

C&D Industry Stakeholder Meeting
Hosted by NAHB and AGC
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ELG Background and Stormwater
Developments

Presented by:

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Effluent Limitations Guidelines 101

CWA Two-Part Approach – Part 1

- Technology-based effluent guidelines are established nationally by EPA within an industry category.
- Once established, these “best available technology” requirements replace the permit writer’s “best professional judgment.”

Effluent Limitations Guidelines 101

CWA Two-Part Approach – Part 2

- Water quality-based effluent limitations are site-specific determinations that account for the current quality of the receiving water and the state's use classification for that water.
- State or national criteria may be applied in the absence of site-specific data.

Key: ELGs set the permitting minimum requirements with BAT. Water quality issues then are addressed on a permit-specific basis.

Effluent Limitations Guidelines 101

- EPA writes ELGs for all types of industrial discharges – from manufacturing, agricultural, and service industries.
- EPA has issued ELGs for 56 industries. EPA estimates that these regulations have prevented the discharge of more than 690 billion pounds of pollutants each year.

C&D ELG Rulemaking

- Aug. 31, 2000 – EPA Identified C&D industry as a category for ELG development (65 FR 53,008).
- June 24, 2002 – EPA proposed C&D ELG and other options for controlling stormwater discharges from construction sites (67 FR 42,644):
 - Option 1: Modify existing NPDES regs to include new inspection and certification requirements;
 - Option 2: National categorical ELGs;
 - Option 3: Continue to rely on existing permit requirements and BPJ of each permitting authority.

C&D ELG Rulemaking

- April 26, 2004 – EPA chose Option 3 as its “final action” based on public comments it received on proposed rule, economic impacts associated with other options, and its determination that C&D stormwater discharges consist predominantly of conventional pollutants (69 FR 22,472).

C&D ELG Litigation

- Aug. 30, 2004 – NGOs file petition for review in 9th Circuit Court of Appeals.
- Oct. 6, 2004 – NGOs file complaint in federal district court alleging EPA failed to comply with a non-discretionary duty to promulgate ELGs under the CWA (while moving to dismiss 9th Cir. Petition).
- Dec. 15, 2004 – 9th Cir. grants NGO motion to dismiss.

C&D ELG Litigation

- Dec. 30, 2004 – NGOs file motion for reconsideration seeking to reinstate 9th Cir. petition, which is granted without the 9th Cir. taking a position regarding jurisdiction.
- NY and CT are allowed to join NGOs in district court litigation, while NAHB and AGC already had joined EPA in defense of EPA's C&D ELG actions.

C&D ELG Litigation

- Aug. 29, 2005 – District court determines that it has subject matter jurisdiction, finding that EPA failed to “approve or promulgate” ELGs or NSPS as required by the CWA.
- June 28, 2006 – District court granted NGO/States motion for partial summary judgment and denied EPA/industry motions.
- Dec. 5, 2006 – District court enters permanent injunction and judgment against EPA, requiring it to promulgate ELGs ASAP and no later than Dec. 1, 2009.

C&D ELG Litigation

- Court included yearly milestones and status report obligations.
- Jan. 30, 2007 – NAHB/AGC and EPA file appeals in 9th Circuit.
- Opening briefs due Sept. 7, 2007.

Construction General Permit

- July 1, 2003 (68 FR 39,087) and August 4, 2003 (68 FR 45,817), EPA issued CGP for areas for which EPA is the permitting authority (note that EPA also modified the CGP in early 2005).
- CGP slated to expire on June 30, 2008.
- NGOs and certain industries filed petitions for review, that were consolidated in the 7th Circuit Court of Appeals.

Construction General Permit

- Issues included fundamental challenges to EPA general permitting processes (NOI process, ESA certification, BMP selection, etc.), and Oil and Gas issues.
- 7th Circuit dismissed several claims based on NGO failure to demonstrate standing, and found for EPA that NOI and ESA certification processes were consistent with CWA and ESA statutes.
- No subsequent appeals.

Subsequent Developments that May Impact future CGP

- EPA preparing to publish revised industrial general permit (MSGP), and we look forward to seeing how the Agency handles issues similar to those raised before 7th Cir. (as well as other key issues).
- EPA has initiated national and regional enforcement initiatives relating to construction of large retail stores and home builders, among others.

Subsequent Developments that May Impact future CGP

- National Academies of Science – EPA grant to review stormwater program and report back to EPA (due Sept. 2008).

Specific Tasks

- Clarify link b/w stormwater discharges and ambient WQC.
- Consider how useful monitoring is to determine potential impact of discharges and adequacy of SWPPPs.
- Evaluate the relationship b/w SWPPP implementation and in-stream WQ.
- Recommend how to stipulate permit requirements to ensure WQS.
- Assess design of EPA's current stormwater program under the CWA.

Subsequent Developments that May Impact future CGP

- Other state CGP-like permits:
 - *E.g.* California CGP proposal contains possible restrictions based on flow and action levels (quasi-NEs).
- MS4 Program – the MS4 program has specific construction discharge mandates.
 - GAO Report (May 2007)
 - Phase I/Phase II
 - New Mexico (new Phase II permits issued by EPA)

Other Considerations for CGP

- Local Qualifying Programs – simplify the incorporation of LQPs into the CGP concept (*i.e.* list LQPs on EPA website?).
- Add “Single Lot” permitting option.