



## DISCUSSION DOCUMENT: U.S. EPA's DRAFT 2017 CONSTRUCTION GENERAL PERMIT

**Proposal:** **Mandatory Public Reporting (Online) of Construction Site Stormwater Management Plans**

### **BACKGROUND:**

The U.S. Environmental Protection Agency's (EPA) draft 2017 CGP considers a new first-time provision that would impose additional mandatory reporting requirements on all construction site "operators" (e.g., landowners, developers/builders and general contractors). Specifically, EPA would require each site operator to include his/her entire initial Stormwater Pollution Prevention Plan (SWPPP), a portion of it, or a URL, as part of the Notice of Intent (NOI) form submission, which EPA would then make publicly available through its **Enforcement and Compliance History Online (ECHO)** website. EPA's CGP serves as a model for the nation: history has shown that NPDES-authorized states follow EPA's lead in adopting new, more stringent permit provisions.

- Under the 2012 CGP, permittees must provide copies of their SWPPPs, upon request, to only: EPA; a state/tribal/local agency approving stormwater management plans; the operator of a storm sewer system receiving discharges from the site; or representatives of USFWS or NMFS. EPA will provide access to portions of a SWPPP to a member of the public only upon request.

### **AGC'S CONCERNS (DRAFT LIST):**

*Mandating public availability of SWPPPs is not feasible, for the following reasons:*

- 1. Unreasonable, unprecedented paperwork burden for both permittees and States.** More than 200,000 construction starts every year could be required to submit initial compliance plans, which can range from hand written sediment control maps on single family sites to 300+ page binders full of CAD drawings for large commercial construction projects.
- 2. Published data would be "stale" as soon as it hits the Web.** Construction sites are temporary and every changing. Stormwater plans are meant to be "live" working documents that must be revised frequently – sometime daily – to comply with the terms/conditions of EPA's CGP. Providing the public with outdated SWPPP information will only cause confusion and subject the construction sector to unfair scrutiny. It will likely lead to unsubstantiated citizen complaints (or, even worse, frivolous citizen suits) – which will, in turn, force needless government inspections and thwart construction work, including critical infrastructure improvements that are necessary to environmental gains; all of this will waste government's limited resources and taxpayer dollars.
- 3. Lack of safeguards to prevent data from being misconstrued, taken out of context, simply misunderstood, or even misused.**
- 4. Unauthorized release of proprietary and confidential business information without proper agency/FOIA screening.** Not only the well-motivated but also anyone at odds with any party to the construction and development process, for any business, political or other reasons could easily access and make extensive use of the central database that the agency plans to make available. The ready availability of this site-specific information would empower businesses to search for their competitors' propriety or

otherwise confidential information. The system would completely circumvent the Freedom of Information Act, and the limitations that it expressly imposes on the disclosure of government records.

**5. ECHO Database was never intended to hold SWPPP plans from general permit holders.** A wide range of stakeholders negotiated over a two-year period with EPA to reach consensus on what construction stormwater permit data must be shared with EPA (and then, presumably, with the public via the Web), under the new **NPDES Electronic Reporting Rule**. General permit SWPPPs were specifically left out (see Appendix A to 40 CFR Part 127). With only nine months left until the current CGP expires, EPA should focus its limited time and resources on effectively implementing the mandatory e-Reporting rule provisions in its new 2017 CGP. (EPA will be the 1<sup>st</sup> NPDES permitting authority to do so and will set an important precedent for states to follow.) Last minute “add-ons” -- in the midst of an already insufficient 45-day comment period on the draft CGP -- will result in unintended consequences, as further explained in this document.

- The codified text of the final NPDES e-Reporting rule does not require EPA to post the NPDES stormwater permit data it collects (from permittees and states) on the **Enforcement and Compliance History Online (ECHO)** website. However, the rule’s preamble text states: “[s]eparate from this rulemaking, EPA *intends* to make this more complete set of data available electronically to the public, to *promote transparency and accountability* by *providing* communities and *citizens with easily accessible information* on facility and government performance” (*emphasis added*).
- Accordingly, the e-Reporting rule appropriately makes several distinctions (allows certain flexibility) for the construction sector based on the large and transient number of CGP permittees (approximately 200,000 new construction site locations each year) including: (1) a hybrid approach for construction NOI submittals, (2) temporary waivers from e-Reporting, and (3) qualification that an authorized NPDES state is only required to share with EPA SEV (single event violation) data from a construction stormwater inspection when the authorized NPDES program also issues a formal enforcement action against the inspected construction site.

**6. Permit contains no discussion of how to prevent release of national security and public safety data.** A paramount concern is protecting sensitive material that could cause damage or be prejudicial to national security or safety, if publicly available.

- AGC and NAHB members are concerned about the security of their jobsites.
- Many AGC members build infrastructure (tunnels, airports, federal bldgs) – public access to those design plans is an issue of national security.

**7. Larger volumes of poor data will lead to dilution of enforcement resources.** EPA’s NPDES e-Reporting rule is frequently referenced in government literature as a prominent “Next Generation of Compliance” example that will bring about enhanced transparency and public accessibility of required NPDES documentation, which are Agency priorities and, according to EPA, will better enable the goals of the CWA to be met. Conversely, public accessibility (online) of SWPPPs would run counter to EPA’s “NextGen” principles and goals of enabling regulators to more easily monitor and ensure compliance, resulting in better environmental performance. Rather, it would make regulators less efficient because it would lead to “false alarms” and dilute resources. High volumes of poor information can be a dangerous thing when asking an uninformed public to serve as government’s “watchdogs.”

**8. Agency resources should be directed to education and onsite compliance assistance for both enforcement staff and industry; not to delegating all phases of the regulatory enforcement process to 3<sup>rd</sup> parties.** Even EPA’s own enforcement staff often disagrees on what is (or is not) a permit violation in the SWPPP context. For example, the regulated community has been subjected to inconsistent interpretations regarding whether (or not) an onsite error/omission that violates a company’s SWPPP – but

is not counter to a CGP term or condition – amounts to an enforceable action. Industry has long expressed concerns regarding inspectors’ lack of knowledge of the construction process and inconsistent enforcement practices. Problems will only get worse if EPA opts to make the public active participants in enforcement actions. By making un-validated data readily available to the untrained community, EPA would be, in essence, delegating its inspection, investigation, and information collection and review obligations to third parties.

- 9. EPA has not demonstrated how collecting and sharing site-specific stormwater control information will lead to tangible improvements in water quality.** If anything, this practice may become a reason for “operators” to include *bare minimum* controls in their SWPPPs, as a way to limit public analysis, examination and inquiry – and avoid paperwork violations. Indeed, it appears that this information would remain on EPA’s website long after the project is complete and the construction site “operators” have terminated their permit coverage (and any associated Clean Water Act responsibility associated with the site).
- 10. EPA has not documented any need for the public to review site-specific stormwater control information from transient, temporary sources or how the public gains any useful information from reviewing *probably* outdated site plans or erosion and sediment control practices.** Tips should come from people who actually observe pollutant discharges that have environmental consequences – not from people who scan paperwork online.
- 11. Although a similar reporting requirement was included in the most recent 2015 Multi-sector General Stormwater Permit (MSGP) for industrial sites, active construction is different.** The utility and feasibility of such a provision as it applies to stormwater discharges associated with industrial activities is not readily transferable to the construction sector setting. Unlike construction site SWPPPs, most industrial site SWPPPs are modified only a few times a year. Facilities are permanent; operations are routine and consistent. The perennial and temporary nature of active construction starts means they need to be treated differently.
- 12. It is not appropriate for EPA to increase the amount of information required from NPDES regulated entities without undergoing a formal rulemaking process that adheres to all of the Administrative Procedures Act procedures at 5 U.S.C. 553.** For example, the Paperwork Reduction Act (PRA) stipulates that every federal agency must obtain approval from the Office of Management and Budget (OMB) before collecting the same or similar information from 10 or more members of the public. The omission of any discussion of the PRA in the draft CGP deprives the public an opportunity to submit comments on cost, burden or difficulties associated with online SWPPP reporting, and thus represents a clear violation of the APA.

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