Indeed, it remains impossible for EPA even to determine the separate or distinct impact of any one discharge into such a system.

AGC also finds Part 4.2 of the Draft to be very troubling. That part states: "If you indicate that you do not discharge to an impaired water, EPA may determine, based on additional information, that you are considered to be discharging to an impaired water." The Draft neglects to specify the source of such authority, or the nature of the "additional information" that could lead EPA to make such a determination, or the standards that EPA would apply, or the process that EPA would follow. AGC questions whether Congress has granted such authority to EPA, and if it has, AGC still calls on the agency to specify the "additional information" it would consider relevant, how it would evaluate that information and how it would ensure that its decision-making process is fair to permittees.

Other provisions of the Draft — Part 4.2 through Appendix J — lead AGC to fear that EPA is seeking to establish unrealistic performance standards for permittees. These provisions wrongly assume that the natural background level of dirt and other pollutants in stormwater is zero. *See* Appendix J at J-5. Thus, the starting point for the agency's primary performance metric in this comprehensive and critical scheme also rests on the assumption that, in a pure natural setting, rain never causes dirt to move. This assumption infects all of the pollutant concentrations levels (*i.e.*, the "benchmark" values) that will, if exceeded, become a water quality concern.

Appendix J of the Draft states that EPA interpreted state-specific water quality criteria to establish the benchmarks included in the Draft. One problem with this approach is that the

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

benchmarks. AGC also maintains that EPA lacks the legal authority to impose a zero benchmark level, or any other level, without first complying with 33 U.S.C. § 1314(b)(1)(B) and the Regulatory Flexibility Act (*see* AGC comments at Section III). The direct and indirect costs of this irrational and scientifically unsound approach could be substantial and must be calculated and accounted for. Furthermore, there is absolutely no evidence that the agency has considered, much less demonstrated, whether there are demonstrable environmental benefits to offset the potentially huge employment and economic costs this provision may impose on property owners, developers, builders and consumers. In the absence of such a demonstration, EPA's action is not justified.

V. It would be onerous to require construction contractors to self-report any non-compliance with a numeric limit on the turbidity of stormwater runoff to a publicly accessible database within 24 hours. Over the short-term, test results may be misleading, and requiring contractors immediately to report their results would do more to confuse the public and fuel citizen suits than to protect the environment.

If and when EPA completes and succeeds in defending its C&D ELG, the agency should set up a well-structured and streamlined system for permittees to submit the required reports. The Draft would require permittees to submit turbidity data reports 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. It is more appropriate to require quarterly reporting of the numeric turbidity values and corrective action within a reasonable time of any exceedances.

According to EPA regulations, requirements to report monitoring results for stormwater discharges associated with industrial activity (which includes construction) that are subject to an effluent limitation guideline shall be established on a "case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year." *See* 40 CFR § 122.44(i)(3). In light of this provision, we stress that a requirement to report turbidity data on a monthly basis is too onerous.

Moreover, the 24-hour reporting of any exceedance is misplaced. According to EPA regulations, 24-hour reporting is needed only for "toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance." *See* 40 CFR § 122.44(g). The sediment found in stormwater runoff from construction sites falls into neither category.

In addition, EPA's proposed requirement to immediately notify the agency of any exceedance of the numeric turbidity limit implicates the Fifth Amendment rights of certain small businesses. *See* AGC's comments at Section IX on Draft CGP Part 3.3.8, Actions Required if You Violate Numeric Turbidity Limit.

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

least burden on society," EPA obviously needs to know, in advance, what all of the variables are going to be. The proposed CGP does not merely set forth specific "performance objectives"; it repeatedly dictates specific "manners of compliance" in excruciating detail. Until EPA has completed its work on the C&D ELG, EPA's most efficient and effective path forward is to extend the 2008 CGP for its full five-year term and refocus its efforts on implementing the C&D ELG at an appropriate future date when the contents of that regulation are fully understood.

VIII. EPA should rectify the draft permit's inconsistency with the agency's Information Quality Guidelines.

The Information Quality Act, 44 U.S.C. § 3516 note ("IQA"), directs EPA to comply with the Office of Management and Budget's (OMB) information quality guidelines. *See* 44 U.S.C. § 3516 note (b); *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 *Fed. Reg.* at 8,452 (Feb. 22, 2002); *see also PrimeTime v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010)(discussing IQA requirements). To comply, EPA must ensure that all information meets OMB's high standards for objectivity, utility, and integrity before it is disseminated and that it meets substantiate information quality "through documentation or other means appropriate to the information." *See* 67 *Fed. Reg*. at 8,459.

The Draft, including buffers, design requirements, stabilization criteria, pollution prevention standards, discharge sampling and quality standards, and especially requirements for discharges to "sediment or nutrient-impaired waters" ought to be informed by and in conformance with the IQA guidelines.

The law states that EPA must use the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices and data collected by accepted methods or best available methods and must specify, to the extent standards or practices are based on risk estimates, the expected risk or central estimate of risk, each appropriate upper-bound or lower-bound estimate of risk, each significant uncertainty identified in the process and peer-reviewed studies that support, are directly relevant to, or fail to support the agency's determinations. *See* 42 U.S.C. 300g-1(b)(3)(A) & (B). AGC maintains that the metrics employed by the agency to develop the draft CGP's technical provisions, particularly those in Appendix J, Section 4, were created using procedures that are inconsistent with these requirements. Quite simply, more administrative transparency is needed and appropriate.

IX. AGC's Section-By-Section Comments on EPA's Proposed CGP

To reiterate AGC's comments above, AGC urges EPA to take the time it clearly requires to put itself on a sound and defensible course. EPA is no immediate obligation to revise the CGP, and in fact, it would be premature for EPA to do so. EPA should extend the 2008 CGP for its full

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 permitees 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:

> 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 And Answer Document Volume II; USEPA B33-F-93-002B; July 1993; at 11.

To avoid the sort of confusion called out above — which has plagued the construction and development industry since the introduction of the construction stormwater permit program — AGC recommends that EPA specifically reference in Part 1.2 of the permit all of the parties to the construction process that EPA seeks to require to obtain permit coverage. Beyond that (and throughout the entire permit) EPA should clearly identify the exact party(ies) who are responsible for compliance with each specific part of the permit. For example, see AGC's comments below on Draft CGP Part 8.1.2, Person(s) Responsible for Developing SWPPP. To this end, AGC continues to be concerned by the fact that there is no reference anywhere in the Draft to the architect, designer or professional engineer, all of whom clearly play key roles in controlling construction site stormwater runoff on any given project.

EPA also should specifically exempt from CGP requirements those parties that have individual NPDES permits that include appropriate sediment and erosion control obligations, whether in the form of non-numeric or numeric effluent limitations for sediment-related discharges. Many individual permittees collect stormwater as well as process water and treat all of that water through BMPs or advanced treatment devices (of combination thereof). If discharges from any ongoing construction activities is captured and also becomes subject to the effluent limits set forth in and contemplated in the development of the individual permit, such persons overseeing such activities should not have to obtain separate CGP coverage.

2. Part 1.3. Eligibility Conditions.

For emergency-related construction projects, Part 1.3.2, operators would receive immediate authorization to discharge stormwater provided that "all relevant requirements in the permit" are met. AGC recommends that EPA add language "as soon as safe to reasonably do so" or "as soon as practicable" to the end of this sentence. A common emergency on a highway project is a failed highway slope — such as a landslide or a debris flow. In this case, it may not be safe to attempt to comply with all of the requirements of the permit.

In addition, Part 1.3.3 describes permit eligibility with regard to new sources and existing unpermitted dischargers who are discharging to impaired waters. EPA should maintain the same impaired waters eligibility requirements as set forth in the 2008 CGP, which relies extensively and appropriately on EPA's TMDL program to address these issues. The proposed CGP Fact Sheet (*see* page 19) appears to confirm that EPA intends to follow this approach: "The proposed

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 prior to authorization.

AGC strongly urges EPA to retain the 7-day waiting period. A 30-day waiting period would increase the cost of construction projects and it would be impracticable on many small-scale projects that may only last a few months. If the 7-day period cannot be retained for all projects, at a minimum, AGC recommends that it continue to apply on all small projects (e.g., those disturbing less than 10 acres). In addition, if EPA determines a change is absolutely necessary for larger projects, a two week (14-day) waiting period would be much better than 30 days.

Also, AGC requests that EPA add language to Part 1.5.3, Table 1-1 that would allow the NOI to be processed sooner if the permit applicant demonstrates that the legal requirements under the Endangered Species Act and Historic Properties Act were addressed previously through the National Environmental Policy Act (NEPA) process. In addition, if the permit applicant can show that a site does not have endangered species or historic properties (which are EPA's reasons for requiring the additional review time), then EPA should allow for an expedited permit approval process.

In addition, as a threshold matter, AGC is very concerned that EPA's new process of making NOIs (and discharge monitoring reports) publicly accessible through EPA's website is furthering public confusion in ways that will harm job growth and economic recovery. As EPA states in the proposed CGP Fact Sheet, during the extended 30-day waiting period, "the public will have the opportunity to review the NOIs, to request to review the SWPPPs, and to provide feedback to EPA." This will foster situations wherein people who have objectives unrelated to protection of water quality will take issue with construction site operator's electronic submissions in order to delay important projects. These concerns are compounded by the draft permit provisions that would allow "any interested person" to object to coverage under the CGP (*see* AGC's comments at Section IX on Draft CGP Part 1.5.6, Procedures for Denial of Coverage), as well as provisions that would require site operators to electronically report within 24 hours any exceedances of the

numeric turbidity limit (*see* AGC's comments at Section V above and at Section IX on Draft CGP Part 3.3.8, Actions Required if You Violate Numeric Turbidity Limit and Part 6.6, Reporting to EPA).

4. Part 1.5.2. How to Submit Your NOI.

EPA has requested comment on the transition to a "paperless" NOI system for the CGP. The agency has made clear its strong preference to require all construction operators to use the eNOI system in the interest of developing a "paperless" application process and of minimizing the administrative cost of continuing to process paper NOIs. A total paperless system for the NOI may be desirable for EPA, but the agency admits that the permitting program is still transitioning to a paperless process.

AGC strongly urges EPA to continue accepting paper NOIs. There are still some small contractors that are hesitant about totally relying on the computer and also the security of electronic sites.

In addition, EPA must be mindful of circumstances that would require a paper submittal. For example, some construction companies are required to generate the paperwork for the project owner, and they must obtain written signature of the responsible authority prior to submission. This can only be accomplished via paper submittal. Also, if EPA expects state permitting authorities to switch over to an all electronic NOI filing system, it must make provisions for payment of permit fees by non-electronic means (a paper check) to accommodate operators that do not have an available means of electronic payment. For example, a company must pay by credit card to use the current electronic notice system in Florida. Many AGC member companies do not put these types of expenses on credit cards and/or do not issue company credit cards to the people who will be completing these tasks. Also, some AGC companies report that when they are required to generate paperwork for the project owner, they must get the signature of the responsible authority prior to submission. This can only be accomplished via paper submittal.

In any event, EPA should phase in any requirements for electronic NOI and provide training to small businesses. Some AGC members who have experience using the eNOI system reported problems with the Latitude and Longitude Validation page (under the "Project Site Information" Tab).

5. Part 1.5.6. Procedures for Denial of Coverage.

This Part of the Draft states that "any interested person may request that EPA consider requiring an individual permit…." This language is very problematic because it could force contractors to submit individual permits for invalid reasons. Of utmost concern to AGC is the likelihood that this provision would become a tool for persons to delay projects either in protest to a specific project or out of ideological or political motivations. Individual permits are extremely burdensome, time consuming, and costly, and the CGP already contains requirements to ensure water quality is not compromised.

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. EPA must also clarify that it is the decision-maker and establish an appeals process or other mechanism that applicants can use if they believe the requirement to obtain an individual permit is not warranted. In addition, there need to be safeguards in place to protect against nuisance requests and an opportunity for the prospective permittee to respond. There should also be a deadline by which this process must conclude to allow projects to move forward in a timely manner.

B. Section-By-Section Comments on Part 2 of the Proposed CGP

As stated above, EPA has no reason to rush the non-numeric or other provisions of C&D ELG into the CGP. EPA can and should wait until a final revised C&D ELG package is finally promulgated and the related 7th Circuit Court of Appeals litigation is completed.

1. Part 2.1. Erosion and Sediment Control Requirements.

In its final C&D ELG, EPA relaxed many of the overly-prescriptive erosion and sediment control practices that it had proposed, often stating that, for example, the "need for these controls is dictated by site-specific considerations," because they were "not always feasible," or that "implementing the requirement would be cost-prohibitive." *See* 74 *Fed. Reg.* at 63,018. The Draft inappropriately reverts back to the type of overly-prescriptive BMP mandates that EPA eliminated from the final C&D ELG.

If, in fact, many BMPs are best assessed on a site-specific basis or may prove to be "cost-prohibitive" in certain circumstances, then EPA should develop non-mandatory guidance for implementing the BMPs set forth in the C&D ELG rulemaking and then rely upon the individual permittees to assess and analyze the appropriate BMPs and their implementation to meet the standards set forth in the C&D ELG. For example, at the appropriate time, EPA should adopt in a final CGP only that which is required by the C&D ELG with regard to slopes; "minimize the disturbance of steep slopes" and then require the permittee to justify in its stormwater management plan the appropriate steps it will take to achieve that end. EPA should be proposing separate guidance concurrent with the C&D ELG rulemaking that sets forth more precise implementation strategies that reflect the need for site-specific flexibility. Under no circumstance should EPA be attempting to provide what appears to be essentially a one-size-fits-all implementation strategy as proposed in the Draft (*see* AGC's comments at Section III above).

2. Part 2.1.1.2. Avoid Steep Slopes.

The Draft defines "steep slopes" as slopes of 15% or greater. In areas with steep slopes, EPA would require avoidance unless infeasible, in which case EPA would require the use of specialized controls.

While the language provides some flexibility, AGC remains concerned about how this proposed requirement would be applied on the ground. Typical linear transportation projects span great lengths and AGC highway contractors report they commonly have a 3:1 slope (33%) over the majority of the project. AGC suggests that EPA require specialized controls only for very steep slopes — i.e., outside of what is typical on a highway project. Of course, the operator would have the option of using these specialized controls on typical highway projects if effective and conditions make these controls practical.

3. Part 2.1.2.1. Natural Buffers and Equivalent Sediment Controls Compliance Alternatives.

EPA has requested comment on the buffer compliance alternatives proposed in Part 2.1.2.1 and on the guidelines provided in Appendix M. AGC finds that EPA's proposed 50-foot buffer (or equivalent) mandate in Part 2.1.2 is another example of regulatory over-reach. In the C&D ELG, EPA eliminated many of the specific vegetated buffer requirements because the agency could not justify its initially prescriptive approach, ultimately requiring site operators to "provide and maintain natural buffers around surface waters …" to "increase sediment removal." *See* 40 CFR § 450.21(a)(6). Now, EPA has proposed two pages of prescriptive permit language, a 17-page proposed CGP Fact Sheet explanation and an additional 16-page permit "appendix," to mandate how sites must implement that requirement. *See also* AGC comments at Section III above.

When the appropriate time arrives to implement a revised C&D ELG, EPA should address more precisely the requirements contained in that regulation and use the existing extensive information (and more) in developing separate non-mandatory *guidance* that may assist site operators to more knowledgably implement such requirements without unnecessarily complicating the proposed CGP.

As proposed, AGC is concerned that the 50-foot buffer requirement will be particularly difficult to meet on linear highway projects where DOTs have limited rights-of-way and where most projects use all but a small portion of that space. Also, the proposed buffer requirements will be difficult to implement where linear projects (roadways) abut wetlands, which is a common occurrence in coastal states. There are times that work must take place right up to the right-of-way line which is also beside the wetlands area.

In addition, the alternative measures provided in lieu of constructing a 50-foot natural buffer are not practical. Tables 1 through 8 in Appendix M list very specific localized vegetation and sediment removal performance for specific states and territories covered by the EPA CGP only. These tables would not apply in other states that may choose to adopt the EPA CGP. This will place an undue burden on the states that have their own CGP to institute similar estimated removal tables for the various regions and cover vegetation typical within their state. AGC asks that EPA clarify that natural buffer sediment removal values in other states or regions within other states will not necessarily be equivalent to these tables, and that they are derived only for the specific localities where the EPA CGP is currently in force.

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.

Recognizing that a 2-year, 24-hour storm varies greatly from state to state and location to location, AGC questions whether it would be more appropriate for EPA to select a quantity of rainfall (in inches) as a guideline. For example, some AGC members suggested a guideline of two inches in 24 hours.

In the alternative, AGC finds that a 1-year, 24-hour storm event would be a more reasonable standard. The 1-year, 24-hour storm event accounts for the majority (upwards of 90%) of the precipitation annually. Adopting a 2-year, 24-hour standard would achieve only a minor incremental increase in TSS reduction at a significant increase in cost. Many state and local governments have adopted the 1-year, 24-hour storm event as the standard over the 2-year, 24-hour event based on the minimal increase in benefit in proportion to the increased cost.

Setting the volume based standard such as the 1-year, 24-hour storm event would be reasonably applicable to volume based BMPs such as detention ponds. However, beyond ponds, it is not clear what other BMPs exist where the size would be considered adequate for a 2-year, 24-hour rain event. Sizing and placement of many, if not most BMPs other than ponds are not based on any particular volume of rainfall. For example, silt fences, rolled fabric, soil enhancers, etc. are primarily sized and located on exposed slopes, with their size based on the topography and length of the immediate slope behind them. Any reference to specific sizes being equal to a given rain event would contain so many caveats and/or exceptions so as to make the point useless. Similarly, a volume-based standard would not apply to flow based BMPs such as check dams which are impacted by water velocity and peak flow.

7. Part 2.1.3.1.c. General Design Requirements - Use of Vegetated Areas for Sediment Control.

The Draft would require the "use of level spreaders." AGC members report 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.

8. Part 2.1.3.2.a. Install Stormwater Controls before Construction Starts.

The Draft states that prior to starting earth disturbing activities in ***any*** portion of the site, stormwater controls would be required. EPA has requested comment on whether there are situations in which it would be infeasible or impracticable to make operators install all stormwater controls before commencing earth disturbances.

AGC finds that it would be infeasible, impractical and pollution producing to install all controls prior to the start of any work. It is a common circumstance, particularly on larger sites, for only a portion of the site to be constructed (or disturbed) at one time; other portions of the site may remain undisturbed for many months. For example, oftentimes during a road construction project, lanes (or other project features) on the one side of the roadway will have no disturbed earth for more than a year while the other side of the roadway is being modified. Installation of controls on the side of the roadway with no activity will serve no purpose and will increase the

cost of construction through the installation of controls that will only need to be replaced prior to the actual start of work in that portion of the site. Installation of the controls before they are needed and then needing to replace them prior to actual construction will generate unnecessary waste (pollution). On a very large, phased-development site, the same situation could occur.

While most often the SWPPP will specify all BMPs throughout all phases, BMP installation is predicated on the work to be completed within each phase. Furthering the example used above, a roadway project has numerous phases including clearing and rough grading followed by rough drainage, which is refined as the roadway is built to include pavement, curb inlets, etc. It would be impossible to install curb inlet protection at the rough grading stage, because the inlets would not exist. It would be impossible to install all ditch checks at the clearing stage, because the planned ditches would not exist. In addition, there are many areas during the construction season where it is next to impossible to get the perimeter control BMPs installed prior to any construction. These areas may be in flood plains, areas with brush and small trees, areas on bridge construction sites, slopes, etc. For these reasons, it is not feasible to install "all" storm water controls prior to commencing earth disturbing activities.

AGC requests that EPA clarify that the requirements under this Part are for the portion of the project that is being disturbed only. AGC also asks that EPA modify the term "all" with "all applicable."

EPA must acknowledge that most construction projects are phased, with BMP selection and installation corresponding to each phase. AGC requests that EPA allow contractors to install controls as they are needed so that they can continue to limit the amount of area cleared at one time. Such phasing helps maintain natural vegetation, which is the best control. A requirement to install all controls prior to start of construction would cause the contractor to "hop around" the site installing controls before they are needed. Contractors would also have to inspect and maintain those controls. These may exist in areas where the contractor has no active work for quite some time. We see this as an item that will greatly increase the cost of construction without a definable environmental benefit.

9. Part 2.1.3.3. Maintenance Requirements - Keep Stormwater Controls in Effective Operating Condition.

The Draft states: "You must ensure that all stormwater controls remain in effective operating condition and are protected from activities that reduce their effectiveness." AGC maintains that this clause is too vague. It is not possible to protect all BMPs from damage, which is why this permit includes corrective action provisions. AGC requests that EPA define the meaning of this statement.

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.

14. Part 2.1.3.7(a). Entrance and Exit Points. Stabilize Construction Entrance and Exit Points.

EPA has requested comment on the feasibility of the requirement to stabilize entrance and exit points for a minimum of 50 feet.

The current wording of this part is unacceptable to AGC. The language should read 50 feet in length to eliminate confusion. The current wording would require stabilization of all points (presumably in all directions) 50 feet from the point of exit or entrance. On a home site this is the whole front yard.

Length is only one factor which must be balanced with others including available space for safe ingress and egress to the construction area. EPA should allow the site operator flexibility to stabilize the proper width distance as necessary for anticipated traffic.

In addition, EPA must also recognize that a 50-foot limit is not practical at all sites. AGC recommends that EPA provide an exemption for space constrained projects such as highway projects where work area space may not allow a 50-foot construction exit (e.g., within medians of roadways) or projects in highly developed areas such as central cities.

AGC also finds the provision prohibiting sediment discharge from a construction exit to be unreasonable. Construction exits by their function remove mud from vehicle wheels. This mud accumulates within the construction exit aggregate. During a single storm event mud can accumulate to the point where it discharges as stormwater runoff passes through the aggregate. In addition, EPA in Subsection B states that "No visible sign of tracking from vehicles should be present on public or private roadways exiting the site." The term "No visible" is too restrictive and unreasonable. Even the most rigorous methods of mud removal such as wheel washing will leave traces of silt on a roadway. It is impossible to completely remove all traces that construction vehicles are exiting a site. EPA should remove this provision.

Finally, it is common for construction sites to have separate (one-way) construction entrance and exit points. Limited or no stormwater management value is gained from stabilizing, or installing a construction exit, at a designated one-way construction entrance point.

15. Part 2.1.3.7(b). Entrance and Exit Points - Eliminate Track-out from Vehicles.

The Draft states: "No visible signs of soil tracking from vehicles should be present on public or private roadways exiting the site." This is impossible even when exiting from fields which have no construction on them. The phrase "exiting the site" must be removed. In addition, EPA should allow for the fact that often some fine materials may remain in the cracks/crevices of pavement; it may be visible to the public, but it cannot be swept up or remediated easily.

16. Part 2.1.3.8. Compliance with Safe Drinking Water Act Underground Injection Control Requirements for Certain Subsurface Stormwater Controls.

The Draft also proposes to adopt through reference certain Safe Drinking Water Act (SDWA) requirements relating to underground injection control laws and regulations. Construction sites are subject to SDWA requirements regardless of whether EPA includes them in the Draft. To avoid creating additional and unnecessary liability under the NPDES program for requirements found in the SDWA and to simplify the Draft, AGC recommends that EPA avoid such unnecessary cross-referencing. Appropriately regulated sites are subject to these requirements whether or not they also must obtain NPDES stormwater permits. If additional "guidance" is necessary, EPA references a 2008 memorandum that clarifies such issues, and the agency can use that memorandum in the future CGP as compliance assistance guidance. *See* proposed CGP Fact Sheet at 55.

17. Part 2.1.4.1. Requirements Applicable to Specific Stormwater Controls - Constructed Stormwater Conveyance Channels.

The Draft would require "[c]omplete stabilization of stormwater conveyance channels before the first predicted storm event, or within seven (7) days, whichever is sooner … [using] … armoring materials that are suitable for use in areas with concentrated or channelized flow." On a highway project, it may not be feasible to complete stabilization of a stormwater conveyance channel within the timeframes identified. Stormwater conveyance channels typically parallel roadways — often on both sides and in the median. For any given project, EPA's proposed provision would require highway contractors to "armor" tens of miles of channel. This would be incredibly expensive and of limited benefit.

18. Part 2.1.4.2. Requirements Applicable to Specific Stormwater Controls - Steep Slope Controls.

The Draft provides that if it is not feasible to avoid disturbing steep slopes, the operator must immediately initiate stabilization on any exposed steep slope areas where earth-disturbing activities have permanently or temporarily ceased, and will not resume for a period exceeding seven (7) calendar days. For the purposes of this permit, earth-disturbing activities have temporarily ceased when clearing, grading, and excavation within any area of a construction site will not resume for a period of seven (7) or more days, and earth-disturbing activities have permanently ceased when clearing and excavation within any area of a construction site has been completed, and final grade has been reached.

AGC wants to point out that a conflict exists between the first and second sentences of the paragraph above. In the first sentence, EPA refers to "any exposed steep slope areas." But in the second sentence, EPA refers to "any area of your construction site." AGC also recommends that EPA remove the phrase "… and final grade has been reached." Stabilization appears to be required whether or not final grade is achieved in areas where ground has been disturbed.

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 disproportionally 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 relies on prescriptive deadlines.

AGC recommends that EPA consider an approach that would require contractors to start stabilization practices when construction is substantially complete and then make weekly progress until completion of the stabilization practices. EPA should also include language recognizing weather conditions like snow cover or frozen ground that would preclude stabilization practices from taking place on the jobsite.

For permittees who conduct construction activities in critical habitat areas or areas where listed endangered species exist, AGC recommends that EPA instruct all permit holders to adhere to the provisions of the Endangered Species Act (ESA), which is designed to ensure the protection of species and their critical habitats — rather than add an additional set of unnecessary and potentially burdensome requirements.

24. Part 2.2.1.4. Stabilization Deadlines for Arid/Semi-arid Areas and Sensitive Areas.

EPA has requested comment on the proposed deadlines for initiating and completing stabilization of exposed areas of the site in arid and semi-arid areas. EPA also requested comment on treating as a sensitive area for stabilization purposes sites that will conduct construction activities in critical habitat areas or areas where listed endangered species exist.

See response above concerning reducing stabilization timeframes. Regarding arid/semi-arid areas, EPA should retain the language "as soon as practicable" due to the extended time required to establish vegetation and because the risk of discharge is low given the lack of precipitation in these areas. The requirement for stabilization to be complete at the time of the notice of termination is sufficient.

For stabilization in arid or semi-arid areas, the following excerpt from the current Nevada state CGP (Section 5.c.iii) could serve as a guide:

> In arid areas (areas with an average annual precipitation of 0 to 10 inches), semiarid areas (areas with an average annual precipitation of 10 to 20 inches), and areas experiencing droughts where the initiation of stabilization measures…. (original Nevada CGP says "by the 14th day, which is their standard stabilization time frame)…after construction activity has temporarily or permanently ceased is precluded by seasonal arid conditions, stabilization measures shall be initiated as soon as practicable.

25. Part 2.2.2.1. Criteria for Stabilization/Vegetative Stabilization.

In the Draft, EPA provides two options for stabilizing exposed portions of the site with vegetation, including the 2008 CGP's 70% criteria and the new C-factor value approach. EPA has requested comment on whether the C-factor stabilization criteria should be used as the sole

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

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.

27. Part 2.3.2.1.a. Pollution Prevention Standards for Fueling and Maintenance of Equipment and Vehicles - Location Restrictions.

This part states: "If you conduct fueling and/or maintenance activities at your site for equipment or vehicles used for your construction activities… you must … [c]learly flag off and designate areas to be used for fueling and maintenance activities and conduct such activities only in these areas." AGC maintains that this would be very problematic. Moving equipment to central areas will be hard on road projects. It would be a waste of fuel, waste of time, and result in inefficient operations and potentially more environmental harm (e.g., further land disturbance and dust). Contractors need to maintain the ability to perform mobile fueling.

28. Part 2.3.2.1.b. Pollution Prevention Standards for Fueling and Maintenance of Equipment and Vehicles - Design Requirements for Stormwater Controls.

AGC maintains that it is reasonable to require contractors to keep spill kits on the jobsite at areas where equipment fueling and/or maintenance activities occur. On linear projects, for example, a mobile fuel truck refuels equipment located along the right of way at various locations. The truck is equipped with means to clean up any fuel that may get on the ground by use of absorbent pads, a pail in which to place contaminated soil, etc.

AGC finds that it would not be practical for EPA to require secondary containment for fueling and maintenance areas on the site beyond what is already required under the Spill Prevention Control and Countermeasures (SPCC) requirements in 40 CFR 112 and Section 311 of the CWA. Secondary containment will not work for vehicles that move up and down the road and

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 … ."

31. Part 2.3.2.5(d). Storage, Handling, and Disposal of Construction Waste - Maintenance Requirements.

The Draft states: "At least once per week, you must inspect all containers or other devices used for the collection, storage, detention, and/or disposal of wastes for leaks or overflows." This language indicates a site inspection every seven (7) days and is in conflict with the 14-day inspection indicated in Part 5.1.2 of the Draft (at page 45). Consider revising this language to correlate to the inspection frequency required by the permittee in Part 5.1.2 and Part 5.1.4.3 of the Draft.

C. Comments on Part 3 of the Proposed CGP

Until EPA finalizes a C&D ELG with a numeric limit, AGC finds it premature to comment on Part 3 of the Draft. There simply is no basis from which to judge what monitoring requirements will be appropriate, what outfalls might require monitoring, or what the final standard (if any) will necessitate, in terms of compliance. AGC urges EPA to promulgate and defend its ELG and only then proceed with a notice-and-comment procedure to revise its CGP and provide non-mandatory guidance, a process that will help to ensure the most efficient and effective monitoring protocols/requirements. The following comments should not be understood or construed to support EPA's presumptive approach to the implementation of its C&D ELG, or to suggest that the agency's approach is in any way appropriate.

The Draft fails to identify the recording and reporting that its monitoring provisions contemplate. And to that significant degree, the Draft is inconsistent with EPA's NPDES regulations, which state that "all permits shall specify requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate." *See* 40 CFR § 122.48.

1. Part 3.1.2. Exceptions to the Turbidity Limit.

Under the Draft, on projects where the numeric turbidity limit applies, permitees would be exempt from the turbidity limit if a storm event produced a discharge that exceeded the local 2-year, 24-hour storm. To demonstrate that it qualified for this exception following a particular storm event, the construction site operator would have to "record the amount of rainfall (in inches) that occurred at his site using a rain gauge, or similar device, or using data from other sources that are no more than five miles distance from your site." AGC points out that many construction projects occur in rural areas. If the on-site rain gauge is damaged or stolen, there may not be another data point within five miles. AGC requests that EPA edit this provision to require the use of the closest reasonably attainable data.

AGC maintains that EPA should also exempt from the turbidity limit any project that does not have the potential to discharge to waters of the United States. This could include flat (less than 2% grade) or isolated sites with no storm drain inlets in the immediate vicinity. It should also include sites that are engineered to retain and infiltrate all of their stormwater onsite. On such

sites, the stormwater either evaporates or is absorbed into the ground, and no discharge of stormwater into waters of the U.S. occurs.

In fact, as the following paragraph explains, AGC believes that EPA should expand the "no discharge" concept to the entire permit program. Specifically, the CWA and its NPDES permit program regulate the discharge of pollutants from point sources to waters of the U.S. In order to be subject to the Act's provisions, one must meet the two-part test of having both a point source and a discharge. Conversely, if there is not a discharge, or if a discharge comes from something other than a point source, the CWA does not apply. Section 502(12) of the Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." Nowhere does the Act mention or indicate the need to obtain permit coverage for potential discharges. In 2008, EPA recognized that certain animal feeding operations do not discharge pollutants and therefore are not subject to sections 301 and 402 of the CWA. Thus, the agency finalized a process whereby Concentrated Animal Feeding Operations (CAFO) operators may certify that they do not discharge or propose to discharge pollutants. *See* 73 *Fed. Reg.* at 70,418 (Nov. 20, 2008). Because the CWA regulates actual discharges only, and, like CAFOs, all construction activities do not result in the discharge of pollutants from point sources, AGC urges EPA to adopt a similar program for construction activities.

While the Draft does provide an exception for complying with the turbidity limit for storms exceeding the 2-year, 24-hour rain event, this provision, as currently written, is unworkable. The Draft provides "If you determine that your stormwater discharges in any day are generated by a storm event in that same day that is larger than the local 2-year, 24-hour storm, you are not required to comply with the numeric turbidity limit for that day." There are technical problems with the emphasis of the "same day" language in the CGP, as follows:

1. The meteorological definition of a 2-year, 24-hour rain event is just that: 24 hours. It is not confined to a calendar day as written in the Draft, and this is contrary to provisions stated in the C&D ELG. If at any time during any 24-hour period, rain occurs that exceeds the 2-year, 24-hour rain event total, then the 2-year, 24-hour rain has been exceeded by meteorological definition, whether it all occurred on the same calendar day or not. The site must qualify for the turbidity exemption based on the meteorological rain event.

2. The CGP as written does not exempt the runoff from any 2-year, 24-hour rain event; it only provides an exemption for the same calendar day. AGC maintains it would make more sense for the turbidity exemption to apply for some period of time after the 2-year, 24-hour event. AGC has two suggestions: 1) that the turbidity limit exemptions extend until discharge from the 2-year, 24-hour event is complete; or 2) that the turbidity exemption would extend until flooding or disruptive conditions have abated at the site, and the passive treatment and site BMPs can be safely accessed and repaired.

AGC also recommends that EPA craft provisions for contingencies other than a single rain event that might exceed the 2-year, 24-hour threshold. Extended rain for many days or a heavy rain

while the ground is still saturated from previous rains can produce flooding or disruptive conditions often much worse than a single large and isolated rain event, even if no individual 24-hour period exceeded the 2-year, 24-hour threshold. If there is significant flooding or active flash flooding in the local area (maybe as reported on the local news), then a turbidity limit exemption should be granted until the flooding or disruptive conditions subside. All of the streams in the area would be turbid anyway, and the impact of construction runoff would be negligible under these circumstances.

In addition, an exemption is also needed for high intensity rainfall events, such as one (1) inch per hour or more. These events could be less than the volume of a 2-year, 24-hour storm event, however cause significant damage to even stabilized construction areas.

2. Part 3.2. Numeric Effluent Limit.

The Draft includes a placeholder for a recalculated numeric turbidity limit, stating "if you are subject to the numeric turbidity limit, the average turbidity of any discharge for any day must not exceed the value listed."

While EPA may intend to finalize a numeric effluent limit for turbidity in a revised C&D ELG, it is entirely possible that EPA will not promulgate or be able to defend such a limit. EPA may settle for a "benchmark" or "action level" type approach for a final turbidity or total suspended solids threshold. Because EPA cannot predict how its ELG rulemaking or related litigation will end, the agency should remove these provisions.

3. Part 3.3.1.1. Types of Discharge Conditions Requiring Sampling.

AGC urges EPA to include a minimum rainfall amount in the permit. Smaller rain events are unlikely to cause significant erosion, and the total volume of water discharged, if any, would be small and short-lived. Any low amount of runoff from these events can be very difficult to sample cleanly, and the measured turbidity might artificially appear to be much higher than the actual runoff. The recently adopted California CGP (effective July, 2010) only requires sampling from rain events that exceed 0.5 inches. Similarly, AGC recommends that EPA not require turbidity sampling for rain events less than 0.5 inches. If a site starts having discharge, and the operator takes a sample within the first hour of discharge, the results need not be reported if the rain event does not exceed 0.5 inches. EPA might specify that to qualify for this exemption, the site must have a suitable rain gauge on the premises.

In the Draft, EPA expresses some concern about this approach. It questions, for instance, how a permittee could know how much precipitation would end up falling. AGC, however, recommends that EPA define a minimal rainfall for which reporting would not be required, instead of exempting sampling for a pre-determined minimal rainfall event. This approach would achieve EPA's goals while eliminating operator speculation as to how much precipitation will fall.

In addition, AGC recommends that EPA clarify its definition of "storm event" (*see* Appendix A and Part 3.1.2.1). The Draft appears to require sampling during every storm and also every snow melt event which results in any amount of runoff. It unclear to AGC how long permitees would be required to sample when the storm starts out heavy in the first 24 hours and then continues to drizzle for the next few days. The Draft also would require sampling even if no land changes have occurred since the last compliant sample was collected/analyzed. AGC members also question if they would need to sample in the middle of winter when there is a slight snow melt and then the ground freezes back up again.

In addition, if a construction site operator is using all low impact development (LID) stormwater controls to infiltrate stormwater flow into the ground, the contractor should not have to sample, except where overflow pipes are part of the LID device. For example, Maryland's current state stormwater rule mandates only LID devices for stormwater management, unless it can be shown that such devices cannot be utilized at a particular building site.

4. Part 3.3.1. When to Sample.

According to the Draft Part 3.3.1.3, "normal working hours are considered to be Monday through Friday, between the hours of 8:00 am and 6:00 pm, unless your working hours are different at your site." This appears to arbitrarily dictate the working day, and also potentially would require overtime, since this is longer than 8 hours. EPA is not in a position to judge what normal hours work best for a construction site. For example, 6:00 pm during the winter is dark in most locations, and many construction activities might not be practical. Most construction sites likely have a set period of time each day where the permanent work crews and their direct supervisors are expected to be at the site working, however, these hours may vary seasonally or for other reasons. EPA should delete any reference to a specific time of day and indicate that the company's general hours of business (when sampling could occur) should be specified in the SWPPP, with flexibility to cover seasonal or job related adjustments.

5. Part 3.3.2. Sampling Frequency.

EPA requested comments on the sampling frequency specified, and on the alternative option of requiring samples to be taken once every two (2) hours following the first sample.

The Draft states—

> You must collect your first sample within the first hour that the discharge begins. After you take your first sample (as required in Part 3.3.1), you must take a minimum of 2 additional samples (a total of 3 samples) during the remaining hours of the work day (for normal working hours) that the discharge continues. The 3 samples must be distributed in such a way that the beginning, middle, and end of the discharge for that day are represented. If the discharge continues on the subsequent day(s), you must take a minimum of 3 samples per day that there is a discharge.

AGC disagrees with EPA's proposal to require a sample to be collected within the first hour that discharge begins. In some cases, a person qualified to perform sampling may not be onsite to witness the beginning of a discharge. Therefore there will be cases where it will be impossible to capture discharge within the first hour. AGC suggests that EPA modify this part to read: "To the extent practical, and if the rain event occurs during normal operating hours, the first sample should be taken during the first hour of discharge." AGC is also concerned about a situation where a discharge does not begin until the last hour of business. It would be impractical to require the site operator to collect three samples in one hour. Similarly, a discharge may not occur until the last two or three hours of the workday. To facilitate permit compliance, AGC recommends that EPA require site operators to collect only a single stormwater sample on each day when a discharge of more than 0.5 inches leaves the site during normal working hours. Requiring multiple samples over a specified period of time would create manpower issues and significantly raise the cost of stormwater compliance. A construction site operator could choose to take additional samples on any given day as circumstances may warrant.

The purpose of sampling should be targeted toward corrective action. There is no purpose in sampling again and again if the site has not changed. Once sampling has been done on an area, it is pretty easy to predict what the next sample may look like. If the first sample collected from the site shows compliance with the turbidity limit, AGC believes that the site operator should be finished sampling for the day. If, however, the first sample collected from the site shows any exceedance of the turbidity limit, the Draft would require corrective action. After taking action, the construction site operator would continue to take additional samples (at his discretion) and initiate additional corrective action as necessary until the average of all of the samples taken that day meets the compliance limit. (Note that AGC continues to prefer a daily average compliance limit.) If the overall daily average of all the samples collected is below the turbidity limit, then the site would be in compliance with the CGP. According to the required reporting schedule (preferable quarterly), the site operator would submit on his discharge monitoring report the daily average calculation.

AGC also finds that the logistics of sampling every two hours would be difficult if not impossible on large projects with multiple discharge points. Depending on the number and distance between discharge points and condition of access to those points it will be unlikely if not impossible to complete all sampling within two hours.

6. Part 3.3.3.4. Sampling Location.

EPA has indicated that it would prefer to limit the use of representative monitoring (allowing a single representative sample location for more than one discharge point) to linear type projects. AGC feels very strongly that EPA also should allow representative sampling for large non-linear projects if the operator can document sufficiently within its SWPPP that representative sampling is warranted.

For example, the Washington state Department of Ecology handbook "*How to do Stormwater Monitoring: A guide for construction sites*" states that permitees 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 permitees 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"

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).

AGC also suggests that EPA relax the reporting requirements for those sites demonstrating compliance. It will aid in improving EPA's effectiveness by reducing the amount of data EPA staff must review and allow them to focus on new and/or projects with compliance problems. Also, EPA should provide this relief and other incentives to operators who demonstrate good compliance histories.

D. Section-By-Section Comments on Part 4 of the Proposed CGP

1. Part 4.2. Discharge Limitations for Impaired Waters.

To the extent that Parts 4.2, 4.2.1 (Identify If You Discharge To An Impaired Water) and 4.2.3 (Requirements for Discharges to Waters Impaired for Other Pollutants**)** attempt to enhance and further explain the water quality-based limitations contained in the 2008 CGP, AGC could support such an approach. EPA's past, straight-forward, and uncomplicated approach to requiring NPDES stormwater permittees to comply with appropriate TMDLs if they discharge pollutants to impaired waters that are impaired for those pollutants represents a logical and

effective approach to addressing water quality requirements through a general permitting scheme.

However, adding benchmark monitoring (Part 4.2.2) for waters impaired by sediments or nutrients is an unproven and unnecessary obligation that will do more to fuel citizen suit liability than protect the environment. That has been the experience with EPA's industrial general permit and recent attempts (including by the recently proposed California Industrial General Permit) to inappropriately convert benchmark monitoring into numeric effluent limitations. EPA has not provided any justification or scientific rationale for its benchmark levels nor has it identified any reason why the current approach mandating compliance with locally-derived (and EPA approved) TMDLs is insufficient to demonstrate compliance with water quality standards.

See also AGC comments at Section IV above.

2. Part 4.2.2.3.b. Discharges to Sediment or Nutrient-Impaired Waters - Daily Visual Examination.

Daily visual inspections are not appropriate. This Part would obligate a site operator to a full-time inspection/reporting/maintenance job, which adds undue complexity to the permit and is unreasonable.

E. Section-By-Section Comments on Part 5 of the Proposed CGP

1. Part 5.1.4. Requirements for Inspections.

In past versions of the CGP, representative inspections were allowed for linear construction projects at or near access points where a roadway, undisturbed right-of-way, or other similar feature intersected the construction site. *See* Part 4.G of the 2008 CGP. After revisiting this requirement, EPA is of the opinion that site inspections at linear sites should be performed at the same frequency and should include the same requirements as any other construction site.

AGC recommends that EPA continue to allow representative inspections for linear projects. EPA is incorrect in its assumption that linear project phasing reduces the amount of disturbed area. Clearing and grubbing of corridors is typically conducted in a manner to minimize the number of mobilizations of a clearing contractor. Most commonly, clearing is conducted for the entire project corridor with one mobilization with mass grading to balance cut and fill project-wide shortly thereafter. Phasing typically occurs later in the project in the areas of constructing drainage, structures, etc. While it is true, large linear projects are segmented and managed as blocks of work during construction; it is most common for work within segments to be performed concurrently. Representative inspection/sampling is justified for linear projects due to the length of these projects and the higher number of discharge points along their alignment.

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.

F. Section-By-Section Comments on Part 6 of the Proposed CGP

1. Part 6.3.1. Deadlines for Correcting Condition.

This part of the Draft states that if your stormwater controls are not designed, installed, and/or maintained as required by the permit, you must "[i]nitiate work to fix the problem immediately after discovering the problem, and complete such work by the close of the next full work day," if "repair" or "regular maintenance of the stormwater control or pollution prevention measure" would fix the problem. AGC maintains that it often would not be feasible to complete the work in a single, full work day. Relevant factors include the size of the stormwater control and its accessibility on the jobsite.

2. Part 6.3.1.3. Residual Chitosan Testing.

The proposal for residual chitosan testing does not have any foundation and runs counter to EPA's justification in the C&D ELG that chitosan is a safe natural product. During the public comment process on the C&D ELG proposal, industry raised several concerns with the use of chemicals, including the toxicity of such chemicals. EPA responded to concerns about the potential toxicity of chitosan by stating that the only documented case of possible toxicity or adverse effect was due to mismanagement and/or misuse of the polymer. Specifically, in the preamble to the final EPA rule, EPA states: "EPA has determined that when properly used, environmental impacts from polymers or flocculants should not occur through the use of passive treatment systems. Based on the information in the record EPA has determined that when polymers are properly applied the risks of toxicity to aquatic life or adverse effects to the receiving water are minimal." *See* 74 *Fed. Reg.* at 63,008.

AGC is very concerned that EPA is now considering a requirement to monitor for chitosan as well as to employ additional measures *even from the mere detection* of any chitosan: including 24-hour notification, immediate corrective action, and the measurement of chitosan every two hours until the discharge ends. What is more, EPA has not provided any justification for selecting chitosan for residual testing.

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.

In addition, by making the owner responsible for providing the initial SWPPP, it would force the owner and architect / engineer to address stormwater compliance during the planning stage in a holistic manner. It also would ensure that all contractors are informed up front as to what will be required of them to properly implement the SWPPP. This stipulation would remove all ambiguities as to what is required and would guarantee that project owners take an active role in complying with the SWPPP.

2. Part 8.2.1. Stormwater Team.

The term "team" connotes multiple individuals. Many instances of small construction activities will not have the financial means, or require a "team" of trained individuals. Consider revising the language to include an individual SWPPP person for smaller projects.

3. Part 8.2.13. Training.

This section should be removed. It is redundant and just causes more paper work. The staff training requirements are already covered in Part 7.

AGC recommends that all EPA inspectors be required to successfully complete training programs with instruction in construction applications. AGC members report that many field inspectors are greatly lacking in practical field applications.

X. Conclusion

The proposed changes to the CGP would greatly increase its complexity and the cost of complying with its terms and conditions, putting site operators at a new and unprecedented level of risk of non-compliance, including fines of up to $37,500 per day per violation. The proposed permit would rigidly prescribe the stormwater controls that operators have to put in place, require them to sample and test runoff for compliance with a new and still uncertain limit on turbidity, leave them liable for non-compliance with that limit even if they have implemented all of the prescribed measures, and require them to self-report any non-compliance to a publicly accessible database within 24 hours. It would also add a heavy layer of water quality benchmarks that EPA has not the information to justify. And it would do all of this before EPA has even established its new limit on turbidity or finalized the non-numeric provisions of the C&D ELG — all of which remain embroiled in federal litigation. What is more, EPA has neither calculated the economic and employment costs of these provisions nor disclosed or quantified their potential environmental benefits. With all due respect, AGC urges EPA to slow down, change course, and proceed in an orderly way that better reflects the enormous economic risks as well as the environmental rewards of its undertaking.

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 or (703) 837-5332.

Sincerely,

Leah F. Pilconis
Senior Environmental Advisor to AGC of America

cc: Schaner.Greg@epamail.epa.gov
Farris.Erika@epamail.epa.gov