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July 12, 2020

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

RE: AGC's Comments on EPA's Draft National Pollutant Discharge Elimination System (NPDES) 2022 Issuance of General Permit for Stormwater Discharges from Construction Activities; Docket ID No. EPA-HQ-OW-2021-0169

Dear Sir or Madam:

On May 12, 2021, 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 from Construction Activities (hereinafter "proposed CGP" or "proposed 2022 CGP"), proposed Appendices and accompanying proposed Fact Sheet. In response, the Associated General Contractors of America (AGC) is pleased to submit the following comments[1] on the proposed CGP for the record of this administrative proceeding.

AGC of America is the nation's largest and most diverse trade association in the construction industry. The association represents more than 27,000 member companies including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC members are engaged in the construction of commercial buildings, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, and in-site preparation and utilities installation for housing developments.

AGC members conduct construction activities at project sites nationwide and are required to obtain and comply with NPDES permits on nearly all projects disturbing one or more acres of land (and smaller sites part of a larger common plan of development or sale). These permits address "stormwater associated with construction activity," as defined by the relevant federal regulations. The manner in which federal and state NPDES permitting authorities craft and enforce permits

[1] AGC is a member of the Federal StormWater Association (FSWA) and incorporates by reference the FSWA's comments submitted to this docket.

directly affects AGC members. Although EPA's CGP directly applies in only a handful of states and territories, our members are aware that it serves as a national model for state-issued CGPs, and therefore has far-reaching implications.

I. SUMMARY

AGC appreciates the opportunity to participate in the CGP reissuance process. EPA's proposed 2022 CGP contains several significant changes from the current CGP that are of particular interest to AGC – such as new provisions that would increase the construction dewatering requirements and add turbidity monitoring for certain dewatering discharges; increase the waiting period for discharge authorizations; and increase certain inspection, documentation and reporting obligations. AGC seeks to provide EPA with insights and information on how these changes could greatly impact construction operations and overall environmental management of all construction sites seeking coverage under EPA's 2022 CGP. AGC also offers its support of the proposed changes to the CGP that would provide flexibility for the pollution control of some types of construction waste/materials, clarify that permittees may keep stormwater documentation in electronic form, and modify the definition of "operator" to better ensure that all parties with control over the project are permitted.

AGC is committed to working with EPA to develop a final CGP that meets the technology-based and water quality-based standards of the Clean Water Act (CWA) and provides jobsite "operators" with the necessary regulatory flexibility to tailor their stormwater management plans to address different construction projects, settings, and delivery methods. AGC provides these comments and recommendations to point out apparent legal inconsistencies, to identify potentially significant increases in compliance and reporting burdens, to respond to the items on which EPA has requested input, and to point out permit language that has raised concern amongst AGC's membership.

II. PROCEDURAL ERRORS/INEFFICIENCIES

EPA states that it expects the incremental cost impact on entities that will be covered under the proposed 2022 CGP, including small businesses, to be minimal. EPA anticipates the approximate average annual incremental cost increase (compared to the 2017 CGP) will be $704 to $714 per permitted project per year.[2]

AGC is concerned that EPA's *Federal Register* notice and accompanying documents inaccurately refer to the cost impact of the proposed permit changes as "minimal" and find that the proposed permit is "not a significant regulatory action." EPA's proposed 2022 CGP is extensive and evolving; it totals nearly 300 pages, including appendices, fact sheet and requests for comments. It is critically important to AGC members that EPA demonstrate that the CGP is being reissued in full

[2] 86 *Fed. Reg.* 26023, 26032 – online at https://www.govinfo.gov/content/pkg/FR-2021-05-12/pdf/2021-09961.pdf. *See also* EPA's incremental cost analysis for the proposed permit, *Incremental Cost Impact Analysis for the Proposed 2022 Construction General Permit*, posted in Docket ID No. EPA–HQ–OW–2021– 0169.

compliance with all applicable laws, guidelines and Executive Orders that promote public participation, protect small business, and reduce excessive costs.

A. EPA Should Comply with the Regulatory Flexibility Act

AGC maintains that EPA has not followed proper administrative procedures. EPA failed to recognize the draft CGP as a rulemaking and thus failed to fully comply with the Regulatory Flexibility Act (RFA). As explained below, EPA's proposed CGP will have a significant impact on a substantial number of small entities, necessitating appropriate RFA mandates, checks and balances. In addition, EPA should have submitted the permit to the Office of Management and Budget (OMB) for review pursuant to Executive Order 12866 due to the significant effect of proposed changes on construction sector, as well as the novel legal and policy issues associated with possible new data collection and public availability requirements.

As detailed in Appendix 1 of this letter, AGC is very concerned that EPA's incremental cost analysis for the proposed permit, *Incremental Cost Impact Analysis for the Proposed 2022 Construction General Permit*,[3] drastically underestimates the additional time and money permittees will need to spend (compared to present day) to comply with the proposed monitoring requirements for turbidity in dewatering discharges. AGC details its findings in Appendix 1 to this letter and summarizes the key points below—

- EPA has underestimated the number of days a "typical' construction site produces a dewatering discharge.
- EPA has underestimated the average costs to each site of purchasing a turbidity meter.
- EPA's has underestimated the number of projects per year that would need to perform turbidity monitoring.
- EPA has underestimated the cost to permittees of performing the proposed benchmark monitoring of dewatering discharges at construction sites.
- EPA underestimated the added costs associated with performing corrective action under the proposed dewatering requirements.
- EPA has underestimated the added costs of introducing daily inspections at sites while dewatering and the accompanying recordkeeping requirements.
- EPA has not properly accounted for the one or more state-specific dewatering permits that are already applicable where EPA is the NPDES permitting authority, which ensure that such discharges do not violate water quality standards.

EPA's failure to accurately consider the factors above has impacted the agency's cost calculations and its analysis of the proposed permit's impact on small entities.

Specifically, the RFA requires federal agencies to consider the impacts of their regulatory proposals on small entities and determine whether there are effective alternatives that would reduce the regulatory burden on small entities. Section 612 of the Act requires the Office of Advocacy – an

[3] https://www.regulations.gov/document/EPA-HQ-OW-2021-0169-0073

independent office within the U.S. Small Business Administration – to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.[4]

The CGP is an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[5] Consequently, the permits being issued by EPA are "rules" under the Administrative Procedure Act, 5 U.S.C. § 551(4) and arguably subject to the requirements of the RFA.[6]

AGC maintains that EPA should have prepared or be preparing an initial regulatory flexibility analysis (IRFA) for the proposed CGP, published it in the *Federal Register* and transmitted a copy to the Chief Counsel for Advocacy of the Small Business Administration.[7] Additionally, EPA should have discussed significant alternatives such as the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements; the use of performance rather than design standards; and an exemption from coverage of the rule, or any part thereof, for such small entities.[8]

AGC urges EPA to rectify the proposed 2022 CGP's inconsistency with the RFA by exploring ways to minimize the economic impacts of the CGP on small businesses and tailoring it to address small businesses' unique needs and concerns. EPA should abide by its prior commitments and practices and submit the Final CGP to SBA for review consistent with the RFA. Case law firmly supports this approach.

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[4] Executive Order 13272 entitled "Proper Consideration of Small Entities in Agency Rulemaking," signed August 13, 2002, (67 FR 53461), further directs agencies to work closely with the Office of Advocacy to consider the impact of their regulations on small entities. E.O. 13272 authorizes Advocacy to provide comment on draft rules and, in turn, requires agencies to include their response with publication of the final rule – unless the rulemaking agency certifies that the public interest is not served by doing so.

[5] *See* 76 *Fed. Reg.* at 21,331-33(describing the proposed CGP as an agency statement of particular applicability and future effect designed to implement law and policy). EPA is issuing the" rulemaking" to implement its permitting authority pursuant to the Water Quality Act of 1987 and the Clean Water Act, which directs EPA to develop a phased approach to regulate stormwater discharges. EPA's permits also grant rights, impose obligations, and produce other significant effects on private interests.

[6] 5 U.S.C. § 601 et seq.; s*ee National Ass'n of Home Builders v. US Army Corps of Engineers,* 417 F.3d 1272, 1284-85 (DC Cir.2005) (Army Corps general permits under Section 404 of the Clean Water Act are rules under the APA [Administrative Procedure Act] and the Regulatory Flexibility Act; "Each NWP [nationwide permit] easily fits within the APA's definition 'rule.'… As such, each NWP constitutes a rule . . ."); *see also Final NPDES General Permit for Stormwater Discharges from Construction Activities*, 73 *Fed. Reg.* 40,388 (July 14, 2008) ("EPA has committed to operating in accordance with the RFA's framework and requirements during the Agency's issuance of CWA general permits (in other words, the Agency has committed that it will apply the RFA in its issuance of general permits as if those permits do qualify as "rules" that are subject to the RFA)"). EPA used the same language when it published the final 2008 MSGP permit on September 29, 2008: http://www.epa.gov/npdes/regulations/msgp2008_fr.pdf.

[7] 5 U.S.C. § 603(a).

[8] 5 U.S.C. § 603(c).

B. EPA Should Comply with the Paperwork Reduction Act

AGC is concerned about the new information collection provisions between the 2017 CGP and the proposed CGP that would increase the amount of information the agency is collecting from permittees (i.e., reporting/paperwork burden). Permittees would be required to submit new Notice of Intent (NOI) information,[9] new Notice of Termination (NOT) information, new dewatering inspections as well as inspection training records. The federal government's information collections take an enormous toll on the construction industry, which is predominantly small business.

AGC members have raised particular concern about the proposed changes to Part 8.2.1(a) that would require operators to take and submit photographs showing the stabilized areas of the site as part of the NOT. Notably, AGC finds that the costs of collecting this additional site data under the construction general permit scheme – and uploading it using EPA's NPDES eReporting Tool (NeT) – are underestimated in *EPA's Incremental Cost Impact Analysis for the Proposed 2022 CGP* (the agency has estimated that capturing photographic documentation and attaching it to the NOT will cost just $9 per year per permitted project and 15 minutes of staff time). Similarly, AGC finds EPA has underestimated the costs of requiring increased inspection and recordkeeping oversight of all dewatering discharges, as well as the costs associated with dewatering turbidity monitoring/reporting and corrective action recordkeeping, as outlined in Appendix 1 below.

AGC asks that EPA comply with the OMB regulations and guidance to promote agency compliance with the Paperwork Reduction Act (PRA).[10] EPA does acknowledge in its *Federal Register* notice and request for comment on the proposed 2022 CGP that the Agency is proposing to collect new information as part of the 2022 CGP. The *Federal Register* notice points to an Information Collection Request (ICR) that EPA prepared[11] that includes these findings:

> Total estimated burden: EPA estimates that the information collection burden of the 2022 CGP is 134,059 hours per year. Burden is defined at 5 CFR 1320.3(b). Total estimated cost: EPA estimates that the final information collection cost of the 2022 CGP is $8,195,357 per year.

More detailed text in the proposed 2022 CGP ICR Supporting Statement itself reveals EPA's conclusion that the proposed 2022 CGP will have a decrease in annual respondent labor burden and labor cost compared to the CGP-related aspects of the most recent NPDES Program ICR:

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[9] In addition, proposed Appendix A inserts new text encouraging additional NOI attachments: "Attaching: 1) the species list with the action area used to obtain the list; 2) aerial image(s) of the site; and 3) a copy of the SWPPP to the NOI is helpful to EPA, USFWS, and NMFS in confirming eligibility under this criterion."

[10] 44 U.S.C. § 3502(1). Before requiring or requesting information from the public, the PRA requires Federal agencies (1) to seek public comment on proposed collections and (2) to submit proposed collections for review and approval by OMB.

[11] EPA points to the DRAFT Information Collection Request (ICR) Supporting Statement for the Proposed 2022 National Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activities OMB Control No. 2040-NEW; EPA ICR No. 2686.01 in the docket at https://www.regulations.gov/document/EPA-HQ-OW-2021-0169-0074.

> The calculations made for this ICR cover the estimated burden and costs for both CGP respondents and EPA. The proposed 2022 CGP has a total estimated annual labor burden of 126,567 hours for 2,600 respondents and a total labor cost of $7,904,124. Compared to CGP-related aspects of the NPDES Program ICR, this reflects a decrease in annual respondent labor burden and labor cost of 47,067 hours and $2,065,951. The proposed 2022 CGP has a total estimated Agency annual labor burden of 7,492 hours and $341,860. Compared to the NPDES Program ICR, this reflects a decrease in annual labor burden of 4,666 hours and $178,735. The total reporting and recordkeeping burden for this collection of information is estimated to average 48.68 hours per respondent (0.84 hours per response).

Table 1 - Estimated Annual Burden for the Proposed 2022 CGP

	NPDES Program ICR (2017) Burden for EPA CGP		Proposed 2022 CGP Incremental Change in Burden		Proposed 2022 CGP Total Burden	
Burden Category	Labor Burden (hours)	Labor Cost ($)	Labor Burden (hours)	Labor Cost ($)	Labor Burden (hours)	Labor Cost ($)
Total for Respondents	173,634	$9,970,075	-47,067	-$2,065,951	126,567	$7,904,124
Total for Agency	12,158	$520,595	-4,666	-$178,735	7,492	$341,860

AGC finds this result to be illogical, considering the increase in information the proposed permit is asking for, and urges OMB's Office of Information and Regulatory Affairs (OIRA) to disapprove this ICR and send it back to EPA for further review.

Also, this ICR does not include an estimate for burden hours or cost associated with dewatering turbidity monitoring and reporting, which EPA is requesting public comment on in the proposed 2022 CGP.

C. EPA Should Comply with the Agency's Information Quality Guidelines

The Information Quality Act (IAQ)[12] directs EPA to comply with OMB's information quality guidelines.[13] 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."[14]

[12] 44 U.S.C. § 3516.
[13] *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).
[14] 67 *Fed. Reg.* 8451 (Feb. 22, 2020).

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.[15]

AGC has data quality concerns with the proposed 2022 CGP and the accompanying proposed CGP ICR Supporting Statement.[16] For example, it appears that EPA lacks the industry- and site-specific data and analyses needed to develop either turbidity benchmark monitoring or turbidity indicator monitoring of dewatering discharges to sediment-impaired waters or Tier 2, Tier 2.5, or Tier 3 designated waters. Lacking good data, *EPA's Incremental Cost Impact Analysis for the Proposed 2022 CGP* drastically underestimates the additional time and money permittees will need to spend (compared to present day) to comply with the proposed monitoring requirements for turbidity in dewatering discharges. The agency's cost analysis also fails to include the environmental benefits that would result from the proposed monitoring requirements, thereby making the cost effectiveness study virtually meaningless. In addition, EPA's proposed CGP ICR Supporting Statement finds that new information collection that would be required under the 2022 permit would decrease the labor burden in hours and cost. AGC details its finding in Appendix 1 to this letter and summarizes the key points in Section II.A. above.

III. TURBIDITY MONITORING FOR DEWATERING DISCHARGES

A. Monitoring Requirements – Part 3.3

EPA has proposed monitoring requirements for turbidity in dewatering discharges. For affected sites (i.e., those sites discharging dewatering water to a sediment-impaired water[17] or a water designated as a Tier 2, Tier 2.5, or Tier 3 water), the permittee would be required to collect and analyze at least one turbidity sample from the discharge on each day in which dewatering discharges are occurring. EPA is considering one of two approaches as a model for monitoring in the CGP: benchmark monitoring or indicator monitoring. Under a benchmark monitoring approach, permittees would be required to take turbidity samples on each day of a discharge from their

[15] *See* 42 U.S.C. § 300g-1(b)(3)(A) & (B).
[16] *See supra* footnote 9.
[17] Footnote 46 on page 24 of the proposed CGP states "…For assistance in determining whether your site discharges to impaired waters, EPA has developed a tool that is available both within the electronic NOI form in NeT, and at https://water.epa.gov/polwaste/npdes/stormwater/discharge.cfm." But the link directs you to EPA's general NPDES webpage at https://www.epa.gov/npdes. It is not clear where the tool is located on EPA's website.

dewatering activities and compare the weekly average of the results with an established benchmark turbidity value, which EPA proposes to be 50 Nephelometric Turbidity Units (NTU). If benchmark monitoring is used, the operator will be required to conduct corrective action(s) any time the weekly average exceeds the benchmark of 50 NTU. Under an indicator monitoring approach, permittees would still be required to monitor the dewatering discharge for turbidity; however, there is no benchmark level that triggers corrective action to change and upgrade dewatering controls to lower turbidity levels.

AGC strongly opposes turbidity meter monitoring in the CGP that requires the collection of samples and use of an instrument (as opposed to visual monitoring). The high degree of variability in site parameters, rainfall patterns, and erosion and sediment control effectiveness make specification of standard stormwater discharge monitoring requirements impracticable for a national regulation. EPA has not provided any legal justification or scientific rationale for its benchmark. The Agency has failed to explain how a turbidity meter monitoring approach would produce meaningful data that would translate into improved water quality (compared to visual monitoring). Notably, as outlined in Appendix 1 below, AGC has identified deficiencies with the cost analysis that EPA is using to support its decision to propose a benchmark turbidity limitation, which raises numerous administrative procedural concerns (see Section II of this letter).

Both the language and the legislative history of CWA Section 302 make it clear that NPDES stormwater permits should include water quality-based conditions/limits only when national technology-based standards fail to produce the desired level of water quality in a given watershed. EPA proposes to include additional technology-based limits in its CGP applicable to dewatering discharges. At this point in the process, it is quite clearly impossible for EPA to know whether the proposed updates to the technology-based requirements for construction dewatering activities in Part 2.4 and the new dewatering specific inspection requirements in Part 4, along with the new corrective action trigger in Part 5.1 – all discussed in Section VI.J of this letter -- will or will not be sufficient to meet the water quality standards. According to 33 U.S.C. § 1303 and the regulations at 40 C.F.R. § 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 discussed in Section II of this letter, EPA lacks the legal authority to impose any benchmark level without first complying with the Regulatory Flexibility Act. Appendix 1 outlines AGC's concerns with EPA's incremental cost analysis for the proposed permit, *Incremental Cost Impact Analysis for the Proposed 2022 Construction General Permit*,[18] which drastically underestimates the additional time and money permittees will need to spend (compared to present day) to comply with the proposed monitoring requirements for turbidity in dewatering discharges. The direct and indirect costs of a scientifically unsound approach could be substantial and must be calculated and accounted for. There is no evidence that the agency has considered, much less demonstrated, whether there are demonstrable environmental benefits to offset the potentially huge economic costs a turbidity meter

[18] https://www.regulations.gov/document/EPA-HQ-OW-2021-0169-0073

monitoring requirement may impose on the construction industry. In the absence of such a demonstration, EPA's action is not justified.

EPA has proposed a benchmark value for turbidity that (1) sets unrealistic performance standards for permittees and/or (2) is not appropriate water quality objectives for some naturally turbid waterways. AGC is very concerned that EPA is attempting to set a benchmark limit that does not account for the levels of natural background turbidity (e.g., shall not exceed [X] NTU over background turbidity levels). AGC recognizes the Agency's focus on reducing sediment loads in receiving water, but the treatment cost to reduce loads to below what is naturally/historically occurring in receiving water is not practical from a cost-benefit standpoint. To illustrate this point, AGC calls attention to the fact that much of the dewatering of in-stream surface waters in cofferdams for bridge construction is actual source-based discharge water. You are pumping stream/river/surface water from point A to point B. Treating this water before pumping directly back to the source makes little economic sense and achieves very little to no environmental benefit. AGC also asks EPA to recognize that 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.

Water quality-based effluent limits and Total Maximum Daily Loads (TMDL) should be written at the state level and in close coordination with proper monitoring programs that will yield appropriate benchmarks. Individual state agencies are best suited to identify natural background levels of turbidity in their "sensitive" waters, based on geographical and geological information. EPA's "one size fits all" approach is irresponsible and not based on observable science.

AGC believes that EPA should continue to rely on its 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 if these permittees discharge pollutants to waters impaired for those pollutants. This is an approach that EPA has long considered effective, and EPA has yet to produce any information that would justify the proposed change in course.

AGC urges EPA to follow a visual monitoring approach that is easily implemented with minimal required training or field expertise. For visual monitoring, the observer looks for either a plume or a visible difference in turbidity between the background site and the compliance site. EPA has proposed a new definition for "visual turbidity" wherein the observer looks for either a visual plume or a visible difference in turbidity between the background site and the compliance site. (But see AGC's advisory comment in Section IV.J below that "cloudiness" may be caused by other pollutants than sediment, notably metals and algae.)

IV. MEMBER RESPONSES TO SPECIFIC QUESTIONS

A. Definitions – Appendix A

Definition "Dewatering" and "Construction Dewatering Water"
EPA proposes to add definitions for dewatering as "the act of draining accumulated stormwater rainwater and/or ground water from building foundations, vaults, and trenches, or other similar points of accumulation" (see proposed 2022 CGP Appendix A). The permit authorizes the discharge of several non-stormwater discharges in Part 1.2.2, including "construction dewatering water" not discharged from a contaminated site and in accordance with Part 2.4. However, the proposed CGP does not specifically define "construction dewatering water;" it is unclear if that term is restricted to accumulated stormwater rainwater and/or groundwater only or if the term also includes water from cofferdams, water diversions, and perhaps other water used during construction activities that must be removed from a work area.

For the definition of dewatering, the phrase "other similar points of accumulation" does not describe all the types of dewatering activity in the proposed Fact Sheet. For example, wells may not be considered similar to trenches. The proposed Fact Sheet notes the construction dewatering activities can include "in-stream dewatering: cofferdams, drill hole, or pylon development."[19]

Definition of "Seasonally Dry Period"
The 2017 CGP provided exceptions to stabilization and site inspection requirements during a "seasonally dry period," an undefined term. The proposed 2022 CGP includes a new definition ("a month in which the long-term average total precipitation is less than or equal to 0.5 inches") and refers to EPA's Climate Lookup Tool and supporting maps for assistance in determining whether a site is operating during a seasonally dry period for the area. AGC members reported back that the Climate Lookup Tool[20] appears to be inaccurate in the test group used. Utah is a desert; Salt Lake County has months where it is seasonably dry. The tool says there are no months considered seasonably dry for zip codes from that area that the group entered.

For assistance in determining average annual rainfall in specific locations, the proposed 2022 CGP refers to the PRISM Climate Group's Time Series Values for individual locations. AGC members reported back that the PRISM site is comprehensive; in the timeframe allowed for public comment, we did not have sufficient time to delve into the material in that database.

AGC requests additional time for the regulated community to review and test these climate tools.

[19] *See* proposed Fact Sheet at page 63.
[20] See the CGP Climate Lookup Tool in the docket for this rulemaking at https://www.regulations.gov/document/EPA-HQ-OW-2021-0169-0029.

B. Request for Public Comment: Definition of Operator - Part 1.1.1

EPA has requested comment on whether to modify the Part 1.1.1 definition of "operator" to better ensure that all parties with operational control over the project are permitted.

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

In Design-Bid-Build project delivery system, the most common method of construction procurement, the design of the project must be completed prior to contractor bidding and selection – and the owner retains overall responsibility for project management. The contractor bases its bid price on the plans and specifications and their estimated pricing of the units and quantities. The contractor submits a pay application every month that charges by unit quantities installed – as defined in the bid package – and the owner can resist overruns in the quantity specified in the bid (such as for silt fence) because the item would be over budget. Since the owner has so much control over payment, schedule, and changes to the project that may require more BMPs, the owner has significant influence over stormwater compliance and as such must be recognized as an "operator" for stormwater permitting. To this end, it would be beneficial for EPA to clarify that the definition of "operator" includes those entities that approve the contractor's payment for work performed.

Also, in both Design-Build (DB) and Engineer-Procure-Construct (EPC) methods of project delivery, AGC members have shared situations where the owner or owner's manager/representative has not filed an NOI, maintaining that they do not have "***operational*** control over construction plans and specifications" [emphasis added] when in fact they do retain control of the specs and review and approve the plans.

EPA should consider adding the word "contractor" to the language proposed -- "determines the acceptance of work" and "[**contractor**] payment for work performed" – to exclude lenders, grant-funders, or any other entities that are financing the construction project generally. At a minimum, AGC urges EPA to clarify that the definition includes those entities that supply the project plans and specifications and approve payment for the work performed on the permitted construction project.

C. Prohibition on Dewatering Discharges from Contaminated Sites - Part 1.3.6

The 2017 CGP allows for non-stormwater construction dewatering water discharges. EPA proposes to add discharges of dewatering water from contaminated sites to the list of prohibited discharges in Part 1.3. EPA proposes to define contaminated site for the purposes of this discharge prohibition (see footnote 7) as "discharges from contaminated sites: sites subject to existing or former remediation activities (e.g., Superfund/CERCLA or RCRA sites)." EPA requests comment on whether additional discharges from sites should be prohibited from coverage under this permit due to the possibility of those discharges containing contaminants.

AGC requests that the CGP clearly define "contaminated site" to include only current CERCLA- or RCRA-involved site and provide case-by-case flexibility to allow dewatering at sites where there is no increased risk of stormwater exposure to pollutants. The phrase "existing or former remediation activities" in EPA's proposed Fact Sheet is undefined and fails to help clarify what constitutes a "contaminated site."

EPA requests comment on whether additional discharges from sites should be prohibited from coverage under this permit due to the possibility of those discharges containing contaminants. AGC has concerns that the broad and expansive scope of what EPA is contemplating – wherein the agency would prohibit dewatering under the permit "due to the possibility of those discharges containing contaminants" or those discharges containing "any groundwater pollutants" (as defined at 40 C.F.R. § 122.2) – would deter construction redevelopment on brownfields. This runs counter to EPA's and this Administration's goal to transform abandoned and underused sites into community and economic assets.

D. Request for Public Comment: Waiting Period for Permit Coverage & Discharge Authorization - Part 1.4.3

EPA is seeking comment on whether it should expand from 14 to 30 days the waiting period between the date a NOI is submitted and the date an operator is authorized to discharge. This timeframe is intended to allow for interagency review of the operator's certifications regarding potential impacts on endangered or threatened species.

AGC opposes extending the waiting period to 30 days. EPA's proposed CGP and proposed Fact Sheet does not provide any justification for why 14 days is an insufficient amount of time for the U.S. Fish and Wildlife Service (FWS) to conduct its review. With the available resources and databases along with the NOI information, FWS should be able to review and make a timely determination on authorization within 14 days. Unwarranted and unnecessary delays in obtaining permit coverage are likely to unreasonably keep the operators from beginning construction, potentially incurring substantial costs for delayed construction absent confirmed permit coverage, as explained more below.

Delays that extend project duration are often critical and result in extended field overhead, unabsorbed home office overhead, idle labor and equipment costs, and labor and materials cost escalation, for example.

Almost all the public construction work in America is accomplished by private sector firms. This work generally is awarded to the lowest responsive bidder through the open competitive, sealed bid system. Generally, the clock to begin work starts ticking with a "notice to proceed" when the contract is signed/awarded to the lowest bidder. The parties to the contract must begin and complete the project within the specified time frames including applicable milestones. Any cost overruns during construction are a loss to the contractor, any cost underruns are a gain to the contractor. An extra two weeks' delay at the front end of starting a project, while waiting for authorization to discharge stormwater runoff from the jobsite, is likely to impact the overall project workflow, schedule, and operational expenses, as cited above.

In all construction work, lost profits, loss use of the building, increase in financing costs, or extended overhead costs are all classic examples of consequential damages that may result from failure to perform according to a contractual schedule. The project owner may seek to recover such damages from the contractor.

There also may be liquidated damages assessed daily to a contractor for not meeting the owner's schedule.[21] (A contractor can receive compensation in days or dollars for schedule delay or errors in the plans caused by the owner or its engineer. However, no compensation is provided for contractor-caused delay, or weather in many cases.) Liquidated damages can generally range from $1,000 to thousands per day.

Additionally, changing the waiting permit for permit coverage/discharge authorization could have implications for surety bond underwriting. Surety bonds (bid performance, and payment bonds) are required by law on most public construction projects and are often required for private projects because the project financing entities require them. These bonds – which are underwritten and provided by third parties (usually an insurance company) – secure the general contractor's commitment to perform the work as specified, to the specified schedule, and for the cost estimated by the contractor in its bid package. Thus, factors negatively impacting a project, such as those above, have potential to raise the perceived risk of guaranteeing its performance, which could have financial repercussions and/or complicate the underwriting process.

To be more transparent, AGC requests that EPA and FWS and National Marine Fisheries Service provide more information or data on review activities taken during the waiting period. AGC also requests EPA develop a system where EPA and/or the Services can release NOIs before the end of the waiting period.

[21] Many contracts, including most contracts for public owners, contain a provision where the parties agree that, instead of paying for the actual out-of-pocket costs caused by their delays, contractors will pay a stipulated generally daily rate known as "liquidated" damages.

E. Differentiate between Routine Maintenance and Corrective Action - Part 2.1.4(b) and (c); Part 5.1.1

The proposed CGP seeks to clarify the difference between routine maintenance and corrective action. Under the proposed permit, EPA would define routine maintenance as repairs to or the replacement of stormwater controls that can be completed within 24 hours of discovering the need for the repair or replacement. If an otherwise routine maintenance activity must be performed "repeatedly (i.e., 3 or more times)," the activity becomes a corrective action. EPA is also proposing that any repair or replacement activity that takes longer than 24 hours to complete is a corrective action.

This would be a significant departure from practices under from the current 2017 CGP, in which routine maintenance is not defined, and correction action is required if the control needs to be repaired or replaced or it was never installed (or installed correctly) in the first place.

AGC does not support EPA's proposed changes outlined above because they would significantly increase the cost and paperwork burden to document otherwise routine maintenance activities, like street sweeping, cleaning silt fences, inlet drains or sedimentation basins. Maintenance actions are normal, occur routinely and are necessary for, and consistent with, the normal functioning of most standard BMPs. Operators typically make the same routine fixes to the same control (time and time again) throughout the duration of a project; for example, a site operator may dig out a filter rock dam weekly over the course of a year-long project.

In addition, there may be a dozen or more maintenance actions identified during a single jobsite inspection – and as many as 75 items on a larger site – deemed necessary to keep stormwater controls in effective operating condition. Upon discovering that multiple BMP repairs are needed, it is generally not possible for the site operator to perform all the routine maintenance fixes by the end of the next business day. Oftentimes the general contractor will hire a subcontractor to perform the repair work. In addition to the current labor shortage, many of these subcontractors are small businesses (including MWBE enterprises) that need an appropriate response time. By requiring all maintenance to be performed within a 24-hour period (or trigger an immediate corrective action response and additional documentation), EPA would force site operators to reduce the use of these subcontractors in favor or self-performing more work, which would place a disproportionate negative impact on small and disadvantaged businesses.

AGC appreciates EPA's proposal to streamline the corrective action documentation in Part 5.4 by allowing a "corrective action log" and signatories by a "duly authorized representative." Notwithstanding that pending improvement, a separate permit change that would trigger a lot more corrective action would still require the "stormwater team" to spend significantly more time documenting site conditions and action, rather than focusing on keeping controls in good working order to prevent the discharge of pollutants.

F. Exception to Requirements for Perimeter Controls - Part 2.2.3(d)

In CGP Part 2.2.3(d), EPA provides operators at "linear construction sites" an exception from meeting the perimeter control requirements "where perimeter controls are infeasible,"[22] and instead allows the use of other types of BMPs that will adequately minimize pollutant discharges to perimeter areas of the site. AGC appreciates that EPA appropriately recognizes in its permit that perimeter controls are not always technologically possible or not economically practicable on linear sites, and that other types of practices can be used to minimize pollutant discharges. However, AGC members have pointed out that the "other practices" that EPA lists in the proposed Fact Sheet at page 37, by way of example, are not usually possible or practical (i.e., conducting earth disturbances only on days when no precipitation will occur and stabilizing areas of exposed soil immediately). The contractor cannot stop work if it rains. Nor can they stabilize immediately because it is necessary to move on to the next phase of construction. For example, if you have cleared and graded, then you would need to begin installing utilities, then installing the infrastructure. AGC requests that EPA remove the examples from the proposed Fact Sheet.

G. Request for Public Comment: Stabilization Timeframes for Larger Construction Disturbances - Part 2.2.14(a)

EPA seeks feedback on whether the stabilization deadlines previously established in the 2017 CGP are "effective in incentivizing the phasing of [ ] construction projects so that no more than 5 acres are disturbed at any one time." EPA further seeks comment on whether it should alternatively prohibit disturbing more than 10 acres of land at a time, with or without case-by-case exceptions.

In general, AGC does not recommend limitations on the amount of land that can be disturbed at a single time. AGC members point out that the existing requirement has not proven an effective incentive to phase construction activities. A 5-acre threshold does not reflect industry practice. It is unworkable in the field due to the scheduling implications that make it technically and economically infeasible.

Construction work must be done as efficiently as possible. This means that the contractor must minimize the mobilizations necessary to complete it. A contractor will try to bring in a clearing subcontractor as infrequently as possible, because each mobilization has a cost and a schedule risk. If subcontractors or materials are delayed or unavailable, the project is held up, and the contractor faces increased cost and risk of not meeting scheduling milestones expected by the owner. See related discussion in the section covering the Request for Public Comment on Waiting Periods.

One possible option that EPA mentioned in the proposal would entail including a phasing plan in the SWPPP. However, EPA must not put the federal government in charge of approving the

[22] The proposed 2022 CGP, Appendix A, would retain the same definition of infeasible: "For the purpose of this permit, infeasible means not technologically possible or not economically practicable and achievable in light of best industry practices." This definition is part of the C&D ELG at 40 CFR § 450.11 (several of the provisions of the C&D rule require permittees to implement controls, unless infeasible).

phasing and scheduling of a project, using a general permit, after the project owner has already approved the schedule that contractors submitted during the bidding process. If this option were to work, it would need to be flexible. If the contractor cannot phase the project, because of contractual or other reasons, they should be able to say so (that the phasing is infeasible---see definition in Appendix A of the 2017 CGP) and explain why. This approach is working for other provisions in the proposed CGP, such as to provide and maintain natural buffers around waters of the United States, to preserve topsoil, or to have perimeter controls except on linear projects when infeasible.

This provision is another example that illustrates the need for the owner of a project to be on the permit as co-primary operator. The owner drives the schedule and the budget.

Furthermore, although EPA uses acreage to determine eligibility under the CGP, it is not a common reference in the construction and development industries. Economic data on buildings uses cost per square foot, which has no relation to the building footprint on the ground. For highways, the unit of measurement is typically lane miles. Even within each market (e.g., building or highway) there can be vast differences in the on the ground footprint. Urban construction –buildings and street work and utilities---happens in a much more confined area. When asked for an average highway project ---anecdotally--- the answer could be anywhere from 1 to 40 miles, which could be more in actual lane miles. An alternative approach might be for EPA to consider total area of disturbance as a percentage of the total land square feet or miles or acres (or percentage of total planned site – see Georgia's permit by way of example), rather than setting a discrete value that applies across the board.

H. Request for Public Comment: Additional Flexibility for Waste Controls - Part 2.3.3(a) and (e)

EPA is seeking comments on whether some types of construction wastes should be excluded from pollution prevention requirements (*i.e.*, be allowed to be stored outside, uncovered, without any secondary containment or other stormwater controls) because their exposure to stormwater would not result in the discharge of pollutants.

AGC strongly supports EPA's effort to incorporate additional flexibilities in the proposed CGP Part 2.3.3(e) for "construction and domestic wastes" that will not result in a discharge of pollutants or that pose little risk of stormwater contamination when exposed to precipitation. EPA's request for comment describes a number of final products and materials intended for outdoor use—such as wood/lumber, concrete blocks, rebar, unused nuts and bolts, and gravel or rock—that would fit within this category. For these items and others that are intended to be used outside and do not result in the discharge of pollutants, the Agency has no statutory basis to regulate the materials or products.

The CWA prohibits the "discharge of any pollutant" except discharges that comply with the permitting, water quality, and technology-based standards provisions of the statute.[23] As used in the CWA, the phrase "discharge of any pollutant" refers to both "any addition of any pollutant to navigable waters from any point source" and "any addition of any pollutant to the waters of the contiguous zone of the ocean from any point source other than a vessel or other floating craft."[24] Accordingly, to regulate stormwater discharges pursuant to the CWA, there must be the potential for a discharge from a point source to a navigable water. There are many construction materials that, when exposed to precipitation or stormwater runoff, do not result in a discharge of pollutants to navigable waters. The Agency's proposal must acknowledge and recognize the limits of CWA authority, which extends only to regulation of construction activities that result in discharges to navigable waters.

This lack of authority to regulate items that are intended for use outside and whose exposure to stormwater does not result in a discharge of pollutants, is illustrated by the exempted materials in existing rules at 40 C.F.R. § 450.21(d)(2). Part 450 contains the construction and development (C&D) effluent limitations guidelines (ELGs) for discharges associated with construction activity. Subsection 450.21(d)(2) establishes an exemption from best management practices to minimize exposure to precipitation and stormwater for final products and materials intended for outdoor use.[25] The precise language specifying when "minimization of exposure is not required" applies to "building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site…" if/when the conditions are met.[26] As the Agency notes, this exemption already appears in the CGP Part 2.3.3(a) as it relates to building materials and building products. EPA should incorporate a similar exemption in the CGP Part 2.3.3(e) for construction and domestic wastes to be consistent with the meaning and intent of 40 C.F.R. § 450.21(d)(2).[27]

As noted above, the Agency only has authority to regulate circumstances that would lead to a discharge of pollutants through a point source to a water of the United States. EPA has already made the determination, as stated in 40 C.F.R. § 450 and in the development of that rule, that exposure to final products and materials intended for outdoor use poses little risk of stormwater

[23] 33 U.S.C. § 1311(a).
[24] 33 U.S.C. § 1362 (12).
[25] *See* 40 C.F.R. § 450.21(d)(2) providing, "Minimization of exposure is not required in cases where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination (such as final products and materials intended for outdoor use)."
[26] *Id.*
[27] §450.21(d)(2) Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater. Minimization of exposure is not required in cases where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination (such as final products and materials intended for outdoor use) -- https://ecfr.federalregister.gov/current/title-40/chapter-I/subchapter-N/part-450/subpart-B/section-450.21.

contamination. Indeed, when EPA proposed changes to the ELGs for discharges associated with construction activity pursuant to a settlement agreement to resolve litigation, the agency offered amendments to 40 C.F.R. § 450.21(d)(2) to "acknowledge that there are certain circumstances where it may not be necessary or environmentally beneficial to minimize exposure of materials to precipitation and to stormwater."[28] The *Federal Register* notice goes on to provide examples of "those instances where a material is not a source of pollutant discharges" –

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

EPA solicited comment on these proposed changes and having received none, it finalized the revisions to 40 C.F.R. § 450.21(d)(2) on March 6, 2014, stating: "EPA did not receive any substantive comments on this proposed amended requirement, and therefore EPA did not make any changes to the proposed requirement for today's final rule."[29] Accordingly, AGC recommends that EPA incorporate an exemption for final products and materials intended for outdoor use into Part 2.3.3(e) to reflect the limits on the Agency's authority to regulate such products and materials.

AGC also seeks to point out the confusion surrounding footnote 42 that lists examples of "building materials and building products" that qualify for the above-referenced exception and footnote 44 that lists examples of "construction and domestic waste" that do not qualify for the exception. To being with, ***building materials*** are listed as a type of ***construction waste***. This may contribute to what AGC members have reported as an inconsistent application of CGP 2.3.3 Parts (a) and (e), by EPA field inspectors and state inspectors enforcing EPA's language in their state CGPs, when contractors store building materials and building products in "roll off' bins, which is a very common practice. Where footnote 42 materials are stored in "roll off" bins, inspectors often categorize the contents as footnote 44 waste and require lids or cover 24/7 and 365 days (not allowing open bins/piles), regardless of whether or not the material is intended to outdoors or has a pollution potential.

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[28] *See* 78 *Fed. Reg.* 19,434 (April 1, 2013) online at https://www.regulations.gov/document/EPA-HQ-OW-2010-0884-0161.

[29] *See* 79 *Fed. Reg.* 12,661 at page 12,665 – online at https://www.federalregister.gov/documents/2014/03/06/2014-04612/effluent-limitations-guidelines-and-standards-for-the-construction-and-development-point-source.

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Footnote 42 Examples of ***building materials and building products*** typically present at construction sites include asphalt sealants, copper flashing, roofing materials, adhesives, concrete admixtures, and gravel and mulch stockpiles

Footnote 44 Examples of ***construction and domestic waste*** include packaging materials, scrap construction materials, masonry products, timber, pipe and electrical cuttings, plastics, styrofoam, concrete, demolition debris; and other trash or ***building materials***.

* * * * *

Finally, AGC agrees with EPA that closing lids on waste containers when not in use and at the end of the business day are good management practices. We disagree, however, that the Agency has authority under the CWA to impose permit requirements for lids or similar cover regardless of whether the contents of the waste containers are exposed to precipitation or stormwater. For example, in the arid west where there may be little to no precipitation for weeks or even months at a time, a permittee could be in violation of the proposed Part 2.3.3(e)(ii) lid/cover requirement even when no discharge from a waste container to a navigable water has occurred (or even when the material in the container poses little risk of stormwater pollution). Accordingly, AGC recommends that EPA revise Part 2.3.3(e)(ii) to better reflect the limits of their CWA authority to regulate construction activities that result in a discharge to a navigable water and to be consistent with the meaning and intent of the C&D ELG regulations at 40 C.F.R. § 450.21(d)(2).

I. Clarify Requirements for On-Site Chemical Containers - Part 2.3.3(c)

EPA's proposed permit instructs operators to store all diesel fuel, oil, hydraulic fluids, other petroleum products and other chemicals in water-tight containers – and if the volume onsite is more than 55 gallons, containers must be kept under storm-resistant cover or surrounded by secondary containment structures (e.g., spill berms, decks, spill containment pallets). If the total volume onsite is 55 gallons or less, a roof structure or secondary containment would not be required.

EPA proposes that the threshold for determining which types of controls apply is whether or not the amount of chemicals on site is above or below 55 gallons. EPA notes in the proposed Fact Sheet that stakeholders have recommended that any permit changes are consistent with the Oil Pollution Prevention regulations at 40 C.F.R. § 112."[30] However, EPA's Spill Prevention Control and Countermeasure (SPCC) program applies to a jobsite if (1) the above ground oil storage containers (in tanks of 55 gallons***** or greater) have a total *capacity* of more than 1,320 gallons and (2) a spill could reach waters of the U.S. The proposed 2022 CGP's secondary containment measures and other requirements would apply to much smaller amounts of chemicals stored on site.

AGC members expressed confusion over the need for additional controls and wondered whether the stormwater program was overlapping with the SPCC program, and even Occupational Safety

[30] See proposed Fact Sheet at pages 59-60.

and Health Administration (OSHA) requirements. AGC urges EPA to take this opportunity eliminate duplicative federal recordkeeping requirements which would save money and reduce current paperwork burdens. If a contractor has a stormwater pollution prevention plan (SWPPP) that addresses oil storage and spill control / containment and cleanup measures, then EPA should allow the jobsite SWPPP to also satisfy the SPCC plan requirements. Otherwise this is double regulation under the SPCC and NPDES programs – and each plan carries significant costs for the contractor to develop. The US Coast Guard also can be involved in spill plans if the project is on/over water.

AGC also questions the use of several terms that are ambiguous in the proposed CGP text. AGC members expressed confusion on whether "other chemicals" would apply to dry chemicals (such as dry grout or dry cement) or only liquids. AGC members also request more clarification on what EPA means by "drainage systems," as it relates to the 50-foot minimum storage requirements. Other confusing terms/provisions that warrant additional clarification and/or information include: the types of "cover" that would satisfy the Part 2.3.3(c) requirement and the use of the term "expeditiously" for the response time to a leak or spill.

J. Construction Dewatering Discharge Requirements - Parts 2.4, 4.3, 4.5.5, 4.6.3, 5.1.5

EPA is proposing updates to the technology-based requirements for construction dewatering activities that change the meaning of "appropriate controls" as used in the C&D ELG rule at 40 C.F.R. § 450.21. The proposed CGP would impose new requirements on site operators to control/treat dewatering discharges to prevent discharges with visual turbidity and prevent the formation of visible oil sheens or deposits. EPA proposes to define "visual turbidity" within the context of dewatering controls as "a sediment plume or other cloudiness in the water caused by sediment that can be identified by an observer."

In addition, the proposed CGP would add new and increased inspection requirements for dewatering activities, including a detailed list of items that must recorded during an inspection in areas where construction dewatering is taking place. The proposed CGP also would require corrective action if a sediment plume or sheen observed in dewatering discharge.

AGC members expressed concern over the new proposed ***one-size-fits-all*** requirement "to route dewatering water through a sediment control," indicating that this may not always be practical, economical or serve an environmental benefit. AGC urges EPA to recognize in the final permit how dewatering requirements associated with in-stream construction activities (that may be covered by a CWA Section 404 dredge and fill permit) are already regulated by the U.S. Army Corps of Engineers, such as the dewatering of a coffered work area

EPA's proposed definition of "visual turbidity" as "a sediment plume or other cloudiness in the water caused by sediment that can be identified by an observer" may cause confusion. AGC offers a note of caution that "cloudiness" may be caused by other pollutants than sediment, notably metals and algae. For example, one AGC member shared that iron, which is common in groundwater and

geologic stratum (e.g., in Nebraska near the Papillion Creek and Missouri River), absorbs light and reduces water clarity. NTU and TSS levels are typically impacted and higher due to background iron levels in groundwater. Once the water reaches the surface and oxidizes, the iron turns red and causes samples to have higher NTU/TSS values.

Also, in the proposed CGP Part 5.1.5, if you observe a sediment plume or a visible sheen or visible hydrocarbon deposits on the bottom or shoreline of the receiving water during discharge from site dewatering activities, you are required to take **immediate action** to address the condition, including immediately suspending the discharge and taking steps to ensure that the controls being used are operating effectively.

AGC requests EPA consider potential safety issues and clarify permit language that instructs operators to take immediate steps to suspend the dewatering discharge. Safety issues that prevent the immediate suspension of the dewatering discharge should be documented in required record-keeping for the permit. Use language similar to Part 4.7.1(e) (Inspection Report) of the CGP, for example, "if you determined that it is unsafe [to continue the dewatering discharge]… you must describe the reason you found it to be unsafe and specify actions taken…."

AGC member also expressed concerned over the new inspection requirements during construction dewatering operations. Part 4.6.3(a) appears to assume that the dewatering will begin and end on the day of inspection and does not address or anticipate the contractor's need for continuous dewatering discharges. What is more, the proposal would significantly increase the documentation required for such inspections (times, estimated rate, and visual qualities of discharge, and photos of dewatering controls and discharge) and impose a new and great burden on field staff to produce substantially more paperwork. EPA has significantly underestimated the added costs to increase the number of inspections on sites while dewatering as well as the additional recordkeeping – and the Agency has not demonstrated how the new requirements, like photographic documentation, would protect water quality. See AGC's cost analysis in Appendix 1 and the discussion on "Photographic Documentation of Final Stabilization."

K. New Training Requirements for Construction Inspections - Part 4.1 and 6.3

EPA is proposing to strengthen the permit's training requirements to ensure inspection personnel are competent, including a new requirement for personnel conducting inspections to have either passed an EPA inspection training course and final exam or hold a certification from a third-party training course that "covers essentially the same principles as EPA's inspection course."[31] EPA is seeking comments on how it should design its own inspection training program and the proposed criteria used to describe the minimum requirements for third-party training programs. Relevant personnel will need to provide documentation that they have passed the EPA course/exam or show a current valid certificate or license as proof of completing a non-EPA program.

[31] *See* proposed Fact Sheet at page 18.

The new training requirements in the proposed 2022 CGP would apply to every jobsite using the permit, including small projects. EPA asserts that providing a free training program will reduce the cost of this added permit provision on small businesses.

AGC finds EPA's proposal to develop a training and certification program well-intentioned; however, the training raises questions that the Agency may not have completely thought through. The proposal has caused concern to members who provide in-house training as well as to other entities that provide third-party training programs that may or may not provide a "valid construction certification or license." What is a "valid" certification or license? AGC requests that EPA clarify which programs would meet the requirements outlined in proposed Part 6.3(b) and/or establish an accreditation program for non-EPA providers. How would a training program provider prove that it meets the CGP requirements? It is also unclear how the personnel conducting site inspections would demonstrate compliance: Is it a "documentation showing that they have successfully completed the EPA course" as EPA proposes for its own program, or proof of a "current construction inspection certification or license" from a third-party program— which implies more commitment than a single training course? How will this impact workers who have a lot of field experience on stormwater controls, yet may have a language or technology divide?

Several members assert that the Federal government should not compete with local stormwater training businesses. AGC asks whether EPA has considered the impact this provision will have on small business entities that offer training?

Furthermore, AGC and its members have found difficulty providing comment on the need or validity of a course that is not yet produced. If EPA does implement this provision, AGC cannot emphasize enough that feedback from industry will be vital for it to have any value. AGC strongly discourages the Agency from creating a course in a vacuum without feedback from those who understand how construction works just as thoroughly as they understand the provisions in the permit.

L. Inspections During Seasonally Dry Periods in Arid or Semi-arid Areas - Part 4.4.2

The 2017 CGP provided exceptions to stabilization and site inspection requirements during a "seasonally dry period," an undefined term. EPA now proposes to define a "seasonally dry period" as "a month in which the long-term average total precipitation **is less than or equal to 0.5 inches**." AGC members have found this clarification helpful and note that other states have used similar language.

EPA also requests feedback on a Climate Lookup Tool and supporting maps. The supporting maps document links to a database that could assist construction operators located in an arid or semi-arid area in determining when they may be operating during a seasonally dry period of the year. AGC members have used the Climate Lookup Tool and were confused by the results indicating that there were no seasonally dry months in the areas queried. AGC requests additional time to review EPA's

Climate Lookup Tool to test more zip codes and the database that EPA references (called PRISM, accessible at https://prism.oregonstate.edu/).

See related comments above under the Definitions section above.

M. Check for Signs of Sedimentation from Discharge - Part 4.6.1(d)

AGC requests the Agency remove a proposed 2022 CGP provision that would require operators to check for sedimentation downstream of the point(s) of discharge and assess whether sedimentation (e.g., sand bars with no vegetation) could be attributable to discharges from the site. EPA further proposes that if downstream sedimentation exists, it must be documented by the operator.

This proposed expansion of inspection requirements is problematic because EPA and other enforcers frequently view such sedimentation to be evidence of a water quality standards violation, although that is not universally the case. AGC's concerns with the proposed expansion of site inspection requirements include: (1) the potential presence of other sources, both natural and anthropomorphic, for any downstream sediment deposits; (2) the inspectors' inability to access or assess other potential sources of sedimentation; (3) the inspectors' competence to assess the site's connection to downstream sedimentation; (4) the failure to specify a distance downstream of the site that operators must check for sedimentation and (5) the requirement to document signs of sedimentation without regard to whether the recorded conditions are attributable to discharges from the permitted site.

AGC asks EPA to recognize the fundamental principle that it can regulate only the "discharge of pollutants through point sources to waters of the U.S." EPA's proposed permit revision wrongly implies that EPA can control downstream environmental concerns not directly related to the discharge of pollutants from point sources (originating from active construction operations subject to NPDES permitting) to waters of the U.S. The proposed provision exceeds the requirements of the 40 C.F.R. § 450 rules and is unnecessary to protect water quality. The 40 C.F.R. § 450 rules reflect the technology-based standards applicable to construction activities and does not require downstream inspections for sedimentation. Further, observing sedimentation downstream does not necessarily mean that the sedimentation is attributable to the upstream permittee. Inspection at the outfall, which is already required under the terms of the permit, is a more direct and sufficient way to identify and address any issues that would potentially cause sedimentation downstream.

By essentially extending the point of discharge to mean at some undisclosed distance downstream 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 becomes impossible for EPA or the permittee to determine the separate or distinct impact of any one discharge into a downstream "combined" system.

N. Clarify that Inspection and Corrective Action Records Can Be Kept in Electronic Form - Parts 4.7.3 and 5.4.3

AGC supports the addition of new permit text that would explicitly provide that electronic versions of the Stormwater Pollution Prevention Plan (SWPPP), inspection reports, and corrective action logs may be used for recordkeeping purposes. AGC has some concern, however, about the Agency's repeated reference to the word "immediately" (without definition or qualification) when pointing to the timeframe permittees would have to produce electronic records upon request by EPA. Specifically, EPA proposes clarifying footnotes to specify that the records may be kept electronically if they are: " (c) immediately accessible to the inspector during an inspection to the same extent as a paper copy stored at the site would be, if the records were stored in paper form."[32] AGC urges EPA to acknowledge in the proposed Fact Sheet that it may take some time to pull together electronic records on a construction site.

In the proposed Fact Sheet, EPA outlines its expectations for an "electronic recordkeeping system used in compliance with Part 4.7 (inspection reports); Part 5.4 (corrective action log); and Parts 7.3 (SWPPPs) of the 2012 CGP"[33], the relevant portion of which is as follows –

> EPA will generally consider electronic records to be accessible enough to be considered to be stored at the site when the operator is able to, **immediately, upon request**, provide to government officials or authorized representatives: **a.** Paper or electronic copies of requested records required to be kept pursuant to Part 4.7 (inspection reports); Part 5.4 (corrective action log); and Parts 7.3 (SWPPPs); and **b**. Electronic access, using hardware and software available at the site, to required permit records via electronic storage at the site, ***or via direct access to an electronic system of records stored elsewhere***, including legacy systems that have been migrated to a current system, provided that the location of the original record is within the United States [*emphasis added*].[34]

Overall, EPA's expectations for electronic recordkeeping are extensive and may require sophisticated programs and applications to put into practice. It is important for EPA to recognize that accessing some electronic files may require an Internet connection, especially when the documents are stored on an offsite or cloud-based database. AGC recommends the Agency make clear in the Fact Sheet that it will allow a reasonable amount of time for permittees to produce electronic records that can only be accessed via an Internet connection. Otherwise, on projects where the Internet is slow/not easily accessible, contractors may need to opt out of using electronic records because electronic files stored offsite may not be available "immediately, upon request." Providing flexibility would enable contractors on remote projects to use electronic records.

[32] *See* footnote 54, proposed 2022 CGP.
[33] *See* proposed Fact Sheet at pages 99-100. Note the typographical error in referencing the 2012 CGP.
[34] *Id.*

O. Photographic Documentation of Final Stabilization - Part 8.2.1(a)

EPA requires the permittee to file an electronic NOT (Notice of Termination) to notify EPA that they have met the conditions for terminating permit coverage under Part 8.2. EPA has made use of an electronic reporting system for the past several CGPs. The proposed 2022 CGP includes a requirement that operators provide photographic evidence of compliance with site stabilization requirements when seeking to terminate coverage. EPA would add a check box to the NOT form to confirm that the operator has attached photographs. EPA is requesting comments on what additional criteria, if any, should be required.

For some companies, it may be useful to document stabilization efforts via photograph as a good recordkeeping practice.[35] However, AGC does not support an expansion of the federal permit reporting requirements whereby the permittee would need to "take photographs… that are representative of the stabilized areas of your site... to clearly show your compliance… and submit them with your NOT."

EPA provides no direction as to how many photographs would accurately depict a stabilized site but rather asks for comment what would be a factor of permit compliance. Construction sites vary dramatically in type, size, scope, and complexity. Some projects are larger than 1,000 acres. Another building site may be 20-25 acres with parking lots and stormwater retention features. A building footprint could take up almost the entire site. Photographs may not adequately or accurately capture the extent of stabilization efforts.[36]

AGC is concerned about the increased cost and risk of legal liability to individuals and businesses of collecting photographic records and reporting additional electronic information to the government. EPA has underestimated the added costs of introducing daily inspections at sites while dewatering and the accompanying recordkeeping requirements.[37] Technological issues with quality and size of the photograph could affect the accuracy of the photographic documentation of stabilization. The NOT must be signed in accordance with the signatory requirements of 40 C.F.R. § 122.22 and include a certification statement that the construction site met the criteria for termination under the provisions of the CGP.

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[35] AGC members are aware that EPA may require companies to produce information to the Agency simply so that it can educate itself or monitor compliance, even after the construction project is complete (permittee shall keep records for at least 3 years).

[36] See AGC's comments below sharing similar concerns with EPA's proposed changes to Part 4.6.3(d): Photographs of (1) dewatering water prior to treatment by a stormwater control(s) and the final discharge after treatment; (2) the stormwater control; and (3) the point of discharge to any waters of the U.S. flowing through or immediately adjacent to the site. EPA states in the proposed Fact Sheet: "The photographs can be taken in any form as long as they fairly represent the conditions of the dewatering operation and discharge on the day of the inspection."

[37] *See EPA's Incremental Cost Impact Analysis for the Proposed 2022 CGP* (the agency has estimated that capturing photographic documentation and attaching it to the NOT will cost just $9 per year per permitted project and 15 minutes of staff time).

In addition, a requirement to take photos and submit them electronically through EPA's NPDES eReporting Tool (NeT) creates numerous administrative and data quality concerns by requiring public posting of construction site photographic data online. Making construction site photos publicly available online represents an unreasonable, unprecedented paperwork burden that would not pass the "integrity, quality, utility" test outlined in Office of Management and Budget (OMB) guidance. In addition, EPA's Enforcement and Compliance History Online (ECHO) database was never intended to hold construction jobsite photos from CGP permittees. A wide range of stakeholders negotiated with EPA to reach consensus on what NPDES data should be shared electronically with EPA under the NPDES Electronic Reporting Rule.[38] Photographs of the stabilized areas of construction sites was not contemplated under the rulemaking.

Another consideration that AGC members raised is whether NeT-CGP will be able to handle large files. Some of the state portals are problematic with large file uploads.

Finally, AGC would like EPA to add a provision to the permit allowing the contractor to file an NOT without stabilization, provided the operators shows proof of contract with a third-party to perform the final stabilization of the site.

P. Additional Comments regarding Concrete Washout

Although EPA is not proposing a change to the prohibition to discharging wastewater from washout of concrete (see Part 1.3.1), AGC members propose a clarification that may reduce confusion in the field. The current language, in bold below, makes it appear that it is not prohibited to discharge concrete washwater in certain circumstances. AGC is aware that the C&D ELG uses this same language. However, it is not consistent with EPA's Best Management approach[39] that maintains concrete washout is to be collected and retained or recycled—nor the CGP, which also does not appear to allow for the discharge of concrete washwater. Greater clarity would be helpful in the subsequent parts of the permit.

> 1.3.1 Wastewater from washout of concrete, **unless managed by an appropriate control as described in Part 2.3.4;** [Emphasis added.]

The text refers the permittee to appropriate controls listed in Part 2.3.4, but that section does not allow for discharge of concrete washout. Instead, it outlines methods necessary to manage wastewater on the site so that it is not discharged. For disposal of liquid wastes, Part 2.3.4 refers permittees to Part 2.3.3---which has handling requirements for materials and wastes. However, that part does not have a category for "disposal of liquid wastes," so permittees are left wondering which

[38] EPA and authorized state NPDES programs must electronically collect, manage, and share NOTs under Phase 2 to ensure that there is consistent and complete reporting nationwide. EPA recently extended the compliance deadline for implementation of Phase 2 of the e-Rule to Dec. 21, 2025 - https://www.epa.gov/compliance/npdes-electronic-reporting-rule-phase-2-extension. The public will be able to view the electronically reported data via the EPA's Enforcement and Compliance History Online (ECHO) system.

[39] *See* EPA's Concrete Wash Out Best Practices available at: https://www3.epa.gov/npdes/pubs/concretewashout.pdf.

of the categories (Part 2.3.3(a) through (e)) this waste belongs to. For disposal of dried concrete, Part 2.3.4 also refers permittees to Part 2.3.3; but provides further instruction to "remove and dispose of hardened concrete waste consistent with your handling of other construction wastes…." presumably meaning Part 2.3.3(e).

Recognizing that the permit provides no clear direction on "actual" discharges of concrete washout from a jobsite and the C&D ELG language appears to allow for it if "managed by appropriate control," AGC finds that more guidance and clarification is needed. EPA also should clarify in Part 2.3.4 exactly which subcategories in 2.3.3 would apply for "disposal of liquid wastes" and "other construction wastes."

V. CONCLUSION

AGC recommends that EPA address our concerns with the deficiencies in the administrative procedures process (regulatory flexibility, cost analysis, small business impacts, and information collection provisions) associated with reissuing the CGP as well as our responses to EPA's proposed changes and requests for public comment. Overall, AGC is very concerned with the increased monitoring, inspection, documentation, and reporting obligations throughout the proposed CGP. AGC strongly opposes changes that would require turbidity meter monitoring in the CGP; extend the waiting period to 30 days; and penalize BMPs that require ongoing routine maintenance---resulting in more documentation and unanticipated costs. AGC members also expressed concern over the new inspection, documentation, and corrective action requirements during construction dewatering operations. AGC further requests EPA remove a proposed 2022 CGP provision that goes beyond the C&D ELG to require operators to check for sedimentation downstream of the point(s) of discharge. AGC also does not support the expanded reporting requirements for photographs that go beyond what is required in the NPDES eReporting Rule. In addition to added cost, these provisions add risk of legal liability. AGC members expressed confusion over the need for additional oil pollution controls and wondered whether the stormwater program was overlapping with other federal requirements, such as the SPCC program.

AGC pointed out several areas where regulated entities would benefit from better clarification and definitions. For example, AGC requests that the CGP clearly define "contaminated site" to include only current CERCLA- or RCRA-involved sites. In addition, AGC members have pointed out that the "other practices" that EPA suggests permittees use when perimeter controls are not technologically possible or not economically practicable on linear sites are themselves not usually possible or practical.

AGC appreciates the opportunity to provide comment on the provision to limit soil disturbance that has not been successfully applied under the 2017 CGP. In general, AGC does not recommend limitations on the amount of land that can be disturbed at a single time. Recognizing that EPA's 5-acre threshold is not practicable, AGC provides some guidance for the agency to consider. On an additional request for comment, AGC and its members have found difficulty providing comment on the need or validity of a course that is not yet been produced. If EPA does produce a training

program, the agency should involve AGC and members of the regulated community in the development.

AGC appreciates the added flexibility for pollution control of some types of construction waste/ materials. The clarification in the permit that permittees may keep stormwater documentation in electronic form also will be helpful. Although, AGC urges EPA to provide some flexibility for projects in areas without internet access. AGC also appreciates the added clarification for seasonally dry periods, but requests more time to review the new tools that EPA introduced and the underlying database. Lastly, AGC appreciates the opportunity to discuss potential modifications to the definition of "operator" to better ensure that all parties with control over the project are permitted.

Respectfully Submitted,

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APPENDIX 1

AGC Comments on EPA's Incremental Cost Impact Analysis for the Proposed 2022 Construction General Permit (CGP)

NOTE: The comments below address EPA's estimated costs of the proposed water quality-based construction dewatering requirements.

US EPA Assumptions:

CGP Applicability

EPA estimated **3,080 projects per year** will be permitted under the 2022 CGP.

- EPA estimated the number of permitted projects likely to be covered under the proposed 2022 CGP by computing the average annual number of permitted projects covered from 2017 – 2020 (complete data is not yet available for 2021). *EPA counted projects in areas where its permit applies (MA, NH, NM, Washington DC, Puerto Rico and other territories as well as most Indian Country lands, and construction projects undertaken by Federal Operators in selected states), not counting those projects permitted in Idaho or Texas which transitioned to a state-administered permit during the term of the 2017 CGP.*

EPA has assumed that the **typical project is approximately 1 year in duration** for purposes of the incremental cost impact analysis, based on projected start and completion dates in the NOI data set.

Dewatering Frequency

The proposed 2022 CGP establishes new requirements for dewatering discharges; however, EPA does not currently collect data regarding the number of permitted projects that are dewatering, the frequency of dewatering, or the volume of dewatered water.

EPA assumptions ("as realistic approximation of the dewatering characteristics of the typical permitted site"):

- EPA assumes the typical project will produce a TOTAL **dewatering discharge 29 days per year per project**.
    - All permitted projects dewater groundwater, on average, 7 days over the life of the typical project.
    - All permitted projects dewater other sources of water from excavations for 22 days over the life of the typical project. This value is derived from the assumption that the typical project will experience 1.8 rainfall events per month producing at least 0.5 inches of precipitation over the typical 12-month project life.

Water Quality-based Construction Dewatering Requirements

EPA is proposing that monitoring requirements would apply to only DEWATERING DISCHARGES TO CERTAIN "SENSITIVE" RECEIVING WATERS (impaired for sediment or listed as Tier 2, Tier 2.5 or Tier 3 for antidegradation purposes.

Proposed Benchmark Monitoring: Require operators discharging dewatered effluent to applicable waters to monitor for turbidity at the point of discharge once per day each day a discharge occurs. The weekly average of turbidity monitoring results is then compared to the corresponding turbidity benchmark value. When the turbidity benchmark is exceeded, or if a sediment plume is observed during discharge, a corrective action is required. Turbidity monitoring values are then reported as an average weekly value within quarterly discharge monitoring reports.

- EPA assumes **850 projects per year** are discharging to waters that would be subject to turbidity monitoring.
- EPA assumes dewatering discharge 29 days/year/project.
- EPA assumes operators at each affected project site will purchase **one turbidimeter per project** to analyze water samples over the permit term (median price of $1,064; the equivalent annualized value of the median is $259.46 based on a 7% interest rate and a 5-year payoff period).
- Each time monitor/test (*must be done 1 time/day at point discharge during dewatering discharge – weekly avg. of turbidity monitoring results compared to benchmark value – if BM value exceeded or plume observed, then corrective action required – report quarterly*) -- EPA estimates the **staff time associated with collecting samples, analyzing samples, performing recordkeeping, and reporting for each monitoring event to be 0.25 hours on average at a labor rate of $36.13 per hour** (BLS, 2020).
- EPA assumes that on average each project will need to implement **one corrective action due to benchmark monitoring** – and assessing/addressing the cause of the turbidity exceedance or visible plume will be **1 hour of labor on average at a labor rate of $36.13 per hour** (BLS, 2020).
- **EPA assumes the total cost for all projects that are subject to the benchmark monitoring alternative requirement is 850 x [259.46 + (29 x 36.13 x 0.25 hours) + (36.13 x 1 hour)] = $473,866.50 (rounded up to $474,000 per year) or $154 per year per permitted project.**

Proposed Informational Indicator Monitoring: Require operators to perform turbidity monitoring at the point of discharge once per day during dewatering discharges. Turbidity monitoring values are reported as an average weekly value within quarterly discharge monitoring reports.

- The informational monitoring alternative estimated costs differ from the benchmark monitoring alternative in that they do not require the performance of corrective actions. **Therefore, EPA estimates the total annual incremental cost attributable to the informational alternative is $444,000 per year, or $144 per year per permitted project.**

AGC Member Feedback:

Construction dewatering occurs on most construction sites to remove accumulated water (precipitation and/or groundwater) in trenches and excavations or in places with an inadequate slope or high-water table. This water must be removed to keep working as scheduled or to provide a safe workplace.

Definition "Dewatering" and "Construction Dewatering Water"

EPA's 2022 CGP defines "dewatering" as the act of draining accumulated stormwater rainwater and/or ground water from building foundations, vaults, and trenches, or other similar points of accumulation (see draft CGP Appendix A). The permit authorizes the discharge of several non-stormwater discharges in Part 1.2.2, including "construction dewatering water" not discharged from a contaminated site and in accordance with Part 2.4.

- For the definition of dewatering, the phrase "other similar points of accumulation" does not describe all the types of dewatering activity in the proposed 2022 CGP Fact Sheet.
- AGC finds it confusing that the proposed 2022 CGP does not specifically define "construction dewatering water;" it is unclear if that term is restricted to accumulated stormwater rainwater and/or groundwater only or if the term also includes water from cofferdams, water diversions, and perhaps other water used during construction activities that must be removed from a work area.

Turbidity Meter

EPA assumes that a turbidimeter would be used for 5 years with a median price of $1,064. If a firm borrows to buy one at 7% interest, the average annual cost is $259.46.

- AGC finds that EPA has underestimated the average cost to each site of purchasing a turbidity meter.
- AGC members similarly report that turbidity meters cost $1000-$1500 each and construction firms would need only one/project; however, the device typically would not last five years. Each instrument would need to be replaced after three to four years of use, on average.

Dewatering Frequency

EPA assumes the typical project subject to turbidity monitoring will produce a dewatering discharge 29 days per year per project.

- AGC finds that EPA has significantly underestimated the number of days a "typical" construction site produces a dewatering discharge.
- AGC members report that dewatering occurs frequently (much more than 29 days/year and sometimes daily) on "earthworks" projects, which generally refers to construction projects that involve the processing of soil to create holes or to level the ground (e.g., prepare the land for building roadways, railways, tunnels and bridges or to prepare the construction of drainage and sewage pipe systems).[1]
    - Also note, most linear projects will have several deep excavations at any one time with more than one discharge point. EPA's cost analysis assumes only one point of discharge per dewatering event.
    - For example, for large projects (wind/solar project sites), contractors often dewater up to 15 excavations at once, after every rain event.
- AGC members report that dewatering occurs frequently (much more than 29 days/year and sometimes daily) on bridge construction and on projects where piers, abutments, bulkheads,

[1] Dewatering operations may occur during a wide range of activities on construction sites including demolition of pavement or structures; grading (including cut and fill slopes); channel excavation; channel paving; trenching and underground drainage; installation of underground drainage facilities; drainage inlet modification; utility trenching; utility installation; structure excavation; bridge or structure construction; miscellaneous concrete work; sound or retaining wall construction; and planting and irrigation.

retaining walls, or other structures are being built, removed or maintained in areas with flow or standing water (e.g., creeks, rivers, lakes, wetlands, etc.) as well as on projects that are adjacent, below, within or near surface waters. This may involve the use of a water diversion or cofferdam to facilitate work in a dry area.

- Event EPA's proposed CGP Fact Sheet at page 63 notes that construction dewatering "can be either ***continuous*** or episodic, and are more similar to industrial wastewater discharges" [emphasis added].

Collecting Samples, Analyzing Samples, Recordkeeping and Reporting
EPA assumes 850 projects per year are discharging to waters that would be subject to turbidity monitoring.

- AGC finds that EPA has underestimated the number of projects per year that would need to perform turbidity monitoring. AGC members point out that in New Hampshire, all waters are Tier 2 except where listed as impaired for the most current approved assessment cycle. In Massachusetts, any wetland could be a Tier 2.5 water.

EPA estimates the staff time associated with collecting samples, analyzing samples, record keeping for each monitoring event to be 0.25 hours at labor rate of $36.13 per hour (BLS, 2020).

- AGC finds that EPA has significantly underestimated the cost to permittees of performing the proposed benchmark monitoring of dewatering discharges at construction sites.
- Turbidity monitoring with a turbidity meter must be done by a trained person and the meter must be calibrated as per the manufacturer's instructions. EPA requires turbidimeters to be re-calibrated on a quarterly basis and site operators must verify the accuracy of the readings periodically. The instrument needs to be cleaned and maintained before/after each use (that alone typically takes 15 minutes, per AGC members).
- A manual grab sample method requires crews to be at each sampling location with short notice. For linear projects, the stormwater discharge points are not always easily accessible and may be spread out over many miles. EPA has not accounted for the staff and/or consultant time to travel to the site and to access the outfall locations.
- Many construction firms would need to hire a third-party consultant to perform the sampling at a flat fee of approximately $100 per hour (independent mid-level engineer/consultant costs $100/hour). It is standard practice for consultants to charge the construction company for travel time "port to port." AGC members estimate the consultant would bill 2 to 4 hours to collect one sample at one outfall point (collect sample, analyze sample, perform recordkeeping/reporting) and add an additional 15 minutes per outfall on the same project.
- Most construction firms have no prior experience with a stormwater monitoring program and do not have in-house staff available and/or trained to collect and analyze grab samples as part of benchmark monitoring. There would be notable costs associated with training jobsite staff on appropriate standardized procedures for sample collection, sample analysis, and data reporting.
- AGC members estimate it would take 1 to 3 hours of "in-house" staff time to collect one sample at one outfall point (collect sample, analyze sample, perform recordkeeping/ reporting) and add an additional 15 minutes per outfall on the same project. This employee

would be paid at a rate of between $55-$65/hr. with factors such as employee pay, insurance benefits, retirement benefits factored in, according to AGC-member feedback.
    - Accuracy is strongly affected by proper sample collection, handling, and analysis methods.

Corrective Action and Sediment Control Methods

EPA assumes each project will need to implement only one corrective action (due to benchmark monitoring) and that addressing the cause of the exceedance will entail 1 hour of labor at a labor rate of $36.13 per hour (BLS, 2020).

- AGC finds that EPA has significantly underestimated the added costs associated with performing corrective action under the proposed dewatering requirements.
- AGC members report that a 50 NTU benchmark limit would require frequent corrective action on many projects.
- Natural background levels of turbidity can exceed 1,000+ NTU in some streams.
- In many cases, even "enhanced" stormwater controls in combination with "conventional" erosion and sediment control BMPs (such as fiber mulch, silt fences, and sediment traps) may not consistently achieve turbidities below 280 NTU, especially for sites with steep slopes, highly erodible soils, and high intensity precipitation events. For some sites with challenging circumstances, the use of chemical coagulants or electrocoagulation would likely be necessary to meet turbidity limits consistently.
- EPA's economic analysis does not include additional costs associated with "enhanced" BMPs or passive coagulation or active treatment, all of which may be necessary to meet the benchmark limit.
- EPA also does not factor in the cost for a contractor to send the consultant back out to the jobsite to figure out what must be corrected and to prepare a report. The consultant likely will go back to the jobsite to re-inspect and make sure everything is okay.
- Failure to take prompt corrective action would be a permit violation and subject to enforcement action and penalties.
- 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.

Table ES-1. Summary Comparison of Major Classes of Turbidity Reduction Technologies.

Sediment Control Method	Expected Achievable Turbidity Range	Reliability	Monitoring & Maintenance Required	Relative Cost
Conventional BMPs	500-2,000 NTU	Low	Low	Low
Enhanced Conventional BMPs	100-500 NTU	Low	Low	Moderate
Passive Coagulation	20-500 NTU	Moderate	Moderate	Moderate
Active Treatment	1-20 NTU	High	High	High

Source: *Turbidity Reduction and Monitoring Strategies for Highway Construction Projects*, Prepared for American Association of State Highway and Transportation Officials Standing Committee on

Environment by GeoSyntec Consultants, Inc and Venner Consulting, Inc., July 2012 – online at http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25(74)_FR.pdf

Increased Inspection Frequency and Recordkeeping for Sites While Dewatering
EPA estimates staff time associated with performing new inspections and performing associated inspection recordkeeping to be on average 0.25 hours per inspection event.

- EPA has underestimated the costs of requiring increased inspection and recordkeeping oversight of dewatering discharges.
- For sites discharging dewatering water, EPA's proposed CGP would increase the number of inspections required while the dewatering discharge is occurring to once per day and impose a brand new tailored checklist of problems to review and record during the inspection (times, estimated rate, and visual qualities of discharge, and photos of dewatering controls and discharge). EPA's proposed Fact Sheet states that neither the default inspection frequency in Part 4.2.2 (either weekly or biweekly and within 24 hours of a 0.25 inch storm) nor the increased inspection frequency for discharges to sensitive waters in Part 4.3.1 is likely frequent or targeted enough."

Missing Benefits Analysis

- EPA's draft economic analysis does not address environmental benefits with its numeric turbidity limit.
- EPA's benefit's assessment completed for the C&D ELG estimated that construction sediment discharges represent approximately 0.15 percent of total sediment to surface waters, and that removing all construction sediment discharge would lead to only a 0.25 percent reduction in baseline total suspended solids levels. Source: U.S. Environmental Protection Agency, *Environmental Impact and Benefits Assessment for Final Effluent Guidelines and Standards for the Construction and Development Category*, November 2009, p. 6-26.

Overlap/Duplication with Existing State Programs

- AGC members report that both New Hampshire and Massachusetts already administer dewatering/water appropriation permits. Depending on the nature of the dewatering activities at a given site, one or more general permits already may be applicable: The Construction Dewatering General Permit, the Remediation General Permit, or the Construction General Permit.
    - Subject to limitations and eligibility requirements, EPA Region 1 has issued a Construction Dewatering General Permit (DGP) that authorizes pumped or drained discharges of uncontaminated stormwater or groundwater from excavations or other points of accumulation associated with construction activity that disturbs less than one acre of land in Massachusetts and New Hampshire. https://www.wayland.ma.us/sites/g/files/vyhlif4016/f/uploads/cgp-dgp-rgp-flow-chart.pdf
    - In addition, EPA's NPDES Remediation General Permit (RGP) for MA and NH may apply; this permit authorizes discharges from contaminated sites as well as a collection of miscellaneous discharges that may be contaminated. https://www.epa.gov/npdes-permits/remediation-general-permit-rgp-massachusetts-new-hampshire