

# **FREQUENTLY ASKED QUESTIONS for the U.S. Environmental Protection Agency CONSTRUCTION GENERAL PERMIT**

2003

In this section, EPA provides answers to some of the more common questions on the construction storm water permitting program. It is intended to help permittees understand the permit. Be aware these answers are general and may not take into account all scenarios possible at construction sites.

## *What is the Goal of This Permit?*

The goal of this permit is to protect the quality and beneficial uses of the nation's surface water resources from pollution in storm water runoff from construction activities. To achieve this goal, the permit requires operators to plan and implement appropriate pollution prevention and control practices for storm water runoff during the construction period. These Best Management Practices (BMPs) are aimed primarily at controlling erosion and sediment transport, but also include controls, including good housekeeping practices, aimed at other pollutants such as construction chemicals and solid waste (e.g., litter). As used in this permit, the terms "Construction and Construction-related activities" include all clearing, grading, excavation, and stockpiling activities that will result in the disturbance of one or more acres of land area.

## *What Types of Construction Activities May Need a Storm Water Permit?*

Any construction activity that will, or is part of a "common plan" of development or sale that will, disturb one or more acres and has the potential to have a discharge of storm water to a water of the United States must either have a permit OR have qualified for a waiver. These regulated discharges are broken into two categories: "Large" and "Small". A large construction activity is one that will disturb, or is part of a "common plan" that will cumulatively disturb, five or more acres. A small construction activity is one that will disturb, or is part of a "common plan" that will cumulatively disturb, one or more acres.

Construction and construction-related activities refer to the actual earth disturbing construction activities and those activities supporting the construction project such as construction materials or equipment storage or maintenance (e.g., fill piles, borrow area, concrete truck washout, fueling), measures used to control the quality for storm water associated with construction activity, or other industrial storm water directly related to the construction process (e.g., concrete or asphalt batch plants). It does not refer to construction activities unrelated to earth disturbing activities such as interior remodeling, completion of interiors of structures, etc. "Construction" does not include routine earth disturbing activities that are part of the normal day-to-day operation of a completed facility (e.g., daily cover for landfills, maintenance of gravel roads or parking areas, landscape maintenance, etc). Also, it does not include activities under a State or Federal reclamation program to return an abandoned property into an agricultural or open land use.

### *Are There Situations Where a Permit is Not Needed?*

If all of the storm water from the construction activity is captured on-site and allowed to evaporate, soak into the ground on-site, or is used for irrigation, you do not need coverage under this permit. Under the Clean Water Act, it is illegal to have a point source discharge of pollutants to a water of the United States that is not authorized by a permit. If there is a potential for a discharge, you need to apply for coverage under this permit. Many local governments have separate requirements for soil and erosion control from construction projects. There may be other federal, state, tribal, or local requirements concerning discharges to ground water or impoundment of runoff (e.g., water rights).

### *If a Construction Activity Does Not Adversely Impact Water Quality, is Coverage Under the Construction General Permit Still Necessary?*

Waivers are possible only for discharges of storm water associated with SMALL construction activity (i.e., construction disturbing less than 5 acres). These waivers are authorized by federal regulation at 40 CFR §§122.26(b)(15)(i)(A) & (B) and are explained in Appendix D of the permit. Waivers are not available for any construction activity disturbing 5 acres or greater, or less than 5 acres if part of a common plan of development or sale that will ultimately disturb 5 or more acres (or if designated for permit coverage by EPA).

### *With All the People Involved in a Construction Project, How Do I Know If I Am the One That Needs to Apply for the Permit?*

You must apply if you meet one or both parts of the definition of “Operator.” This means you should apply for permit coverage if you have operational control over either the construction plans and specifications, including the ability to make modifications to those plans and specifications (e.g., owner or developer of project), or you have day-to-day operational control of those activities at a project which are necessary to ensure compliance with a storm water pollution prevention plan (SWPPP) for the site or other permit conditions (e.g., general contractor). Where your activity is part of a larger common plan of development or sale, you are only responsible for the portions of the project for which you meet the definition of “operator.”

In many instances, there may be more than one party at a site performing tasks related to “operational control” and hence, more than one operator must submit an NOI. Depending on the site and the relationship between the parties (e.g., owner, developer, general contractor), there can either be a single party acting as site operator and consequently be responsible for obtaining permit coverage, or there can be two or more operators all needing permit coverage. Exactly who is considered an operator is largely controlled by how the “owner” of the project chooses to structure the contracts with the “contractors” hired to design and/or build the project. The following are three general operator scenarios (variations on any of these three are possible, especially as the number of “owners” and contractors increases):

- < *“Owner” as sole permittee.* The property owner designs the structures for the site, develops and implements the SWPPP, and serves as general contractor (or has an on-site

representative with full authority to direct day-to-day operations). The “Owner” is the only party that needs permit coverage, in which case everyone else on the site may be considered subcontractors and not need permit coverage.

- < *“Contractor” as sole permittee.* The property owner hires one company (i.e., a contractor) to design the project and oversee all aspects of the construction project, including preparation and implementation of the SWPPP and compliance with the permit (e.g., a “turnkey” project). Here, the contractor would likely be the only party needing a permit. It is under this scenario that an individual having a personal residence built for his own use (e.g., not those to be sold for profit or used as rental property) would not be considered an operator. EPA believes that the general contractor, being a professional in the building industry, should be the entity rather than the individual who is better equipped to meet the requirements of both applying for permit coverage and developing and properly implementing a SWPPP. However, individuals would meet the definition of “operator” and require permit coverage in instances where they perform general contracting duties for construction of their personal residences.
- < *Owner and contractor as co-permittees.* The owner retains control over any changes to site plans, SWPPPs, or storm water conveyance or control designs; but the contractor is responsible for overseeing actual earth disturbing activities and daily implementation of SWPPP and other permit conditions. In this case, which is the most common scenario, both parties need to apply for coverage.

However, you are probably not an operator and subsequently do not need permit coverage if:

- < You are a subcontractor hired by, and under the supervision of, the owner or a general contractor (i.e., if the contractor directs your activities on-site, you probably are not an operator); or
- < Your activities on site result in earth disturbance and you are not legally a subcontractor, *but* a SWPPP specifically identifies someone other than you (or your subcontractor) as the party having operational control to address the impacts your activities may have on storm water quality (i.e., another operator has assumed responsibility for the impacts of your construction activities). EPA anticipates that this will be the case for many, if not most, utility service line installations.

In addition, for purposes of this permit and determining who is an operator, “owner” refers to the party that owns the structure being built. Ownership of the land where construction is occurring does not necessarily imply the property owner is an operator (e.g., a landowner whose property is being disturbed by construction of a gas pipeline). Likewise, if the erection of a structure has been contracted for, but possession of the title or lease to the land or structure is not to occur until after construction, the would-be owner may not be considered an operator (e.g., having a house built by a residential homebuilder).

*My Project Will Disturb Less Than One Acre, But it May Be Part of a “Larger Common Plan of Development or Sale.” How Can I Tell and What Must I Do?*

In many cases, a common plan of development or sale consists of many small construction projects. For example, a common plan of development for a residential subdivision might lay out the streets, house lots, and areas for parks, schools and commercial development that the developer plans to build or sell to others for development. All these areas would *remain* part of the common plan of development or sale.

If your smaller project is part of a larger common plan of development or sale that collectively will disturb one or more acres (e.g., you are building on 6 half-acre residential lots in a 10-acre development or are putting in a fast food restaurant on a 3/4 acre pad that is part of a 20 acre retail center) you need permit coverage. “Common plan” is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot. You must still meet the definition of operator in order to be required to get permit coverage, regardless of the acreage you personally disturb. As a subcontractor, it is unlikely you would need permit coverage.

However, where only a small portion of the original common plan of development remains undeveloped and there has been a period of time where there is no ongoing construction activities (i.e., all areas are either undisturbed or have been finally stabilized), you may re-evaluate your individual project based on the acreage remaining from the original “common plan.” If less than five but more than one acre remains to build out the original “common plan” permit coverage may still be required, but you can treat your project as part of a “small” construction activity and may be eligible for the waivers available for small construction activities (e.g., one of six lots totaling 2 acres in a 50 acre subdivision can be treated as part of a 2 acre rather than 50 acre “common plan”). If less than one acre remains of the original common plan, your individual project may be treated as part of a less than one acre development and no permit would be required.

#### *When Can You Consider Future Construction on a Property to be Part of a Separate Plan of Development or Sale?*

After the initial “common plan” construction activity is completed for a particular parcel, any subsequent development or redevelopment of that parcel would be regarded as a new plan of development. For example, after a house is built and occupied, any future construction on that lot (e.g., reconstructing after fire, adding a pool or parking area, etc.), would stand alone as a new “common plan” for purposes of calculating acreage disturbed to determine if a permit was required. This would also apply to similar situations at an industrial facility, such as adding new buildings, a pipeline, new wastewater treatment facility, etc. that was not part of the original plan.

#### *What If the Extent of the Common Plan of Development or Sale is Contingent on Future Activities?*

EPA recognizes that there are situations where you will not know beforehand exactly how many

acres will be disturbed, or whether some activities will ever occur. If you are not sure exactly how many acres will be disturbed, you should make the best estimate possible and may wish to overestimate to ensure you do not run into the situation where you should have a permit, but don't. For example, if you originally estimated less than 5 acres would actually be disturbed and took advantage of the "R" Factor waiver, but you actually disturbed 5.5 acres, you would lose your waiver and would need to apply for permit coverage. This could result in delays in obtaining permit authorization and costs associated with contract changes to implement permit requirements - in addition to being liable for any unpermitted discharges.

If you have a long-range master plan of development where some portions of the master plan are a conceptual rather than a specific plan of future development and the future construction activities would, if they occur at all, happen over an extended time period, you may consider the "conceptual" phases of development to be separate "common plans" provided the periods of construction for the physically interconnected phases will not overlap. For example, a university or an airport may have a long-range development concept for their property, with future development based largely on future needs and available funding. A school district could buy more land than needed for a high school with an indefinite plan to add more classrooms and a sports facility some day. An oil and gas exploration and production company could have a broad plan to develop wells within a lease or production area, but decisions on how many wells would be drilled within what time frame and which wells would be tied to a pipeline would be largely driven by current market conditions and which, if any, wells proved to be commercially viable.

*What if the "Common Plan of Development or Sale" Actually Consists of Non-Contiguous Separate Projects?*

There are several situations where discrete projects, that could be considered part of a larger "common plan," can actually be treated as separate projects for the purposes of permitting:

- A. A public entity (e.g., a municipality, state, tribe, or federal agency) need not consider all construction projects within their entire jurisdiction to be part of an overall "common plan." For example, construction of roads or buildings in different parts of a state, county, or city could be considered separate "common plans." Only the interconnected parts of a project would be considered to be a "common plan" (e.g., a building and its associated parking lot and driveways, airport runway and associated taxiways, a building complex, etc.)
- B. Where discrete construction projects within a larger common plan of development or sale are located 1/4 mile or more apart and the area between the projects is not being disturbed, each individual project can be treated as a separate plan of development or sale provided any interconnecting road, pipeline or utility project that is part of the same "common plan" is not concurrently being disturbed. For example, two oil and gas well pads separated by 1/2 mile could be treated as separate "common plans." However, if the same two well pads and an interconnecting access road were all under construction at the same time, they would generally be considered as part of a single "common plan" for permitting purposes. If a utility company was constructing new trunk lines off an existing transmission line to serve separate residential subdivisions located more than 1/4 mile apart, the two trunk line projects could be considered to be separate projects.

### *What Do You Need to Do to Apply for Permit Coverage?*

First - you will need a copy of the CGP to determine if you are eligible for the permit. The text of the permit also explains, for example what must be included in your SWPPP and what you need to do in order to comply with the permit.

Second - you need to determine if you are eligible to use the permit. You will need to document how you determined your eligibility with regard to protection of endangered species, total maximum daily loads, etc.

Third - you will need to prepare your SWPPP. You will also need to include a copy of the CGP and documentation of your eligibility in your SWPPP.

Fourth - you will need to fill out an NOI form and submit it to EPA at least seven days before you start construction.

### *What are My Options For Meeting the "Final Stabilization" Criteria?*

In most cases, you can terminate permit coverage as soon as the portion(s) of the project for which you are an operator are finally stabilized. A definition of "Final Stabilization" is in Appendix A of the CGP. For the purpose of these discussions, "structure" is used not only in the more traditional sense of "buildings," but also refers to other things that would remain in a non-vegetated condition after construction has ended. Examples of "structures" include: buildings; parking lots; roads; gravel equipment pads, sidewalks, runways, etc. All other disturbed areas must be finally stabilized by either vegetative or non-vegetative practices, except disturbed areas on lands that will be returned to an agricultural use such as cropland, rangeland, or silviculture need only be returned to the preexisting condition (e.g., tilled land, grass rangeland, agricultural buffer strip, etc). Where a residential homeowner has decided to install their lawn themselves, only temporary stabilization is required. Perennial vegetation could include grasses, ground covers, trees, shrubs, etc. Vegetative final stabilization requires 70 percent coverage of the "natural" vegetative cover in that part of the country. If the natural vegetation in your area covers 50 percent of the land, final stabilization is achieved when coverage of 35 percent or more of the land is achieved (70 percent of 50 percent). Non-vegetative stabilization could include rip-rap, gravel, gabions, etc. Impervious cover such as concrete or asphalt should be avoided as a final stabilization technique. Long-term, semi-permanent erosion control practices combined with seeds that would establish vegetative stabilization (e.g., properly secured seed impregnated erosion control mats, etc.) could also be used as "final stabilization." To qualify as "long-term," the erosion control practice must be selected, designed, and installed so as to provide at least three years of erosion control.

EPA believes, where the environmental threat is low (i.e., in arid and semi-arid climes), that "final stabilization" can also include techniques that employ re-vegetation combined with other stabilization measures. "Other stabilization measures" in this context include what are known as "temporary degradable rolled erosion control products," a.k.a., "erosion control blankets" (ECBs) along with an appropriate seed base. With proper selection (degradability, application, siting,

etc), design, and installation, ECBs can be very effective in preventing the detachment and transportation of soil until they naturally degrade and vegetation has assumed this function. Therefore, upon proper selection, design, and installation of the combination ECB-seed technique in arid or semi-arid areas, a permittee can be considered to have achieved final stabilization and can terminate permit coverage. If more than 3 years (i.e., three growing seasons) is required to establish the 70 percent of the natural vegetative cover, this technique cannot be used or cited for fulfillment of permit termination requirements prior to actual establishment of vegetative cover.

#### *What if the Operator(s) Changes Before the Project is Completed?*

If operational control changes, the old operator submits a Notice of Termination (NOT) and the new operator submits a Notice of Intent (NOI) before taking over operational control.

In many instances, operational control changes, but only for a portion of the site. In these instances, the new operator must:

- 1) submit an NOI; and
- 2) develop and implement their own SWPPP or adopt the SWPPP of the previous operator if it's still applicable (with appropriate revisions)

#### *What if Earth Disturbance is a Normal Part of the Post-Construction Use of the Site?*

The earth disturbing activity has to be part of a project to build, demolish, or replace a structure (e.g., building, road, pad, pipeline, transmission line, etc.) to trigger the need for permit coverage. Earth disturbance that is a normal part of the long-term use or maintenance of the property is not covered by the construction general permit. For example, re-grading a dirt road or cleaning out a roadside drainage ditch to maintain its “as built” state is road maintenance and not construction. Restoring the well pad of an existing oil or gas well is operation of a well and not construction. Re-grading and re-graveling a gravel parking lot or equipment pad is site maintenance and not construction. Repaving is routine maintenance unless underlying and/or surrounding soil is cleared, graded, or excavated as part of the repaving operation. Where clearing, grading, or excavating (i.e., down to bare soils) takes place, permit coverage is required if more than one acre is disturbed. Reworking planters that are part of the landscaping at a building is landscape maintenance and not construction. Applying daily cover at a landfill is part of the operation of a landfill and not construction.

#### *Does the exclusion of “Routine Maintenance” Apply to all Construction Activity?*

Yes. The definition of small construction at 40 CFR §122.26(b)(15)(i) includes the phrase “Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility” EPA has revised the definition of “large construction” in this permit to include similar language. However, the term “routine maintenance” should not be confused with activities such as repairs, replacement, and other types of non-routine maintenance that require permit coverage where

more than one acre is disturbed.

*How Many Notices of Intent (NOIs) Must I Submit? Where and When Are They Sent?*

You only need to submit one NOI to cover all activities for which you are considered the operator in any given project. The site map you develop for the SWPPP identifies which parts of the overall project are under your control. For example, if you are a homebuilder in a residential development, you need submit only one NOI to cover all your lots, even if they are on opposite sides of the development.

A complete NOI must be sent at least seven days before work begins on the site. The address for submitting NOIs is found in Part 2 of the CGP. You must also look in Part 9 of the permit to determine if copies of the NOI form must be sent to a State or Indian Tribe.

*Do I Have Flexibility in Preparing the Storm Water Pollution Prevention Plan (SWPPP) and Selecting Best Management Practices (BMPs) For My Site?*

Storm water pollution prevention plan requirements were designed to allow maximum flexibility to develop storm water controls based on the specifics of the site. Some of the factors you might consider include: more stringent local development requirements and/or building codes; precipitation patterns for the area at the time the project will be underway; soil types; slopes; layout of structures for the site; sensitivity of nearby water bodies; safety concerns (e.g., potential hazards of water in storm water retention ponds to the safety of children; and coordination with other site operators.

The approach and BMPs used for controlling pollutants in storm water discharges from small construction sites may vary from those used for large sites since their characteristics can differ in many ways. Operators of small sites may have more limited access to qualified design personnel and technical information. Sites may also have less space for installing and maintaining certain BMPs. A number of structural BMPs (e.g., use of inlet protection, or silt fence) and non-structural BMPs (minimizing disturbance, good housekeeping) have shown to be efficient, cost effective, and versatile for small construction site operators to implement. As is the case with large construction sites, erosion and sediment control at small construction sites is best accomplished with proper planning, installation, and maintenance of controls.

*Must Every Permittee Have His or Her Own Separate SWPPP or is a Joint Plan Allowed?*

The only requirement is that there be at least one SWPPP for a site that incorporates the required elements for all operators, but there can be separate plans if individual permittees so desire. EPA encourages permittees to explore possible cost savings by having a joint SWPPP. For example, the general contractor could assume the inspection responsibilities for the entire site, while each homebuilder shares in the installation and maintenance of sediment traps serving common areas.

*If a Project Will Not Be Completed Before This Permit Expires, How Can I Keep Permit Coverage?*

If the permit is reissued or replaced with a new one before the current one expires, you will need to comply with the new permit conditions in order to transition coverage from the old permit. This will likely include submitting a new NOI. If the permit expires before a replacement permit can be issued, the permit will be administratively continued. You are automatically covered under the continued permit, without needing to submit anything to EPA, until the earliest of:

1. The permit being reissued or replaced;
2. Submittal of a Notice of Termination (NOT);
3. Issuance of an individual permit for your activity; or
4. EPA issues a formal decision not to reissue the permit, at which time you must seek coverage under an alternative permit.

*When Can I Terminate Permit Coverage? Can I Terminate Coverage (i.e., Liability for Permit Compliance) Before the Entire Project is Finished?*

You can submit an NOT for your portion of a site providing: (1) You have achieved final stabilization (e.g., 70 percent revegetation) of the portion of the site for which you are responsible; (2) another operator/permittee has assumed control, according to Subpart 5.1.B of the permit over all areas of the site that have not been finally stabilized for which you are responsible (for example, a developer can pass permit responsibility for lots in a subdivision to the homebuilder who purchases those lots, providing the homebuilder has filed his or her own NOI); (3) coverage under an alternative NPDES permit has been obtained for the discharge; or (4) for residential construction only, you have completed temporary stabilization and the residence has been transferred to the homeowner.

*Is Coverage Required for Oil and Gas Construction?*

EPA received numerous comments concerning the applicability of the construction permit requirements, which were modeled after residential and commercial construction, to oil and gas construction. The oil and gas industry noted that a residential or commercial project typically has a definite plan of development that involves a planning phase, a construction phase and termination of the construction, while an oil and gas construction project is typically on a very tight schedule and moves very quickly from planning to construction because both the access to mineral rights and the availability of drilling rigs are on schedules.

EPA believes sediment from oil and gas sites can be a problem, but realizes that this type of construction may require different controls than residential and commercial construction. EPA has extended the permit application deadline for oil and gas construction activity disturbing 1 to 5 acres from March 10, 2003 to March 10, 2005. See 68 Federal Register 11325. The two-year postponement will allow for time for EPA to analyze and better evaluate: the impact of the permit requirements on the oil and gas industry; the appropriate BMPs for preventing contamination of storm water runoff resulting from construction association with oil and gas exploration, production, processing, or treatment operations or transmission facilities; and the scope and effect of 33 U.S.C. 1342(l)(2) and other storm water provisions of the CWA.

The two-year postponement applies only to “small” oil and gas construction projects. Large construction has been regulated as an industrial activity under CWA section 402(p)(6) since

promulgation of the Phase I storm water rule. Large construction activity was covered under the 1998 CGP and must now obtain permit coverage under the 2003 CGP.

*Do I Need to Have Coverage Under the MSGP and the CGP for Mining Activity?*

Coverage under the CGP is required for the construction or exploration phase, and coverage under the multi-sector general permit (MSGP) is required for the active mining phase. This is due to EPA's concern that the initial clearing, grading, or excavation on a site could escape permit coverage under the MSGP for mining activities (e.g., Sector G -Metal Mining) despite the significant pollutant discharges that may result. Members of the mining industry have requested to be covered by only one permit for any and all earth disturbances. To allow this, EPA may need to modify the MSGP. As part of the next MSGP reissuance, EPA will consider the effectiveness and justification for addressing different mining phases in two different permits, including whether all mining and mining-related activities (from exploration and construction to reclamation) should be placed in the MSGP. At present, however, discharges relating to the exploration and construction phases of mining operations must be covered by the CGP, while discharges from active mining activities must be covered under the MSGP.