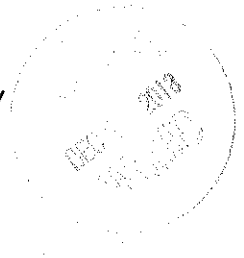




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
5 Post Office Square, Suite 100
BOSTON, MA 02109-3912



CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DEC 1 2018

Pete LaFlamme
Director
Watershed Management Division
Vermont Department of Environmental Conservation
1 National Life Drive
Montpelier, VT 05620-3522

Re: Request for Clean Water Act (CWA) Section 401 Certification for a Modification to the National Pollutant Discharge Elimination System (NPDES) 2017 Construction General Permit (CGP)

Dear Mr. LaFlamme,

The U.S. Environmental Protection Agency (EPA) is proposing a permit modification to the National Pollutant Discharge Elimination System (NPDES) 2017 Construction General Permit (CGP), which covers stormwater discharges from construction activities that disturb one or more acres of land, or less than one acre and is part of a common plan of development or sale that will ultimately disturb one or more acres of land, in areas where the EPA is the NPDES permitting authority.

The 2017 CGP became effective on February 16, 2017. Within the period of judicial review after the EPA issued the 2017 CGP, both the National Association of Home Builders (NAHB) and the Chesapeake Bay Foundation (CBF) filed petitions for review of the permit in the D.C. Circuit Court. Based on new information provided to the EPA, the Agency is proposing a permit modification through notice and comment proceedings to clarify the EPA's intent of certain permit requirements. The proposed modification includes removing examples of the types of parties that could be considered operators in the definition of operator; aligning three requirements that implement the Construction and Development Effluent Limitations Guidelines (ELG) and New Source Performance Standards (NSPS) more closely with the ELG text; and clarifying individual operator responsibilities in multiple operator scenarios. The litigation has been held in abeyance while the EPA pursues this permit modification. Copies of the draft modified permit and the accompanying fact sheet are available at <https://www.epa.gov/npdes/proposed-modification-2017-construction-general-permit-cgp>.

The EPA may not issue a permit authorizing discharges into waters of your jurisdiction until the Vermont Agency of Natural Resources Department of Environmental Conservation has granted certification under Clean Water Act (CWA) section 401 or has waived its right to certify. 33 U.S.C. § 1341(a)(1); 40 C.F.R. 124.53(a). Under EPA's CWA section 401 certification regulations, all jurisdictions are required to waive, grant, or deny certification based on the *draft* permit, not the final "as

issued” permit. See 40 C.F.R. 124.53(c)-(e). By means of this letter and the transmittal of the draft modified permit and fact sheet, the EPA is requesting that you make a written determination regarding certification of the modified 2017 CGP under CWA section 401. Please note that the draft modified 2017 CGP includes all of the conditions that were submitted to the EPA with previous certifications.

- **If you previously certified (with or without conditions) the 2017 CGP, or if you denied or waived certification of the 2017 CGP, or if you received Treatment as a State (TAS) for CWA §303(c) and §401 after the issuance of the 2017 CGP on January 19, 2017, and you would now like to certify (with or without conditions) the draft modified permit, or revise, or delete any of your previous conditions, or add new conditions:** You must submit your certification, in writing within 60 days of receipt of this letter, and it must include any specific conditions necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of State law. 33 U.S.C. § 1341(d); 40 C.F.R. 124.53(c)(3) and (e)(1). If you believe that any condition(s) more stringent than those contained in the draft modified permit is necessary to meet the requirements of either the CWA or State law, you should include such condition(s) and, in each case, cite the CWA or State law reference upon which that condition(s) is based. Failure to provide such a citation waives your right to certify with respect to that condition(s). 40 C.F.R. 124.53(e)(2). The certification must include a statement of the extent to which each condition of the draft modified permit can be made less stringent without violating the requirements of State law, including water quality standards. Failure to provide this statement for any condition(s) waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process. 40 C.F.R. §124.53(e)(3). **Please send both an official copy and a Word Document version (if official copy is not in Word) of your new or modified certification so the EPA can copy and paste your conditions into the final modified permit. If you previously certified the 2017 CGP with conditions, you should clearly indicate, preferably through redline strikeout, how any new or modified conditions should be integrated with your previous conditions in the CGP, or clearly state that your new certification conditions replace the previous conditions in their entirety.**
- **If you previously certified (with or without conditions) the 2017 CGP, or if you denied or waived certification of the 2017 CGP, or if you received Treatment as a State (TAS) for CWA §303(c) and §401 after the issuance of the 2017 CGP on January 19, 2017, and would now like to deny certification of the draft modified permit:** You must notify the EPA, in writing within 60 days of receipt of this letter, that you deny certification of the modified 2017 CGP. If you deny certification of the modified 2017 CGP, the final modified permit will not be considered issued in your jurisdiction and will therefore not be available for use in authorizing discharges from regulated construction activities.
- **Regardless of whether you certified (with or without conditions) the 2017 CGP, or denied or waived certification of the 2017 CGP:** You may waive your right to certify the modified 2017 CGP by either *not* responding to the EPA within 60 days of receipt of this letter or by notifying the EPA in writing within 60 days of receipt of this letter that you waive certification. If you waive certification of the modified 2017 CGP, the final modified permit (including all conditions) will become effective in your jurisdiction. Because the draft modified 2017 CGP already includes all conditions submitted with previous certifications, **waiving certification on the modified 2017 CGP means that the final modified permit will become effective in your jurisdiction with all of those previous conditions in place.**

EXCERPT OF PROPOSED MODIFICATION TO THE 2017 CONSTRUCTION GENERAL PERMIT

This document provides an excerpt of the proposed modification to the 2017 CGP for more efficient review. Please refer to the actual permit documents in the public docket on Regulations.gov (ID# EPA-HQ-OW-2015-0828) to see the proposed modification in context of the entire permit and accompanying fact sheet.

Proposed modification to the PERMIT

1.1 ELIGIBILITY CONDITIONS

1.1.1 You are an "operator" of a construction site for which discharges will be covered under this permit. For the purposes of this permit and in the context of stormwater discharges associated with construction activity, an "operator" is any party associated with a construction project that meets either of the following two criteria:

- a. The party has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications (e.g., in most cases this is the owner of the site); or
- b. The party has day-to-day operational control of those activities at a project that are necessary to ensure compliance with the permit conditions (e.g., they are authorized to direct workers at a site to carry out activities required by the permit; in most cases this is the general contractor (as defined in Appendix A) of the project).

Where there are multiple operators associated with the same project, all operators must obtain permit coverage.¹ Subcontractors generally are not considered operators for the purposes of this permit.

- ¹ If the operator of a "construction support activity" (see Part 1.2.1c) is different than the operator of the main site, that operator must also obtain permit coverage. See Part 7.1 for clarification on the sharing of permit-related functions liability between and among operators on the same site and for conditions that apply to developing a SWPPP for multiple operators associated with the same site.

2.2.6 Minimize dust. On areas of exposed soil, minimize the generation of dust through the appropriate application of water or other dust suppression techniques to control the generation of pollutants that could be discharged in stormwater from the site.

2.2.11 Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize channel and streambank erosion and scour in the immediate vicinity of discharge points. Minimize erosion of stormwater conveyance channels and their embankments, outlets, adjacent streambanks, slopes, and downstream waters. Use erosion controls and velocity dissipation devices²⁴ within and along the length of any stormwater conveyance channel and at any outlet to slow down runoff to minimize erosion.

- ²⁴ Examples of control measures that can be used to comply with this requirement include the use of erosion controls and/or velocity dissipation devices include (e.g., check dams, sediment traps), within and along the length of a stormwater conveyance and at the outfall to slow down runoff, riprap, and grouted riprap at outlets.

2.3.3 For storage, handling, and disposal of building products, materials, and wastes:

a. For building materials and building products³⁹, provide either (1) cover (e.g., plastic sheeting, temporary roofs) to minimize the exposure of these products to precipitation and to stormwater, or (2) a similarly effective means designed to minimize the discharge of pollutants from these areas.

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).

³⁹ 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.

7.1 GENERAL REQUIREMENTS FOR STORMWATER POLLUTION PREVENTION PLAN (SWPPP)

All operators associated with a construction site under this permit must develop a SWPPP consistent with the requirements in Part 7 prior to their submittal of the NOI.^{52, 53} The SWPPP must be kept up-to-date throughout coverage under this permit.

⁵² The SWPPP does not establish the effluent limits and other permit terms and conditions that apply to your site's discharges; these limits are established in this permit in Parts 2 and 3.

⁵³ You have the option of developing a group SWPPP where you are one of several operators at your site. For instance, if both the owner and the general contractor of the construction site are operators and thus are both required to obtain a permit, the owner may be the party responsible for SWPPP development, and the general contractor (or any other operator at the site) can choose to use this same SWPPP, as long as the SWPPP addresses the general contractor's (or other operator's) scope of construction work and functions to be performed under the SWPPP.

Where there are multiple operators associated with the same site through a common plan of development or sale, they may develop a group SWPPP instead of multiple individual SWPPPs. Regardless of whether there is a group SWPPP or several multiple individual SWPPPs, all each operators would be jointly and severally liable is responsible for compliance with the permit's terms and conditions, notwithstanding how the SWPPP(s) may divide each operator's responsibilities. operators may assign to themselves various permit-related functions under the SWPPP provided that each SWPPP, or a group SWPPP, documents which operator will perform each function under the SWPPP. However, dividing the functions to be performed under each SWPPP, or a single group SWPPP, does not relieve an individual operator from liability for complying with the permit should another operator fail to implement any measures that are necessary for that individual operator to comply with the permit, e.g., the installation and maintenance of any shared controls.

In addition, all operators must ensure, either directly or through coordination with other operators, that their activities do not cause a violation and/or render compromise any other operators' controls and/or any shared controls ineffective. All operators who rely on a shared control to comply with the permit are jointly and severally liable for violations of the permit resulting from the failure to properly install, operate and/or maintain the shared control.

Proposed modification to the APPENDICES

Appendix A: Definitions

"Operator" – for the purposes of this permit and in the context of stormwater discharges associated with construction activity, any party associated with a construction project that meets either of the following two criteria:

1. The party has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications ~~(e.g. in most cases this is the owner of the site); or~~
2. The party has day-to-day operational control of those activities at a project that are necessary to ensure compliance with the permit conditions ~~(e.g., they are authorized to direct workers at a site to carry out activities required by the permit; in most cases this is the general contractor of the project).~~

"Shared Control" - for the purposes of this permit, a stormwater control, such as a sediment basin or pond, used by two or more operators that is installed and maintained for the purpose of minimizing and controlling pollutant discharges from a construction site with multiple operators associated with a common plan of development or sale. ~~Any operators that are contributing stormwater from their construction activities to a shared control are considered to rely upon a shared control.~~

Proposed modification to the FACT SHEET

Section I(2)(b) regarding background on NPDES Permits for Stormwater Discharges Associated With Construction Activity

EPA Construction General Permit (CGP). Since 1992, EPA has issued a series of Construction General Permits (CGPs) that cover areas where EPA is the NPDES permitting authority. At present, EPA is the permitting authority in four states ~~(Idaho, Massachusetts, New Hampshire, and New Mexico, and Idaho, until July 1, 2021, which is the date Idaho becomes authorized to implement the NPDES Stormwater program)~~, the District of Columbia, Puerto Rico and all other U.S. territories with the exception of the Virgin Islands, construction projects undertaken by Federal Operators in four states (Colorado, Delaware, Vermont, and Washington), most Indian Country lands and a couple of other specifically designated activities in specific states (e.g., *oil and gas activities in Texas and Oklahoma*). See Appendix B for a complete list of areas covered by EPA's CGP. The 2012 CGP became effective on February 16, 2012 (see 77 FR 12286), and expires at midnight on February 16, 2017. The 2017 CGP replaces the 2012 CGP.

Section IV regarding Geographic Coverage of Permit

This permit makes available coverage for stormwater discharges associated with construction activities that occur in areas not covered by an approved state NPDES program. The areas of geographic coverage of this permit are listed in Appendix B, and include the states of ~~Idaho, Massachusetts, New Hampshire, and New Mexico, and Idaho, until July 1, 2021, which is the date Idaho becomes authorized to implement the NPDES Stormwater program~~, as well as most Indian Country lands, and construction projects undertaken by Federal Operators in selected states. Permit coverage is also available in the District of Columbia, Puerto Rico, and all other U.S. territories with the exception of the Virgin Islands.

Proposed Modification to the 2017 Construction General Permit (CGP)

Regarding Part 1.1.1

The definition of "operator" in Part 1.1.1 above is consistent with the 2012 CGP. ~~The Any party associated with a construction site that meets the first part of the definition of "operator" (i.e., the party has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications) in most cases will be the owner of the site. The party that meets or the second part of the definition of "operator" (the party has day-to-day operational control of those activities at a project that are necessary to ensure compliance with the permit conditions (e.g., they are authorized to direct workers at a site to carry out activities required by the permit)) in most cases will be the general contractor of the project must obtain NPDES permit coverage for its stormwater discharges associated with construction activity including clearing, grading, and excavation. EPA clarifies that subcontractors generally do not meet the definition of "operator," and thus are generally not required to obtain permit coverage.~~

Part 1.1 of the permit also clarifies the requirements with respect to projects with multiple operators. Where there are multiple operators associated with the same project, all operators must obtain permit coverage. Also, if the operator of a "construction support activity" (see Part 1.2.1.c) is different than the operator of the main site, that operator must also obtain permit coverage. For example, if a construction support activity for the project is owned by a separate owner, and if the separate owner meets the definition of "operator", that person must obtain permit coverage for discharges from the site where the support activities are located. However, if the construction support activity is owned or operated by the site operator, then the support activity must be included in the site operator's permit coverage, including any documentation provided in the NOI and SWPPP. Part 1.1 references Part 7.1 for clarification on the sharing of ~~liability~~ permit-related functions between and among operators on the same site and for conditions that apply to developing a SWPPP for multiple operators associated with the same site.

Regarding Part 2.2.11

Part 2.2.11 implements the C&D rule requirements to ~~"control stormwater volume and velocity to minimize soil erosion in order to minimize pollutant discharges,"~~ to "control stormwater discharges... to minimize channel and streambank erosion and scour in the immediate vicinity of discharge points," to ~~"minimize the amount of soil exposed during construction activity,"~~ and to ~~"minimize the disturbance of steep slopes."~~

Examples of control measures that can be used to comply with this requirement include the use of erosion controls and/or velocity dissipation devices (e.g., check dams, sediment traps), within and along the length of a stormwater conveyance and at the outfall to slow down runoff.

Regarding Part 7.1

The new language in footnote 532 of the permit notes that ~~one operator may develop a group SWPPP provides that where there are several multiple operators associated with~~ at the same site, they may develop a group SWPPP instead of multiple individual SWPPPs. For instance, if both the owner and the general contractor of the construction site meet the

Proposed Modification to the 2017 Construction General Permit (CGP)

definition of an operator and are required to must-obtain a NPDES permit coverage, either party could develop a group SWPPP that applies to both parties, as long as the SWPPP addresses both parties' permit-related functions the owner may be the party responsible for SWPPP development, and the general contractor (or any other operator at the site) can choose to use this same SWPPP, as long as the SWPPP addresses the general contractor's (or some other operator's) scope of construction work and obligations under this permit. Another example is where there are multiple operators associated with the same site through a common plan of development or sale (such as a housing development) at which a shared control exists. In this scenario, the operators may develop a group SWPPP instead of multiple individual SWPPPs, and divide amongst themselves various permit-related functions provided that each SWPPP, or a group SWPPP, documents which operator will perform each permit-related function, including those related to the installation and maintenance of the shared control. Regardless of whether there is a group SWPPP or several multiple individual SWPPPs, all operators would be jointly and severally liable are legally responsible for compliance with the permit, notwithstanding how the SWPPP(s) may divide each operator's individual responsibilities. In other words, if Operator A relies on Operator B to satisfy its permit obligations, Operator A does not have to duplicate those permit-related functions if Operator B is implementing them for both operators to be in compliance with the permit. However, Operator A remains responsible for permit compliance if Operator B fails to implement any measures necessary for Operator A to comply with the permit.

~~Where there are multiple operators associated with the same site through a common plan of development or sale, operators may assign to themselves various permit-related functions under the SWPPP provided that each SWPPP, or a group SWPPP, documents which operator will perform each function under the SWPPP. However, dividing the functions to be performed under the SWPPP does not relieve an individual operator from liability for complying with the permit should another operator fail to implement any measures that are necessary for the individual operator to comply with the permit, for example, the installation and maintenance of any shared controls, such as a sediment basin. In addition, where responsibilities are shared, all operators must ensure, either directly or through coordination with other operators, that their activities do not cause a violation and/or render compromise any other operators' controls and/or any shared controls ineffective. All operators who rely on a shared control to comply with the permit are jointly and severally liable for violations of the permit resulting from the failure to properly install, operate and/or maintain the shared control.~~

~~The new language in footnote 53 clarifies in the permit that all operators associated with the same site through a common plan of development or sale are responsible for the stormwater from their individual parcel until the stormwater is discharged into waters of the U.S. or an MS4. This responsibility includes shared controls, such as a sediment basin, within the common development site used to treat stormwater from the individual parcel. For example, if multiple operators on the same common development site develop a group SWPPP or multiple individual SWPPPs that assign permit-related functions to the various operators, an individual operator is not relieved of liability for permit compliance should another operator fail to perform any function assigned to it under the SWPPP and thus render the individual operator unable to comply with the terms of the permit. In other words, a second operator's failure to perform responsibility for a given function under the SWPPP (e.g., maintaining a sediment~~

Proposed Modification to the 2017 Construction General Permit (CGP)

basin) does not render the first operator immune from enforcement for such failure, unless the second operator's failure does not impact the control of pollutants from the first operator's stormwater or non-stormwater flow (e.g., the first operator does not send stormwater or non-stormwater flow to the sediment basin before discharge from the overall common development site). Similarly, if any individual operator develops a separate SWPPP, that operator remains responsible for compliance with all requirements of the permit that apply to discharges of stormwater and/or non-stormwater from its portion of the site through the common development site and to the point of discharge to waters of the U.S. or an MS4 from the common development site, including requirements that apply to any shared controls relied upon by the operator to control pollutants in stormwater and non-stormwater runoff from its portion of the construction site. Additionally, if an individual operator develops a separate SWPPP, that individual operator is still responsible for compliance with the entire permit even if it relies upon shared controls.

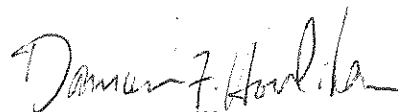
EPA fully reserves its right to pursue liability against any operator as outlined above. When pursuing enforcement against an operator or several operators associated with the same site, EPA will consider the totality of the facts, including but not limited to the actions of each operator, the capability of the operator to remedy the violations, whether there is a written division of permit-related functions in a group SWPPP or individual related SWPPPs, and whether the operator has the ability to obtain access, with assistance from EPA if needed, to any portion of the project at issue.

On December 12, 2018, the EPA published in the Federal Register its announcement of the proposed modification to the 2017 CGP. The EPA is seeking public comment on the modified provisions in the proposed permit for 45 days through January 28, 2019. The EPA welcomes any comments from the Department of Environmental Conservation and requests that you submit your comments to the official docket (do not submit official comments in or with your certification), identified by Docket ID No. EPA-HQ-OW-2015-0828 on the Federal eRulemaking Portal at <http://www.regulations.gov>.

Following review of the public comments received during the public comment period and receipt of your certification (with or without conditions) or waiver thereof, the EPA plans to issue the modified permit as a final document. That final modified permit will incorporate any new or revised conditions specified in your certification. 33 U.S.C. § 1341(d).

If you have any questions, please contact Suzanne Warner at (617) 918-1383 and/or warner.suzanne@epa.gov. Thank you for your assistance and cooperation.

Sincerely,



Damien Houlihan
Acting Chief
Water Permits Branch

Enclosures: Draft Modified Construction General Permit, Fact Sheet

