



# Stormwater Phase II Final Rule

## Small Construction Program Overview

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The 1972 amendments to the Federal Water Pollution Control Act, later referred to as the Clean Water Act (CWA), prohibit the discharge of any pollutant to navigable waters of the United States from a point source unless the discharge is authorized by a National Pollutant Discharge Elimination System (NPDES) permit. Efforts to improve water quality under the NPDES program traditionally have focused on reducing pollutants in industrial process wastewater and municipal sewage treatment plant discharges. Over time, it has become evident that more diffuse sources of water pollution, such as stormwater runoff from construction sites, are also significant contributors to water quality problems.

Sediment runoff rates from construction sites are typically 10 to 20 times greater than those from agricultural lands, and 1,000 to 2,000 times greater than those of forest lands. During a short period of time, construction activity can contribute more sediment to streams than can be deposited over several decades, causing physical and biological harm to our Nation's waters.

In 1990, EPA promulgated rules establishing Phase I of the NPDES stormwater program. Phase I addresses, among other discharges, discharges from large construction activities disturbing 5 acres or more of land. Phase II of the NPDES stormwater program covers small construction activities disturbing between 1 and 5 acres. Phase II became final on December 8, 1999 and small construction permit applications were due by March 10, 2003 (specific compliance dates will be set by the NPDES permitting authority in each State). This fact sheet outlines the construction activities covered by Phase I and Phase II, including possible waiver options from Phase II coverage, and the Phase II construction program requirements.

### Who Is Covered Under the Phase I Rule?

#### Sites Five Acres and Greater

The Phase I NPDES stormwater rule identifies eleven categories of industrial activity in the definition of "stormwater discharges associated with industrial activity" that must obtain an NPDES permit. Category (x) of this definition is construction activity, commonly referred to as "large" construction activity. Under category (x), the Phase I rule requires all **operators** of construction activity **disturbing 5 acres or greater of land** to apply for an NPDES stormwater permit. Operators of sites disturbing less than 5 acres are also required to obtain a permit if their activity is part of a "larger common plan of development or sale" with a planned disturbance of 5 acres or greater. "Disturbance" refers to exposed soil resulting from activities such as clearing, grading, and excavating. Construction activities can include road building, construction of residential houses, office buildings, industrial sites, or demolition.

### What Is Meant by a "Larger Common Plan of Development or Sale"?

As defined in EPA's NPDES stormwater general permit for construction activity, a "larger common plan of development or sale" means a contiguous area where multiple separate and distinct construction activities are occurring under one plan (e.g., the operator is building on three half-acre lots in a 6-acre development). The "plan" in a common plan of development or sale 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 that construction activities may occur on a specific plot.

### What Is the Definition of an “Operator” of a Construction Site?

As defined in EPA’s stormwater general permit for construction activity, an “operator” is the party or parties that has:

- ❑ Operational control of construction project plans and specifications, including the ability to make modifications to those plans and specifications; *or*
- ❑ Day-to-day operational control of those activities that are necessary to ensure compliance with a stormwater pollution prevention plan (SWPPP) for the site or other permit conditions (e.g., they are authorized to direct workers at a site to carry out activities required by the SWPPP or comply with other permit conditions).

There may be more than one party at a site performing the tasks related to “operational control” as defined above. Depending on the site and the relationship between the parties (e.g., owner, developer, 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 obligated to seek permit coverage. It is important to note that NPDES-authorized States may use a different definition of “operator” than the one above.

### How Is the Phase II Construction Rule Related to the Phase I Construction Rule?

In 1992, the Ninth Circuit court remanded for further proceedings portions of EPA’s existing Phase I stormwater regulation related to the category (x) discharges from large construction activity (NRDC v. EPA, 966 F.2d at 1292). EPA responded to the court’s decision by designating under Phase II stormwater discharges from construction activity disturbing less than 5 acres as sources that should be regulated to protect water quality. The Phase II Rule designates these sources as “stormwater discharges associated with *small construction* activity,” rather than as another category under “stormwater associated with *industrial* activity.”

### Who Is Covered Under the Phase II Construction Rule?

#### Sites Between One and Five Acres

The Stormwater Phase II Rule automatically designates, as small construction activity under the NPDES stormwater permitting program, all operators of construction site activities that result in a *land disturbance of equal to or greater than 1 and less than 5 acres*.

#### Sites Less Than One Acre

Site activities disturbing less than 1 acre are also regulated as small construction activity if they are part of a larger common plan of development or sale with a planned disturbance of equal to or greater than 1 acre and less than 5 acres, or if they are designated by the NPDES permitting authority. The NPDES permitting authority or EPA Region may designate construction activities disturbing less than 1 acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

### Are Waivers Available for Operators of Regulated Construction Activity?

Yes, but only for small, not large, construction activity. Under the Phase II Rule, NPDES permitting authorities have the option of providing a waiver from the requirements to operators of small construction activity who certify to either one of two conditions:

- ① Low predicted rainfall potential (i.e., activity occurs during a negligible rainfall period), where the rainfall erosivity factor (“R” in the Revised Universal Soil Loss Equation [RUSLE]) is less than 5 during the period of construction activity (See Fact Sheet 3.1); *or*
- ② A determination that stormwater controls are not necessary based on either:
  - (A) A “total maximum daily load” (TMDL) that address the pollutant(s) of concern for construction activities; **OR**
  - (B) An equivalent analysis that determines allocations are not needed to protect water quality based on consideration of instream concentrations, expected growth in pollutant concentrations from all sources, and a margin of safety.

**Pollutants of concern** include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity, or siltation) and any other pollutant that has been identified as a cause of impairment of a receiving waterbody.

The intent of the waiver provision is to waive only those sites that are highly unlikely to have a negative effect on water quality. Therefore, before applying for a waiver, operators of small construction activity are encouraged to consider the potential water quality impacts that may result from their project and to carefully examine such factors as proximity to water resources and sensitivity of receiving waters.

**a. What is the Rainfall Erosivity Factor in Waiver ❶?**

**W**aiver ❶ uses the Rainfall Erosivity Factor to determine whether the potential for polluted discharge is low enough to justify a waiver from the requirements. It is one of six variables used by the Revised Universal Soil Loss Equation (RUSLE)—a predictive tool originally used to measure soil loss from agricultural lands at various times of the year on a regional basis—to predict soil loss from construction sites. The Rainfall Erosivity Factor waiver is time-sensitive and is dependent on when during the year a construction activity takes place, how long it lasts, and the expected rainfall and intensity during that time. For information about the rainfall erosivity waiver, see Fact Sheet 3.1. An erosivity calculator for construction sites is available at <http://ei.tamu.edu>.

**b. What is a “TMDL” in Waiver ❷?**

**F**or impaired waters where technology-based controls required by NPDES permits are not achieving State water quality standards, the CWA requires implementation of the TMDL process. The TMDL process establishes the maximum amount of pollutants a waterbody can assimilate before water quality is impaired, then requires that this maximum level not be exceeded.

A TMDL is done for each pollutant that is found to be contributing to the impairment of a waterbody or a segment of a waterbody. To allow a waiver for construction activities, a TMDL would need to address sediment, or a parameter that addresses sediment such as total suspended solids, turbidity, or siltation. Additional TMDLs addressing common pollutants from construction sites such as nitrogen, phosphorus, and oil and grease also may be necessary to ensure water quality protection and allow a waiver from the NPDES stormwater program.

A TMDL assessment determines the source or sources of a pollutant of concern, considers the maximum allowable level of that pollutant for the waterbody, then allocates to each source or category of sources a set level of the pollutant that it is allowed to discharge into the waterbody. Allocations to point sources are called wasteload allocations.

**How Would an Operator Qualify for, and Certify to, Waiver ❷?**

**E**PA expects that when TMDLs or equivalent analyses are completed, there may be a determination that certain classes of sources, such as small construction activity, would not have to control their contribution of pollutants of concern to the waterbody in order for the waterbody to be in attainment with water quality standards (i.e., these sources were not assigned wasteload allocations). In such a case, to qualify for waiver ❷, the operator of the construction site would need to certify that its construction activity will take place, and the stormwater discharges will occur, within the area covered either by the TMDLs or equivalent analysis. A certification form would likely be provided by the NPDES permitting authority for this purpose.

**What Does the Phase II Construction Program Require?**

**T**he Phase II Final Rule requires operators of Phase II small construction sites, nationally, to obtain an NPDES permit and implement practices to minimize pollutant runoff. It is important to note that, locally, these same sites also may be covered by State, Tribal, or local construction runoff control programs (see Fact Sheets 2.6 and 2.7 for information on the Phase II small MS4's construction program). For the Phase II small construction program, EPA has taken an approach similar to Phase I where the program requirements are not fully defined in the rule but rather in the NPDES permit issued by the NPDES permitting authority.

EPA recommended that the NPDES permitting authorities use their existing Phase I large construction general permits as a guide to developing their Phase II small construction permits. In doing so, the Phase II requirements would be similar to the three general Phase I requirements summarized below.

- Submission of a **Notice of Intent** (NOI) that includes general information and a certification that the activity will not impact endangered or threatened species. This certification is unique to EPA's NOI and is not a requirement of most NPDES-delegated State's NOIs;
- The development and implementation of a **Stormwater Pollution Prevention Plan** (SWPPP) with appropriate BMPs to minimize the discharge of pollutants from the site; and

- ❑ Submission of a *Notice of Termination* (NOT) when final stabilization of the site has been achieved as defined in the permit or when another operator has assumed control of the site.

In July 2003, EPA issued a construction general permit that covers both large and small construction activities. This permit, supporting information, and guidance can be found at <http://www.epa.gov/npdes/stormwater/cgp>.

### Can the Permitting Authority Reference a Qualifying Erosion and Sediment Control Program in NPDES Construction Permits?

Yes. The Phase II Rule allows the NPDES permitting authority to include in its NPDES permits for large and for small construction activity conditions that incorporate by reference qualifying State, Tribal, or local erosion and sediment control program requirements. A qualifying program must include the following requirements:

- ❑ Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;
- ❑ Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste that may cause adverse impacts to water quality;
- ❑ Requirements for construction site operators to develop and implement a stormwater pollution prevention plan; and
- ❑ Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts.

In addition to the four elements above, a qualifying program for large construction activities must also include any additional requirements necessary to achieve the applicable technology-based standards of “Best Available Technology” (BAT) and “Best Conventional Technology” (BCT) based on the best professional judgment of the permit writer.

Should a State, Tribal, or local program include one or more, but not all, of the elements listed above, the permitting authority can reference the program in the permit, provided it also lists the missing element(s) as a condition in the permit.

### What are Some Recommended BMPs for Small Construction Sites?

The approach and BMPs used for controlling pollutants in stormwater discharges from small construction sites may vary from those used for large sites since their characteristics can differ in many ways. For example, operators of small sites may have more limited access to qualified design personnel and technical information. Also, small sites may have less space for installing and maintaining certain BMPs.

As is the case with all construction sites, erosion and sediment control at small construction sites is best accomplished with proper planning, installation, and maintenance of controls. The following practices have shown to be efficient, cost effective, and versatile for small construction site operators to implement. The practices are divided into two categories: non-structural and structural.

#### ❑ Non-Structural BMPs

- Minimizing Disturbance
- Preserving Natural Vegetation
- Good Housekeeping Practices

#### ❑ Structural BMPs

##### *Erosion Controls*

- Mulch
- Grass
- Stockpile Covers

##### *Sediment Controls*

- Silt Fence
- Inlet Protection
- Check Dams
- Stabilized Construction Entrances
- Sediment Traps

Most erosion and sediment controls require regular maintenance to operate correctly. Accumulated sediments should be removed frequently and materials should be checked periodically for wear. Regular inspections by qualified personnel, which can allow problem areas to be addressed, should be performed after major rain events.

The BMPs listed above as well as additional erosion and sediment control practices for construction activities are described in detail in the National Menu of BMPs for Stormwater Phase II, which can be found at <http://www.epa.gov/npdes/stormwater>.

## For Additional Information

### Contacts

A. U.S. EPA Office of Wastewater Management

<http://www.epa.gov/npdes/stormwater>

Phone: 202-564-9545

☞ Your NPDES Permitting Authority. Most States and Territories are authorized to administer the NPDES Program, except the following, for which EPA is the permitting authority:

|                      |                          |
|----------------------|--------------------------|
| Alaska               | Guam                     |
| District of Columbia | Johnston Atoll           |
| Idaho                | Midway and Wake Islands  |
| Massachusetts        | Northern Mariana Islands |
| New Hampshire        | Puerto Rico              |
| New Mexico           | Trust Territories        |
| American Samoa       |                          |

☞ A list of names and telephone numbers for each EPA Region and State is located at <http://www.epa.gov/npdes/stormwater> (click on “Contacts”).

☞ Your local soil conservation district office. They can provide assistance with RUSLE and other conservation related issues. A list of conservation district contacts is available at <http://www.nacdnet.org/resources/cdsonweb.html>

## Reference Documents

☞ EPA’s Stormwater Web Site

<http://www.epa.gov/npdes/stormwater>

- Stormwater Phase II Final Rule Fact Sheet Series
  - Stormwater Phase II Final Rule (64 FR 68722)
  - National Menu of Best Management Practices for Stormwater Phase II
  - Measurable Goals Guidance for Phase II Small MS4s
  - Stormwater Case Studies
  - Construction General Permit and Fact Sheet (68 FR 45817)
- <http://www.epa.gov/npdes/stormwater/cgp>
- EPA Stormwater Management for Construction Activities and Best Management Practices : Developing Pollution Prevention Plans Guidance
  - And many others

☞ Construction Industry Compliance Assistance Center:

<http://www.cicacenter.org/>

☞ *Agricultural Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning With the Revised Universal Soil Loss Equation (RUSLE)*, Chapter 2, pp. 21-64, January 1997. <http://www.epa.gov/npdes/pubs/ruslech2.pdf>

☞ *Guidance for Water Quality Based Decisions: The TMDL Process*. April 1991. U.S. EPA Office of Water. EPA 440/4-91-001.

<http://www.epa.gov/OWOW/tmdl>