



**EPA STORMWATER INSPECTION AND ENFORCEMENT
POLICIES AND GUIDANCE
OVERVIEW OF DOCUMENTS PERTAINING TO
THE CONSTRUCTION INDUSTRY**



The documents listed below are some of the U.S. Environmental Protection Agency (EPA) policies, guidance, and strategies used to monitor compliance—and initiate enforcement—under the Clean Water Act (CWA) stormwater permit program. This listing is not complete and EPA may also rely on other policy and guidance documents in its compliance monitoring and/or enforcement actions.

**NATIONAL POLICY ON THE ROLE OF THE EPA INSPECTOR IN PROVIDING
COMPLIANCE ASSISTANCE DURING INSPECTION**

As outlined in the *Final National Policy: Role of the EPA Inspector in Providing Compliance Assistance During Inspections* (Suarez, 2003), the role of the inspector is to determine compliance with environmental regulations and enforcement agreements. The policy also describes when it is acceptable for the inspector to provide limited, site-specific compliance assistance.

Under this policy, compliance assistance is defined as “providing tools or regulatory assistance to the facility during an on-site compliance inspection to help the facility understand and comply with federal environmental regulations/requirements.” Acceptable compliance assistance activities generally include providing information on relevant materials published by EPA.

The EPA inspector is tasked with noting any corrective actions taken by the facility to fix or correct potential violations during the inspection and including them in the inspection report. This does not, however, exclude the facility from enforcement action if the potential violation is deemed appropriate and there is ample evidence to support it.

Under the policy, it is not appropriate for inspectors to provide site-specific, interpretive technical and legal guidance during compliance inspections. The policy also limits EPA inspectors to providing assistance on state regulations only when they are identical to federal regulations.

The document is online at—

<http://www.epa.gov/compliance/resources/policies/monitoring/inspection/inspectorrole.pdf>.

NPDES COMPLIANCE INSPECTION MANUAL

The *National Pollutant Discharge Elimination System (NPDES) Compliance Inspection Manual* (EPA 305-X-04-001, July 2004) provides guidance on NPDES inspections of stormwater discharges associated with construction and other industrial activities. These procedures are fundamental to the NPDES compliance program and provide inspectors with a method for conducting inspections. NPDES inspection protocols related to construction stormwater runoff are at Chapter 11 and Appendix S of the manual.

The document is online at—

<http://www.epa.gov/compliance/resources/publications/monitoring/cwa/inspections/npdesinspect/npdesmanual.html>.

2000 STORMWATER COMPLIANCE AND ENFORCEMENT STRATEGY

In early 2000, EPA issued the *2000 Stormwater Enforcement Strategy Update* (Schaeffer, 2000). Prior to the issuance of this strategy, EPA relied on outreach to companies as its main tool for bringing industrial and construction site stormwater dischargers into compliance. With regard to construction activities, EPA would defer to state or local agencies with effective programs for inspection and enforcement actions. In instances where no such programs existed, EPA focused its enforcement activities on identifying and taking appropriate action against the nonfilers posing the greatest potential impact on waterways.

The document is online at—

<http://www.epa.gov/Compliance/resources/policies/civil/cwa/stmwtrstra.pdf>.

2003 STORMWATER COMPLIANCE AND ENFORCEMENT STRATEGY

EPA's *2003 Stormwater Compliance and Enforcement Strategy* (Smith & Stahl, 2003) provides a more focused effort to respond to violations of EPA's construction stormwater permit requirements. The 2003 strategy cites EPA's *Report to Congress on the Phase I Stormwater Regulations* (U.S. EPA, 2000) which estimates that only about one-third of regulated construction sites have actually applied for permit coverage in any given year. According to inspectors, of those sites that have applied for permit coverage, noncompliance with permit requirements remains significant. In response, the 2003 strategy requires EPA Regions to develop strategies to address noncompliance.

Part I of this strategy is a sector-based enforcement model for large construction activities. It states that EPA will focus its efforts on several large developers responsible for a majority of the nation's construction activities. These companies fall into two categories: (1) commercial developers of "big-box" stores and (2) large national residential developers. The strategy calls for EPA to identify the corporations to be investigated and then send Section 308 information requests to their corporate headquarters. (CWA Section 308 gives EPA the authority to gather information involving potential violations by specific individuals or entities.) The purpose of the information collection activities is to attempt to document a trend of corporate-wide noncompliance and respond with re-inspections, Notice of Violations letters, Expedited Settlement Offers, or other enforcement actions.

For smaller construction sites, the strategy focuses initially on providing compliance assistance through outreach activities (for fiscal years 2003-2005). For fiscal years 2005-2008, however, compliance and enforcement priorities should shift away from outreach activities toward identifying those who have failed to submit a timely and complete permit application.

The document is online at—

http://www.agc.org/content/public/PDF/Environmental_Info/stwenfstrategy2003.pdf.

THE CLEAN WATER ACT: STORMWATER STRATEGY SUMMARY OF 2005-2007

In November 2004, EPA's Office of Enforcement and Compliance Assurance (OECA) established its national priorities for fiscal years 2005 through 2007. Stormwater was among the items selected for prioritization in monitoring, compliance assistance, enforcement, and cleanup actions. Increasing overall compliance with EPA's construction stormwater program is identified as a specific priority.

The document is online at—

<http://epa.gov/compliance/resources/publications/data/planning/priorities/fy2005prioritycwastorm.pdf>.

THE CLEAN WATER ACT: STORMWATER STRATEGY SUMMARY OF 2008-2010

Increasing overall compliance with EPA's construction stormwater program continues to be listed among OECA's enforcement priorities through 2010. The agency's enforcement agenda for fiscal years 2008 through 2010, released in October 2007, announces EPA's plans to continue its crackdown on stormwater runoff violations.

EPA plans to target developers of big-box retail stores as well as producers of sand and gravel, crushed stone and ready-mix concrete. "The size and diversity of these sectors, and the levels of observed noncompliance, reveal the problem to be national in scope," the agency wrote in a summary of its stormwater strategy." The agency is also studying whether to focus on water pollution from ports, road building, and federal facility construction.

The document is online at—

<http://epa.gov/compliance/resources/publications/data/planning/priorities/fy2008prioritycwestorm.pdf>

CIVIL PENALTY POLICIES

EPA has issued a number of policy documents addressing the assessment of civil penalties for CWA violations. Among other things, these policies describe how the government will determine fines and seek settlement agreements—

EPA Revised CWA Section 404 Settlement Policy issued Dec. 21, 2001
<http://www.epa.gov/compliance/resources/policies/civil/cwa/404pen.pdf>

EPA Civil Penalty Policy for CWA Section 311(b)(3) and Section 311(j) issued Aug. 1998
<http://epa.gov/compliance/resources/policies/civil/cwa/311pen.pdf>

EPA Issuance of Revised Interim CWA Settlement Penalty Policy issued Feb. 28, 1995
<http://www.epa.gov/compliance/resources/policies/civil/cwa/cwapol.pdf>

EXPEDITED SETTLEMENT OFFER (ESO) PROGRAM FOR CONSTRUCTION STORMWATER

EPA first launched its Expedited Settlement Offer (ESO) Program in August 2003 to compel compliance with the construction site stormwater permit requirements. This national ESO enforcement initiative offers a faster, less burdensome way for construction professionals to resolve (and EPA inspectors to enforce) minor construction site stormwater violations with relatively small penalties, according to EPA. The 2003 ESO Policy memo and related forms are online at—

<http://www.epa.gov/Compliance/resources/policies/civil/cwa/esoprogramstormwater.pdf>.

In May 2007, based on feedback from AGC via the association's Sector Strategies partnership with EPA, the agency made the following improvements to its ESO program:

- EPA added the following language to the ESO instructions: "If you believe that the alleged violations are without merit (and you can provide evidence contesting the allegations) you must provide such information to EPA as soon as possible but no later than THIRTY (30) days from your receipt of the Agreement." AGC contractors had opposed the inability to contest alleged violations identified in the Expedited Settlement Agreement.
- The revised ESO package includes a Preliminary Inspection Observations Form, which is a checklist of potential deficiencies noted during the inspection. The form imposes no obligations on site operators, but the checklist will afford operators an opportunity to achieve prompt compliance if they so choose. AGC

members had expressed a desire for inspectors to clearly and explicitly describe all problems identified so they can remedy the problems immediately rather than wait until they receive the enforcement response.

- Previously, you had to be a first-time violator to be eligible for an ESO, which was another point of contention by some AGC contractors. EPA has changed the requirement to “not a repeat violator.” This means no violation of a stormwater permit within the past five years at the facility (e.g., construction site) where the instant violation occurred, or at two or more facilities under the ownership, operation, or control of the operator.
- EPA also eliminated the 50-acre cap for ESO eligibility.
- The new ESO program ensures that penalties for noncompliance with permit conditions will not exceed penalties for not having a permit. AGC had pointed out that previously the penalty for failure to prepare a Stormwater Pollution Prevention Plan (SWPPP) was less than for a SWPPP with many deficiencies.

The 2007 ESO Policy will be available soon on EPA’s Compliance and Enforcement Web site at—
<http://www.epa.gov/compliance/>.

Where a construction site operator declines the offer for expedited settlement, EPA may pursue more formal enforcement measures to correct the alleged violation(s) and seek penalties of up to \$32,500 per day per violation. EPA and the states work in partnership to address stormwater noncompliance throughout the nation.

SELF-AUDIT POLICIES

On May 11, 2000, EPA published its revised final policy on *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, commonly called the “Audit Policy.” This revision replaced the 1995 Audit Policy (issued on December 22, 1995) and became effective on January 22, 1996. The purpose of this revised policy is to provide incentives to regulated facilities to voluntarily disclose violations of federal environmental requirements. Incentives under the policy include reduction of the gravity-based portion of the entity’s penalty by 75 to 100 percent, no obligation to provide audit reports, as well as the decision by EPA to generally not seek criminal prosecution so long as the self-policing, discovery, and disclosure were made in good faith and the entity seeks to prevent recurrence by implementing a systematic approach to prevention. There are nine criteria an entity must meet in order to receive relief from gravity-based penalties. If an entity meets all nine criteria (briefly listed below), EPA will not seek gravity-based penalties.

- Systemic Discovery of the Violation Through an Environmental Audit or a Compliance Management System
- Voluntary Disclosure
- Prompt Disclosure
- Discovery and Disclosure Independent of Government or Third Party Plaintiff
- Correction and Remediation
- Prevent Recurrence
- No Repeat Violations
- Other Violations Excluded
- Cooperation with EPA

At the same time as the issuance of the revised Audit Policy in 2000, EPA revised its *Small Business Compliance Policy*, commonly called the “Small Business Policy.” Its goals are much the same as those of the Audit Policy: to bring small businesses into environmental compliance by providing incentives for the voluntary discovery, disclosure, and correction of violations. There are, however, some differences between the Audit Policy and Small Business Policy.

EPA uses two components in the policy to induce small business to voluntarily disclose violations: waiving or reducing penalties so long as the business makes a good faith effort to disclose and correct the violation; and deferring to state, local, or tribal governments that offer these incentives.

EPA's Audit Policies are online at—

<http://cfpub.epa.gov/compliance/resources/policies/incentives/auditing/>.

In 2005, EPA released *Protocol for Conducting Environmental Compliance Audits under the Stormwater Program*, which includes detailed regulatory checklists to assess environmental performance in the stormwater program. This document is online at—

<http://www.epa.gov/compliance/resources/policies/incentives/auditing/apcol-stormwater.pdf>.

MATERIALS PREPARED BY:

Leah F. Pilconis
Consultant on Environmental Law & Policy
Senior Environmental Advisor to
The Associated General Contractors of America
Phone: 703-837-5332
Fax: 703-837-5401
E-mail: pilconisl@agc.org

November 26, 2007