



DWR-NRU-G-01-Construction Stormwater-113018  
Draft Guidance: Response to Comments  
May 17, 2019

### **Comment 1**

The commenter expressed concern regarding “only someone who is knowledgeable about erosion and sediment controls will be able to develop narrative-only SWPPPs”.

#### Response 1

The minimum standard qualification for someone to prepare the narrative portion of a SWPPP as identified in the current General NPDES Permit for Discharges of Stormwater Associated with Construction Activities (TN CGP) is that the person has a working knowledge of erosion prevention and sediment controls (EPSCs). EPSC training provided through the University of Tennessee is a recognized source of this type of knowledge.

### **Comment 2**

The commenter suggests that NRCS would be in a position of answering Question #1 of the guidance document:

#### **Response 2**

Question 1 in the draft guidance document is:

1. Does the construction site discharge to receiving waters with unavailable parameters for siltation or habitat alterations, or that are Exceptional Tennessee Waters<sup>5</sup>?

Question 1 contains a link to a TDEC Mapviewer that was developed for the purpose of providing data to assist with this specific question. While NRCS is a tremendous resource of information and technical support within the agriculture community; the process of SWPPP development is not predicated on NRCS support/involvement.



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### **Comment 3**

The commenter asks who will determine the answer to Question 3?

### **Response 3**

Question 3 in the draft guidance document is:

3. Will the plans and specifications include the design of sediment basins or other sediment controls involving structural, hydraulic, hydrologic, or other engineering calculations? (CGP Section 3.1.1)

The three questions listed in the guidance document are structured to inform an applicant whether an engineered-designed component of the SWPPP is necessary. Tennessee Code Annotated, Title 62, Chapter 2 and the rules of the Tennessee Board of Architectural and Engineering Examiners identifies activities that are subject to the practice of architects, engineers, landscape architects and interior designers. Furthermore, these rules identify the practice of architecture, engineering, or landscape architecture by anyone other than a person that is duly registered as unlawful.

If the answer to Question 3 is "Yes" then a registered architect or engineer must be involved per state law. DWR has historically recognized the design of sediment basins or other sediment controls requiring engineering calculations as subject to this law and appropriately references it in both our current TN CGP and the draft guidance document. Furthermore, Part 3.5.3.3 of the TN CGP provides that a sediment basin is required for outfalls with drainage areas of 10 acres or more. The state's EPSC handbook provides the best single resource regarding the subject of the need for formal design. A link to this resource is provided in the draft template.



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#### **Comment 4**

"... it is the ultimate goal of our industry to not have to require the hiring of consultants or experience delays in permits being approved when an engineered SWPPP is not required."

#### **Response 4**

As indicated in Response 1, the minimum standard qualification for someone to prepare the narrative portion of a SWPPP is that the person be knowledgeable about erosion and sediment controls. A site-specific SWPPP is required in support of any construction activity for which coverage under the CGP is required. The purpose of the proposed guidance documents was, in part, to provide a template to guide an applicant through the SWPPP development process. The SWPPP is in fact a plan, whether it includes an engineered design or not, for how to treat the site's stormwater prior to discharging into waters of the State and as such is the most critical component of the submittal.

#### **Comment 5**

The commenter expressed concern that information required to answer items g) and k) of Part II of the template may require the services of a paid consultant.

#### **Response 5**

Section "g)" of Part II of the draft template:

- g) If applicable, a description of any discharge associated with industrial activity other than construction stormwater that originates on site and the location of that activity and its permit number.

The landowner or operator would be in the best position to know if there are other permitted industrial activities on the property and the associated permit number. TDEC does not anticipate that answering this question would require the services of a paid consultant.



DWR-NRU-G-01-Construction Stormwater-113018  
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May 17, 2019

Section "k)" of Part II of the draft template:

- k) A description of the protections (e.g., caution fencing or stream side buffer zones) employed to limit the disturbance if only a portion of the total acreage of the construction site is to be disturbed.

This request is specific to a description of what method will be used to delineate areas within the total area to be disturbed in the event that the disturbance is conducted in stages - such as caution fencing or buffer zones. For example if the site is two acres and the plan is to only disturb one acre initially and then stabilize that acre and begin disturbance on the other acre, what method will be used to demarcate the two areas? Another example would be if a stream side buffer zone is required to be established on the site during construction then a description of the method of protection should be included in the SWPPP. TDEC does not anticipate that providing these types of descriptions would require the services of a paid consultant.

#### **Comment 6**

The commenter expresses concern that Parts III and IV of the draft template requires information and detail that will require the services of a consultant to prepare.

#### **Response 6**

Part III of the draft template requests the following information:

- a) A description of the appropriate EPSCs and other Best Management Practices (BMPs) that will be implemented at the construction site.
- b) If applicable, a description of additional permittees (i.e. contractors) responsible for implementation of controls, and which controls.
- c) A description of the practices that will be used to divert flows from exposed soils, store flows or otherwise limit runoff and discharge of pollutants from exposed areas of the site.



DWR-NRU-G-01-Construction Stormwater-113018  
Draft Guidance: Response to Comments  
May 17, 2019

This information is fundamental to any SWPPP, whether or not the plan includes an engineered component. Beginning a construction project without knowing how the erosion/sediment will be controlled, who is responsible for implementing and maintaining these controls, and how other stormwater flows will be diverted from the disturbed areas is not protective of water quality. TDEC does not anticipate that providing this type of information would require the services of a paid consultant. The state's EPSC handbook provides the best single resource on this subject. A link to this resource is provided in the draft template.

Part IV of the draft template provides a check list of the site-specific information that should be included in the SWPPP. TDEC does not anticipate that providing this type of information would require the services of a consultant or engineer.

#### **Comment 7**

The commenter feels that agriculture should be exempt from requiring a site-specific SWPPP of any kind. The commenter provides the following statutory citation:

TCA 69-3-120 Construction of Part (g) states that "Nothing whatsoever in this part shall be so construed as applying to any agricultural or forestry activity or the activities necessary to the conduct and operations thereof or to any lands devoted to the production of any agricultural or forestry products, unless there is a point source discharge from a discernible, confined, and discrete water conveyance."

The commenter then provides the following statements:

"New dry-litter broiler farms are being defined as medium to large CAFOs because of their size and hence are then being designated as point sources in the proposed new rule, even when they don't discharge; they are not generating waste of any kind during the construction phase and are not a point source discharge concern."



DWR-NRU-G-01-Construction Stormwater-113018  
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"For small CAFO operations, like some of smaller dry litter layer/breeder farms, would then refer to 40 CFR 122.3 defining exemptions from NPDES permitting as follows:

(e) Any introduction of pollutants from non-point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23..."

"We therefore do not agree that operators wishing to obtain coverage under this permit should be required to submit a site-specific SWPPP of any kind as part of the proposed DWR-NRU-G-01 Construction Stormwater - 113018 draft guidance document."

## **Response 7**

Federal law and subsequently state law obligate any construction activities that disturb at least one acre of ground to obtain permit coverage, commonly referred to as a construction stormwater permit. Obtaining this type of permit coverage requires the development of a site-specific SWPPP. SWPPPs serve the purpose of identifying what erosion prevention and sediment control practices will be implemented during the construction, the person(s) responsible for implementing and maintaining the practices, and how other stormwater flow will be prevented from coming in to contact with the disturbed area(s). This permitting requirement has no relationship to process wastewater that may be generated from the facility once the facility is constructed and operational. For example, if the construction of a poultry growing facility disturbs one acre or greater of ground, the construction activity must obtain coverage through a construction stormwater permit. This permitting requirement is irrespective to whether the subsequent activities at the facility meet the definition of an AFO or a CAFO, or whether the AFO or CAFO discharges process wastewater.



DWR-NRU-G-01-Construction Stormwater-113018  
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A 1998 U.S. EPA memo pertaining to construction activity at, or construction of, livestock feeding facilities involving AFOs, CAFOs, and feedlots has been included in this Response to Comments as Attachment 1. This memo states, in part, "Under the NPDES regulations for storm water, all activities associated with the construction of livestock feeding facilities, including clearing, grading, and excavation, are subject to NPDES coverage." Please note that while the 1998 memo references construction activities that disturb 5 or more acres of total area as requiring permit authorization, the total area of disturbance requiring permit authorization was subsequently reduced by EPA to 1 acre effective February 7, 2000.

### **Comment 8**

The commenter requests "Whenever site inspections of any kind for any reason are required we ask that anywhere and anytime that a "twice a week" inspection is required that the wording be changed, or that it at least be footnoted to indicate the exceptions (to readily note when twice-weekly is not the requirement)."

### **Response 8**

The current General NPDES Permit for Discharges of Stormwater Associated with Construction Activities prescribes the inspection frequency associated with permit coverage. DWR does not have the authority to alter the inspection frequency framework prior to a formal reissuance of the permit that provides an alternative frequency. The current permit became effective on October 1, 2016, and will expire on September 30, 2021. DWR staff will provide a draft permit for public consideration prior to the expiration of the current permit. The subject of inspection frequency is slated for consideration at that time. DWR encourages the commenter to provide responses specific to these considerations at that time.



STATE OF TENNESSEE  
**DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

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**MEMORANDUM**

TO: Tisha Calabrese Benton, Director, Division of Water Resources  
FROM: Stephanie A. Durman, Assistant General Counsel  
Patrick N. Parker, Senior Counsel  
DATE: April 19, 2018  
RE: Construction General Permit Requirements for Agricultural Construction

This memorandum addresses the applicability of the Tennessee General NPDES Permit for Discharges of Stormwater Associated with Construction Activities (“TNCGP”) to agricultural construction activities and whether the TNCGP’s inspection requirements are more stringent than required by federal law.

**1. NPDES Permits Are Required for Construction of Buildings on Agricultural Land**

The Tennessee Water Quality Control Act (the “Act”) was adopted, in part, “to enable the state to qualify for full participation in the national pollutant discharge elimination system (NPDES) established under § 402 of the Federal Water Pollution Control Act, Public Law 92-500, codified in 33 U.S.C. § 1342.” Tenn. Code. Ann. § 69-3-102(c). The Act further provides:

Nothing whatsoever in this part shall be so construed as applying to any agricultural or forestry activity or the activities necessary to the conduct and operations thereof or to any lands devoted to the production of any agricultural or forestry products, unless there is a point source discharge from a discernable, confined and discrete water conveyance. Tenn. Code Ann. § 69-3-120(g).

The Clean Water Act and United States Environmental Protection Agency (“EPA”) rules require NPDES permits for stormwater discharges from construction sites that disturb one acre or more of land. *See* 33 U.S.C. § 1342(p)(3)(A); 40 C.F.R. § 122.26(b)(14)(x) and (b)(15). The Clean Water Act includes exemptions for agricultural stormwater and return flows from irrigated agriculture. 33 U.S.C. §§ 1342(l)(1) & 1362(14).

Early on in the application of construction stormwater requirements, EPA addressed the question of whether construction of buildings on land used for agricultural purposes requires an NPDES permit. In a 1998 memorandum (attached), EPA explains:

Under the NPDES regulations for storm water, all activities associated with the construction of livestock feeding facilities, including clearing, grading, and excavation, are subject to NPDES coverage...Because storm water *discharges* associated with the construction of livestock feeding facilities is different both in content and nature from storm water discharges associated with the operation of such facilities, the former are not “agricultural” and are not entitled to the exclusion for agricultural storm water discharges.

Therefore, NPDES permits are required by federal law for the construction of buildings on agricultural land if that construction disturbs one or more acre of land. Interpreting the Act in light of its purpose of securing and maintaining a delegation of NPDES permitting authority, the Department should continue to require such facilities to secure coverage under the TNCGP.

## **2. The TNCGP’s Inspection Requirements**

Part 3.5.8.2 of the 2016 TNCGP requires twice weekly inspections, except

[w]here sites or portion(s) of construction sites have been temporarily stabilized, or runoff is unlikely due to winter conditions (e.g., site covered with snow or ice) or due to extreme drought, such inspection only has to be conducted once per month until thawing or precipitation results in runoff or construction activity resumes. Inspection requirements do not apply to definable areas that have been finally stabilized....

EPA’s rules do not specify inspection frequency. *See generally* 40 C.F.R. Part 450. However, Part 4.2 of EPA’s 2017 construction general permit (*available at [https://www.epa.gov/sites/production/files/2017-06/documents/2017\\_cgp\\_final\\_permit\\_508.pdf](https://www.epa.gov/sites/production/files/2017-06/documents/2017_cgp_final_permit_508.pdf)*) establishes the minimum inspection requirements for facilities that are covered by EPA permits (which EPA could be expected to require if the TNCGP were not applied to construction of agricultural facilities in Tennessee). For waters that are impaired by causes other than sediment or nutrients, inspections are required at least (1) once every seven days, or (2) once every 14 days *and* within 24 hours of the onset of each storm event of .25 inches or more. For discharges to waters with available parameters, outstanding national resource waters, and waters that are sediment or nutrient-impaired, EPA’s permit requires inspections at least once every seven days *and* within 24 hours of the onset of each storm event of .25 inches or more. As with the TNCGP, inspection frequency is decreased to once per month during droughts and freezing conditions, and eliminated upon stabilization.

Although the inspection requirements of the two permits are not identical, they are comparable. In fact, for most situations, EPA’s requirements would be more onerous than the TNCGP’s. Most Tennessee waters fall within at least one of the categories requiring EPA’s heightened inspection regime, and rain events of .25 inches or more are a very frequent occurrence across Tennessee. EPA’s requirement to conduct inspections within 24 hours of the onset of each such rain event would be a challenge to implement because inspectors would have to adjust their schedules to the weather, and would have to inspect sites even while it is still raining.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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FEB 5 1998

**FROM:** James F. Pendergast, Acting Director  
Permits Division

**TO:** Water Division Directors, Regions 1 - 10

**SUBJECT:** Applicability of the NPDES Program to Discharges of Storm Water Associated with Construction Activity at, or Construction of, Livestock Feeding Facilities

The purpose of this memo is to clarify our interpretation of the National Pollutant Discharge Elimination System (NPDES) regulations as they apply to discharges of storm water associated with construction activity at, or construction of, livestock feeding facilities involving animal feeding operations, concentrated animal feeding operations, and feedlots. Several Regions have asked whether storm water discharges associated with the construction of these facilities are exempt from the NPDES permit requirements based on the definition of "point source," which excludes "agricultural storm water discharges." (Clean Water Act section 502(14), 33 U.S.C. § 1362(14); see also 40 CFR 122.3(e)(excluding "agricultural storm water runoff")).

After review of the reasoning in the applicable regulations and consultation with regional storm water coordinators, we believe that the regulations treat discharges associated with the construction and operation of these facilities as two distinct activities. Under the existing storm water regulations, storm water discharges associated with construction activities require permit authorization if they disturb five or more acres of total area or disturb less than five acres but are part of a larger plan of common development or sale (40 CFR 122.26(b)(14)(x)). The Agency also may require a permit for storm water discharges from smaller construction sites on a case-by-case basis in accordance with 40 CFR 122.26 (a)(1)(v) or under 122.26(a)(9) and 122.26(g)(1)(i). Note that on January 9, 1998, the Agency proposed to categorically expand applicability of the NPDES permit program to discharges of storm water associated with certain construction sites down to one acre in size.

Under the NPDES regulations for storm water, all activities associated with the construction of livestock feeding facilities, including clearing, grading, and excavation, are subject to NPDES coverage. By contrast, storm water discharges from any clearing, grading and excavation for the purpose of growing crops are not covered by the NPDES program; discharges from these activities are considered to be "agricultural storm water discharges" and therefore are excluded from the requirements of the NPDES permitting program. Because storm water discharges associated with the construction of livestock feeding facilities is different both in content and nature from storm water discharges associated with the operation of such facilities, the former are not "agricultural" and are not entitled to the exclusion for agricultural storm water discharges. Also, the applicability of the NPDES program to the post-construction, operational

phase of these facilities must be determined according to the Federal Clean Water Act regulations for animal feeding operations, concentrated animal feeding operations, and feedlots.

As with any storm water discharge from a regulated construction project in an area where EPA issues NPDES construction general permits, operators who submitted a NOI to obtain permit coverage must also submit a Notice of Termination (NOT) after construction is completed and the site has been finally stabilized. Submission of the NOT is necessary for permittees to terminate their obligations under EPA's NPDES General Permits for Storm Water Associated with Construction Activity.

If you have any questions, please call me at (202) 260-9545, or have your staff contact Brian Burgess at (202) 260-9529.

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