
Date: December 22, 2005

To: Environmental Quality Commission

From: Stephanie Hallock, Director

Subject: Agenda Item E, Rule Adoption: Renewal of NPDES 1200-C Construction Stormwater General Permit, December 22-23, 2005 EQC Meeting

DEQ Recommendation DEQ recommends that the Environmental Quality Commission (Commission) renew in rule the proposed construction stormwater general permit as proposed in the attachments to this report.

Need for Rulemaking Background
This general permit expires on December 31, 2005. This rulemaking is needed to renew the permit for a five-year term and update and make improvements to permit conditions. Federal Clean Water Act regulations require stormwater runoff to surface waters from construction activity disturbing one or more acres to be regulated through a National Pollutant Discharge Elimination System (NPDES) permit. A general permit is the most efficient mechanism for permitting these activities because it allows DEQ to regulate hundreds of similar types of activities and discharges through a single permit, rather than by issuing hundreds of individual permits

Potential Impact of Stormwater Runoff from Construction Sites

There is a well-established and direct connection between construction site activity without effective erosion and sediment controls and the levels of sediment loadings in receiving waters. In promulgating its original 1990 federal stormwater regulations, the U.S. Environmental Protection Agency (EPA) stated that sediment loading rates from construction sites are typically 10 to 20 times that of agricultural lands, with runoff rates as high as 100 times that of agricultural lands and 1,000 to 2,000 times that of forest lands. Additionally, EPA stated that over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades.

There are a wide range of cost-efficient erosion prevention and sediment control measures available to the construction industry to minimize these potential impacts. DEQ believes that the best management practice (BMP) approach used in the expiring general permit and its proposed renewal has been and will continue to be the most effective way of reducing stormwater runoff from construction sites in the state.

Effect of Rule The proposed revisions to Oregon Administrative Rule (OAR) 340-045-0033 *Regulations Pertaining to General Permits* (Attachment A) will renew the NPDES 1200-C general permit for stormwater runoff from construction sites that disturb one or more acres of land.

How many construction sites will be affected?

Approximately 1,500 sites are currently registered under this general permit. However, the number of permit registrants at any one time changes frequently because of the temporary nature of soil disturbance from construction activity. DEQ also has agreements with nine local government agencies to assist in the implementation of the 1200-C permit. In general, the local government agencies review and approve erosion control plans and conduct site inspections, while DEQ maintains NPDES enforcement authority and oversees the work of the local agencies. The total number of permit registrations referenced above includes those in the jurisdictions of these local agencies.

Summary of Revisions

The proposed rule revisions recommend the following noteworthy additions to the permit:

- **A 14-day public notice and review period on permit applications and erosion and sediment control plans (ESCPs) is required for construction sites disturbing five or more acres of land.** The expiring permit contains no provisions for public notice and comment on permit applications and ESCPs. The recommended permit would be the first DEQ general permit with such public notice and review provisions. Based on current construction site figures, 40% of permit registrants disturb five or more acres of land, which accounts for over 80% of construction land disturbances regulated by this permit. While future construction project numbers and sizes are difficult to predict, DEQ estimates that 40% of new permit registrants will need to comply with the new public notice process and believes that this process will provide for public participation on the majority of land disturbances caused by construction activities regulated by this permit. DEQ proposes that this requirement take effect for all new applications received on or after June 1, 2006.
- **An explicit prohibition on causing violations of in-stream water quality standards.** The expiring permit states that the “ultimate goal” of the permit is to comply with water quality standards. The new language states that the permit registrant must not cause a violation of instream water quality standards. However, the language further explains that DEQ will assume a permit registrant’s stormwater discharges will not violate

water quality standards if they develop, implement and revise their ESCP in compliance with permit conditions, unless evidence is obtained to the contrary. This evidence would be based on instream water quality monitoring data obtained by DEQ during a compliance investigation. For instance, samples taken upstream of the site's discharge point could be compared with samples collected downstream of the site to document a standards violation. This condition of the permit also identifies the actions DEQ will require the permit registrant to take if a determination is made that the registrant has caused a violation of water quality standards.

- **More stringent requirements for sites discharging stormwater into waterbodies that are listed for turbidity or sedimentation on the most recent EPA-approved Oregon 303(d) list¹ or that have an established Total Maximum Daily Load² (TMDL) for turbidity or sedimentation.** The expiring permit states that DEQ may establish additional controls for construction activities discharging to water quality limited streams if TMDLs are established or require application for an individual permit. The recommended renewal permit includes specific requirements for sites discharging to waterbodies on the 303(d) list for turbidity or sedimentation, or to waterbodies that have an established TMDL for one of those two pollutants. Currently, the proposed requirements would directly impact 1% of the total universe of 1200-C permit registrants. Of the active 1200-C sites that would be affected by these requirements, nearly all of them are located in the Eagle Point area of Jackson County. The recommended permit requires affected permit registrants to either:
 - (1) Collect stormwater runoff samples, analyze them for turbidity, and compare results to a numeric turbidity benchmark (a target concentration or numeric goal designed to determine effectiveness of pollution controls), or
 - (2) Implement one or more specified best management practices designed to treat, control or prevent sediment discharges.
- **A new requirement to implement immediate corrective actions when sediment or turbidity is visibly detected in discharges to surface**

¹ The Oregon 303(d) list is composed of water bodies that do not meet water quality standards for one or more pollutant parameters.

² A Total Maximum Daily Load (TMDL) is a pollution load limit for a water body that represents the maximum amount of a pollutant a water body can receive and still meet water quality standards. TMDLs are established by DEQ for water bodies on the 303(d) list.

waters or stormwater conveyance systems. This was an expectation in the expiring permit, but not explicitly stated.

- **New procedures for reporting and approving revisions to a permit registrant’s ESCP.** The expiring permit does not directly address ESCP revisions, other than to state that DEQ may request modifications at any time if the ESCP is deemed ineffective. The procedures in the recommended permit are designed to minimize the paperwork involved with revision submittals, while ensuring prior DEQ approval for most ESCP revisions. Rather than requiring the permit registrant to re-submit the entire ESCP every time revisions are made, the proposed permit allows for the submittal of an “Action Plan” that simply summarizes the changes being proposed.

Commission Authority

The Commission has authority to take this action under ORS 468.020, 468.065(2), 468B.035, and 468B.050.

Stakeholder Involvement

Early in the rulemaking process DEQ held numerous meetings with affected parties and individuals interested in changes to the 1200-C construction stormwater general permit. DEQ met with current 1200-C permit holders, business associations, state and federal agencies, environmental organizations and local governments.

Initially, DEQ discussed the proposal and received informal comments during ten stakeholder scoping meetings in March and April 2005 in Portland, Salem, Eugene, and Medford. In addition, DEQ placed a preliminary draft of the revised 1200-C permit on its website in June 2005. The agency then held three meetings in June to discuss this initial draft and to generate further informal comments and suggested changes to the permit.

Public Comment

The formal public comment period was open from August 22, 2005, through September 30, 2005. Public hearings on the proposal were held in Eugene, Portland, and Medford. The major issues raised during the comment period are summarized below under “Key Issues.” Attachment B, the summary of Public Comments and Agency Responses, provides the detailed results of the formal public input and corresponding rule changes.

Key Issues

Key issues raised during the public comment period include the following:

1. Public Notice and Review of Individual Permit Applications and Erosion and Sediment Control Plans (ESCPs)

Initial Proposal:

The proposed renewal draft of the 1200-C permit presented for public comment included a 14-day public notice and review period, and an opportunity for an information meeting when requested by ten (10) or more persons, for *all* permit applications and ESCPs. That notice period would occur prior to DEQ registering the applicant under the permit. This provision was included to be consistent with a similar public notice condition to be proposed in the upcoming renewal of the industrial stormwater general permits as a result of a December 2004 settlement agreement with the Northwest Environmental Defense Center (NEDC). While the 1200-C was not specified in this agreement, it is similar in nature to the industrial stormwater permits, which, when proposed for public comment, will also include a requirement for public notice of permit applications and erosion and sediment control plans as agreed to in the settlement.

Public Comments:

Many commenters opposed inclusion of this permit condition because they believed it would unnecessarily delay permit registration and construction projects, and questioned why DEQ would divert its scarce resources to an administrative process that was not viewed by these commenters as a federal Clean Water Act requirement. In contrast, environmental advocates commented that the federal Clean Water Act does require public notice and comment on individual applications and ESCPs, but stated the comment period should be 35 days, as specified in the settlement agreement.

Legal Background:

The case law on public notice of general permit applications and management plans remains unsettled. The Ninth U.S. Circuit Court ruled that such notice is required for municipal stormwater general permits, and the Second U.S. Circuit Court issued a similar ruling for concentrated animal feeding operations (CAFO) permits. However, the Seventh U.S. Circuit Court ruled in 2005 that EPA was not required to provide public notice and comment on applications for EPA's construction stormwater general permit. The Seventh U.S. Circuit Court decision applies to EPA issued construction general permits throughout the nation, while the Ninth U.S. Circuit Court decision similarly applies to all EPA-issued small municipal separate storm sewer system (MS4) general permits.

Analysis of Alternatives:

DEQ analyzed the following three alternative public notice and comment approaches in response to public comments:

(a) *No Public Notice and Comment on Permit Applications and ESCPs*

This option represents the status quo under the expiring permit. Given that the case law regarding the need for public notice and comment on general permit applications and plans remains unsettled, waiting for more clear direction from the courts or EPA may be warranted. Additionally, the environment may be better protected by using limited DEQ resources to review ESCPs, respond to complaints, and conduct site inspections rather than administering a public notice process.

Workload Analysis: Previously, four full time equivalents (FTEs) were working on 1200-C permit tasks statewide. DEQ allocated one additional FTE to 1200-C permit work effective November 2005. If DEQ directs staff resources to develop and maintain an additional public notice and review process, ESCP review and site inspection work would decrease proportionally. With no public notice and comment process, the additional one (1) FTE added in November 2005 would be directed to increasing the number of ESCP reviews and site inspections conducted by staff. DEQ estimates that all ESCPs submitted with new applications could be reviewed, and the increased number of site inspections would be a combination of complaint responses and DEQ-initiated inspections, which are not currently conducted. The specific implementation commitments are summarized in the table on page 8.

(b) *Public Notice and Comment on All Permit Applications and ESCPs*

Another option is to require a 14-day public notice and comment period on all 1200-C permit applications and ESCPs. Under this option, the public notice process would be streamlined from what was originally proposed in the draft 1200-C permit by removing the provision for an informational hearing if requested by ten (10) or more persons and the public notice for revisions to an ESCP after permit registration. The notice period would still only apply to new applications as originally proposed.

Workload Analysis: If DEQ were to implement a public notice and review process for all permit applications and ESCPs, it would also need to review all ESCPs. Currently, 70% of the ESCPs are reviewed. DEQ estimates that administering a public notice for all applications

and reviewing all ESCPs will require more than the one (1) additional FTE added in November for 1200-C implementation. The FTE required for these additional activities would be approximately 1.5 FTE. Under this scenario, no additional site inspections would be conducted. The same number of complaint-driven inspections conducted in 2004 would be anticipated for 2006 and 2007. The viability of this option is limited by the availability of resources. Since only one (1) additional FTE has been allocated for 1200-C implementation, no other sources of revenue are immediately available to augment the funding needs of this option. For specific workload commitments, see the summary table on p. 8.

(c) Public Notice and Comment on Five Acres or More Permit Applications and ESCPs for five or more acres

This option is similar to (b) above, but is further streamlined to projects disturbing five or more acres. It does not include an opportunity for an informational hearing or public notice on revisions to the ESCP. As discussed earlier in "Effect of Rule," DEQ estimates that focusing the public notice and review process on construction projects disturbing five or more acres will have the potential to impact about 40% of new permit registrants. This is based on current construction site figures indicating that 40% of permit registrants disturb five or more acres of land and account for over 80% of the acres of land disturbed from construction activity regulated by this permit. While future construction project numbers and sizes are difficult to predict, DEQ believes that this alternative provides for public participation on the majority of land disturbances caused by construction activities regulated by this permit. DEQ proposes that this requirement take effect for all new applications received on or after June 1, 2006.

Workload Analysis: Administering a public notice and comment process for new construction projects that disturb five or more acres will require approximately 0.6 FTE (60% of the planned additional 1 FTE for November 2005). With the one (1) additional FTE, DEQ would implement the public notice and review process for new permit applications and ESCPs for about 40% of the new permit applications and ESCPs that are submitted each year. In addition, DEQ would be able to complete reviews of 100% of the ESCPs it expects to receive (currently 70% are reviewed). However, no additional site inspections could be conducted. The same number of complaint-driven inspections conducted in 2004 would be anticipated for 2006 and 2007. For more specific workload commitments, see the summary

table below:

Summary of Workload Commitments for the 3 Alternatives

The table below summarizes DEQ's specific 1200-C permit implementation commitments for the three public notice alternatives evaluated in this report. The total numbers of applications and ESCPs are estimates based on the numbers submitted in 2004. The total number of applications referenced for public notice activity (605) is higher than the number listed for ESCP reviews and inspections (450), because the public notice process will include those permit applications and ESCPs under the purview of local agents and DEQ (i.e., an estimated 155 additional permit applications will be received by local agents each year).

Action	2004	2006 & 2007		
		Option A (No Public notice)	Option B* (Public notice for all sites)	Option C (Public notice on 5+ acre sites)
Public notice	NA	Not required	605 of 605 new permit registrants (100%)	242 of 605 new permit registrants (40%)
ESCP reviews	315 of 450 ESCPs submitted (70%)	450 of 450 ESCPs submitted (100%)	450 of 450 ESCPs submitted (100%)	450 of 450 ESCPs submitted (100%)
Site inspections	35 of 450 new permitted sites (8%)	112 of 450 new permitted sites (25%)	35 of 450 new permitted sites (8%)	35 of 450 new permitted sites (8%)

* NOTE: To implement Option B, 1.5 FTE would be required, while Option A and C would be implemented with the 1 FTE added in November for additional 1200-C implementation activities. Because no other resources are available to support the additional FTE needed, Option B is currently not feasible. DEQ cannot reduce its current commitments to industrial and municipal stormwater permit implementation to free up additional resources for the construction program. In addition, the site inspection level in Option B cannot be scaled back because this level represents the minimal complaint response activity DEQ must maintain to be responsive to the public.

DEQ Recommendation:

DEQ recommends a 14-day public notice and review period on new permit applications and ESCP for construction projects disturbing five or more acres. This public notice and review requirement would become effective on June 1, 2006, thereby giving DEQ time to develop specific internal procedures for this process and to coordinate with local government agents. DEQ recommends this option for the following reasons:

- Implementing this option meets the intent of the 2003 Ninth U.S. Circuit Court decision, which may become applicable to all stormwater general permits as a result of future court rulings. An Oregon Court would likely find a Ninth U.S. Circuit Court decision binding.
- Public notice and review has the potential to result in environmental benefits because citizens may provide information on site conditions and considerations that are not known by DEQ.
- Currently, 40% of permit registrants (600 of 1500) disturb five or more acres of land. This accounts for over 80% of disturbed land from all construction projects regulated by this permit. Focusing on these larger construction activities is the most efficient and effective use of DEQ resources.
- While this process does not include an opportunity for an informational hearing or public notice on revisions to the ESCP, it still provides for significant public comment opportunities. Including an informational hearing opportunity and notice and comment on ESCP revisions would place a significant additional demand on DEQ's already limited resources. As stated previously, the primary advantage of issuing a general permit is that it is a practical and efficient way of regulating hundreds of small sources. If informational hearings and notice and comment on ESCP revisions were included in the 1200-C permit, the permitting process would begin to more closely resemble that used for individual permits, thus negating many of the resource efficiency benefits of a general permit program.

2. Water Quality Standards Compliance

Initial Proposal:

Generally, an NPDES permit must include requirements designed to ensure that authorized discharges will not lead to a violation of instream water quality standards. Hence, DEQ included in the public notice draft a simple statement that permit registrants may not cause instream water quality standards violations.

Public Comment:

Several commenters expressed concern that this simple statement did not specify how the permit registrant is to ensure standards compliance. Without this explanation, these commenters asserted that a permit registrant could be complying with all other permit conditions and following their ESCP, yet could still potentially be violating water quality standards. Including a requirement for which a permit registrant is unable to determine their compliance was deemed an unfair and inappropriate permit condition. For instance, to determine turbidity violations, the background level of turbidity in the receiving stream will need to be determined. Since many permitted sites are not adjacent to the receiving streams, such determinations are difficult to make.

DEQ Recommendation:

DEQ recommends retaining the explicit prohibition on causing a water quality standards violation and has further clarified that DEQ assumes compliance with water quality standards if the permit registrant implements the ESCP in compliance with Schedule A of the permit, unless evidence to the contrary is obtained. This evidence will be based on instream water quality monitoring data obtained by DEQ during a compliance investigation. This permit condition also provides additional certainty regarding DEQ's response(s) if a standards violation does occur.

3. TMDL & 303(d) Requirements and Benchmarks

Initial Proposal:

As noted previously, DEQ is recommending more stringent requirements for those permit registrants discharging to waterbodies that are on the 303(d) list for turbidity and sedimentation or that have established TMDLs for those parameters. Initially, DEQ proposed two options:

Option 1 - Collect stormwater runoff samples, analyze them for turbidity, and compare results to a numeric turbidity benchmark (a goal or target concentration designed to determine effectiveness of pollution controls), or

Option 2 - Implement one or more specified best management practices

designed to treat, control or prevent sediment discharges.

Public Comment:

Most of the comments received concerned the turbidity benchmark option, Option 1. Comments on the public notice draft related to both the benchmark number 160 nephelometric turbidity units (NTU) and the proposal to convert the benchmark to an enforceable effluent limit in response to repeated non-conformance with the benchmark. A benchmark is a numeric goal that, if not met, would result in changes to the ESCP to improve pollution controls. An effluent limit is a numeric concentration level or pollutant amount that, if not met, would constitute a permit violation that could result in DEQ enforcement action. Some commenters asserted that the benchmark was too low and unachievable at most construction sites, while others believed the benchmark was too high and not sufficiently protective of receiving waters.

In addition, the proposal to convert the benchmark to an effluent limit when four consecutive sample results exceeded the benchmark was opposed by numerous commenters for many reasons, including:

- a. Benchmarks, not limits, are appropriate for stormwater permits as evidenced by the approach used by EPA.
- b. The short time frame for converting benchmarks to limits does not provide permit registrants with enough time to make adaptive management changes.
- c. Benchmarks and limits are applied in permits for different purposes, and therefore, the methodology for deriving the numbers for a benchmark versus a limit are different.
- d. The process for determining benchmark exceedances and when the benchmark converts to a limit is very complex, as it involves the use of a daily median and the calculation of a geometric mean. Small construction contractors would have difficulty making these determinations.

DEQ Recommendation:

In the permit proposed to the Commission, DEQ recommends the following:

- **Retaining Option 1, the benchmark of 160 NTU, but eliminating the requirement for the benchmark to convert to a limit.**
DEQ believes that establishing a benchmark promotes adaptive management and will assist in determining the effectiveness of BMPs.
DEQ also believes the methodology used to develop the 160 NTU

benchmark is sound, and has not received data or alternative methodologies from commenters that would cause a re-evaluation of the methodology or the number. Upon further consideration, DEQ agrees that conversion of the benchmark to a limit is problematic for short-term activities like construction sites because the time frame for making adaptive management changes prior to the conversion becomes compressed to a few weeks. In such a circumstance, the permit registrant does not realistically have enough time to assess the problem and ESCP, implement corrective actions, and measure the results. In addition the administrative burden on DEQ staff to constantly track the benchmark or limit status of all affected sites could become significant.

- **Retaining Option 2 that requires the implementation of additional erosion prevention or sediment control and treatment BMPs described in the permit.**

In response to public comment, DEQ modified the list of additional BMPs under Option 2 to ensure the referenced BMPs are the ones that most effectively reduce and treat both turbidity and sedimentation, without other unintended environmental impacts.

DEQ believes that the stormwater discharges of permit registrants who properly implement either of the two options will not cause or contribute to violations of instream water quality standards.

4. Reporting of Visual and Water Quality Monitoring Results

Initial Proposal:

The public notice draft of the permit included a requirement for permit registrants to submit quarterly reports containing visual monitoring information, as well as water quality monitoring data if applicable (e.g., if subject to 303(d) or TMDL requirements).

Public Comment:

Several commenters opposed this proposed requirement because they considered it a paperwork exercise that did not result in any environmental benefit and they asserted that DEQ did not have the staff resources to review all of these reports.

DEQ Recommendation:

DEQ agrees that collecting and reviewing the reports and enforcing non-compliance with reporting requirements would require significant agency resources. This staff time could result in greater environmental benefits if it were spent on site compliance and technical assistance activities.

Therefore, DEQ recommends to the Commission that the quarterly reporting requirement not be included in the permit. However, the permit was revised to explicitly state that the permit registrant must document all required monitoring and inspections and that this documentation must be kept on-site and maintained. In addition, the permit registrant must provide this monitoring information within three working days of a request by DEQ (based on DEQ needs or a third party request).

Next Steps

DEQ has developed an implementation plan that outlines the necessary steps for ensuring the renewed 1200-C permit is implemented in an efficient and effective manner. These steps include updating application guidance information, revising checklists for conducting permit and ESCP compliance evaluations, and implementing the public notice provision for construction activities disturbing five or more acres.

DEQ recommends that the public notice and review requirement take effect on June 1, 2006. This five month period after permit adoption will allow DEQ to develop the procedures and infrastructure necessary for effective implementation. This will include developing the webpage for the public notice process and training regional DEQ staff on the public notice procedures.

In addition, DEQ currently has memorandum of agreements (MOAs) with nine local government agencies to assist in the implementation of the 1200-C permit in exchange for a portion of DEQ permit fees. With the adoption of the renewed 1200-C permit, DEQ needs to revise and update the MOAs to reflect new permit conditions, delineate new roles and responsibilities, and ensure consistency in the implementation of the renewed permit. DEQ also plans to encourage other local governments to assist DEQ in streamlining construction permitting requirements. The goal of this effort will be to provide one-stop permitting opportunities for contractors and builders so both the local building permit and 1200-C may be obtained at the local agency.

Attachments

- A. Summary of Proposed Rule Revisions
 - A-1. Proposed Final Rules
 - A-2. Proposed General Permit
- B. Summary of Public Comment and Agency Response
- C. Presiding Officer's Report on Public Hearings
- D. Relationship to Federal Requirements
- E. Fiscal and Economic Impact Statement
- F. Land Use Evaluation Statement
- G. Evaluation Report for General Permit

**Available Upon
Request**

- Legal Notice of Hearing
- Cover Memorandum from Public Notice
- Written Comment Received
- Public Hearing Audio Tapes
- Previous Versions of Proposed Rule and General Permit
- Implementation Plan

Approved:

Section: _____

Division: _____

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