



Guidance Document to Support:

The Regulations Governing Storm Water Discharges Associated with Industrial Activity
Part 2 – Special Conditions for Storm Water Discharges Associated with Construction Activities

I. Background

The EPA can authorize any state to operate the National Pollutant Discharge Elimination System (NPDES) program. Delaware received this authority in April, 1974. The 1987 amendments to the Clean Water Act require national regulations to be issued to address the control of pollutants entrained in storm water discharges.

Under the provisions of the Clean Water Act, as amended, (33 U.S.C. 1251 et.seq.; the Act), except as provided by Part I.B.3 of the permit, Federal law prohibits discharges of pollutants in storm water from construction activities without an NPDES Permit. A General Permit, as defined by federal law in 40 C.F.R. §122.28, authorizes the discharge of storm water associated with industrial activity from sources within a defined area or sources that share certain similarities.

In 1993, Section 9 (The General Permit Program) of the State of Delaware, Department of Natural Resources and Environmental Control (DNREC), Regulations Governing the Control of Water Pollution was issued. Subsection 1 of the General Permits Program contains The Regulations Governing Storm Water Discharges Associated with Industrial Activity and are referred to as the "General NPDES Storm Water Permit Program". In order to obtain coverage through the General NPDES Storm Water Permit Program, persons will be required to file a Notice of Intent (NOI) with DNREC. The NOI requirement is in accordance with 40 C.F.R. §122.28(b)(2) of the USEPA NPDES Program. The NOI is the equivalent of an NPDES permit application for General NPDES Storm Water Permit coverage.

II. Requirement to Obtain Permit Coverage

In Delaware, any land disturbing activity exceeding 5,000 square feet is required to obtain an approved Sediment and Stormwater Plan prior to the initiation of land disturbance, or construction activities. All projects requiring a detailed Sediment and Stormwater Plan must also submit the Notice of Intent (NOI) for Storm Water Discharges Associated with Construction Activity Under a NPDES General Permit (FORM 1). Submittal of the NOI together with approval of the detailed Sediment and Stormwater Plan provide the site with permit coverage to be authorized to discharge storm water associated with construction activity.

As a matter of practice, the NOI must be submitted to DNREC prior to approval of the Sediment and Stormwater Plan by the local plan approval agency. Projects eligible for Sediment and Stormwater Plan approval through a Standard Plan, where the total limits of disturbance do not exceed one (1) acre, are not required to submit the NOI.

III. Who is Responsible?

Persons with "operational control" of the site activities manage and have control of the construction activity, construction plans and specifications, and have the ability to make modifications to the plans and specifications. Any modification to the plans and/or specifications will require an approval of the modification by the local plan approval agency. It is the person with operational control, or the operator, who must sign the certification on the NOI. By signing the certification, the signatory agrees to fully comply with the *Special Conditions for Storm Water Discharges Associated with Construction Activities*.



Persons with operational control may include:

- owners,
- developers, and
- homebuilders in residential development projects.

A general and/or site contractor who is under contract with the owner, developer, and/or homebuilder is not considered to be an operator when they are acting at the direction of the owner, developer and/or homebuilder, when they do not have the authority to make modifications to the plans and specifications without the consent of the owner, developer and/or homebuilder. The land development plan consultant, engineer, surveyor, landscape architect, or architect is not considered to be an operator, and NOIs submitted under the signature of those individuals will be returned for a proper owner certification signature. The certification shall be signed as follows:

- For a corporation: by a responsible corporate officer which means: (i) president, secretary, treasurer, vice-president of the corporation in charge of a principal business function, or any person who performs similar policy or decision making function, or (ii) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures;
- For a partnership or sole proprietorship: by a general partner of the proprietor; or
- For a municipality, state, federal, or other public facility: by either a principal executive or ranking elected official.

For Delaware businesses, the form certification shall be signed as follows:

- For a Corporation: by an Authorized Officer (8 Del. C., Chapter 1),
- For a Limited Liability Company: by an Authorized Person (6 Del C., Chapter 18),
- For a Limited Partnership: by a General Partner (6 Del C., Chapter 17),
- For a General Partnership: by a Partner or Authorized Person (6 Del. C., Chapter 15),
- For a Limited Liability Partnership: by a Partner or Authorized Person (6 Del. C., Chapter 15),
or
- For a Statutory Trust: by a Trustee (12 Del. C., Chapter 38).

Reference the Delaware Code as listed for definitions of the individuals who may sign for the various business entities.

Transfer of Authorization

There are two different conditions whereby authorization to discharge may be transferred to another permittee who agrees to comply with the requirements of Special Conditions for Storm Water Discharges Associated with Construction Activities:

A. Transfer of Control of Permitted Activities

If an owner who submitted the NOI prior to approval of the Sediment and Stormwater Plan does not intend to manage or control the permitted activities during construction, that owner may choose to transfer authorization to discharge to a duly authorized person by submitting a Transfer of Authorization form (FORM 3). By transferring control of permitted activities, the original permittee relinquishes their own responsibility under the permit. The duly authorized person accepts all responsibility for compliance with the permit conditions. A general and/or site



contractor who is under contract with the owner, developer, and/or homebuilder and has the authority to make modifications to the plans and specifications without the consent of the owner, developer and/or homebuilder may be considered to have operational control and authorization to discharge may be transferred to that general and/or site contractor.

The Transfer of Authorization form (FORM 3) must be submitted to DNREC no less than ten (10) days prior to beginning construction activities. Transfer of Authorization, except in the case of an ownership change, may not take place once construction activities have commenced. After construction begins, if the original permittee wishes to share authorization to discharge with a duly authorized person, the original permittee and the duly authorized person may share operational control through submittal of the Co-Permittee Application [FORM 4, See C. Shared Operational Control (Co-Permittees)]. The Transfer Agreement on the Transfer of Authorization form must provide effective dates of the transfer and be signed by both the original permittee and the duly authorized person, or transferee. The Transfer of Authorization form includes the NOI Certification that must be signed by the transferee. By signing the certification, the transferee agrees to fully comply with the *Special Conditions for Storm Water Discharges Associated with Construction Activities*.

It is the responsibility of the original permittee, not the local plan approval agency, to provide the transferee with the current approved Sediment and Stormwater Plan.

B. New Owner

Should ownership of the project change after submittal of the NOI, either before or during the construction period, the original permittee must transfer authorization to discharge to the new owner by completing the Transfer of Authorization form (FORM 3). The Transfer Agreement on the Transfer of Authorization form must provide effective dates of the transfer and be signed by both the original permittee and the new owner. The Transfer of Authorization form includes the NOI Certification that must be signed by the new owner. By signing the certification, the new owner agrees to fully comply with the *Special Conditions for Storm Water Discharges Associated with Construction Activities*.

In addition to submitting the Transfer of Authorization form to DNREC, the new owner must submit required documentation of the ownership change to the local plan approval agency for the purpose of updating the agency's owner contact information. At a minimum, the Owner's Certification as required by the *Delaware Sediment and Stormwater Regulations* must bear the original signature of the new owner; this may be accomplished through submittal of a revised Sediment and Stormwater Plan. The new owner should contact the local plan approval agency to determine what additional documentation will be required.

It is the responsibility of the original owner, not the local plan approval agency, to provide the new owner with the current approved Sediment and Stormwater Plan.

Shared Operational Control (Co-Permittees)

A single project may have multiple persons with operational control. Examples of this condition include:

- A residential development project with an original developer who is responsible for construction of roads, utility infrastructure, open spaces, and stormwater management components, and one or more homebuilders responsible for home construction and having operational control on individual residential lots.



- An office or business park complex having an original developer who is responsible for construction of roads, utility infrastructure, open spaces, and stormwater management components, while individual lots each have individual owners with operational control on those lots.

In these cases, each of those individual entities will be “co-permittees” under the original NOI for the site. Multiple NOIs are not required and will not be accepted for individual lots within the limits of a project already receiving permit coverage through submittal of an NOI. Should the original permittee sell one or more lots to another person or persons during the construction period, the original permittee must share operational control with each new owner by completing the Co-Permittee Application form (FORM 4). The Shared Operational Control Agreement on the Co-Permittee Application form must provide effective dates of shared operational control and be signed by both the original permittee and the new co-permittee. The Co-Permittee Application form includes the NOI Certification that must be signed by the new co-permittee. By signing the certification, the co-permittee agrees to fully comply with the *Special Conditions for Storm Water Discharges Associated with Construction Activities*. If more than one co-permittee is added for permit coverage under the same NOI, a separate Co-Permittee Application must be submitted for each additional co-permittee.

DNREC and/or its delegated agency will not be responsible for dictating when additional co-permittees must be added to the NOI to gain permit coverage for their construction activities. DNREC recommends that when individual lots are conveyed to new owners (homebuilders or pad site owners, for example), the new owner will at that time become a co-permittee for the overall site with the original permittee as a condition of the sale of property.

It is the responsibility of the original permittee, not the local plan approval agency, to provide the new co-permittee with the current approved Sediment and Stormwater Plan. The Sediment and Stormwater Plan should include a plan sheet that further defines the responsibilities of the co-permittee(s). That plan sheet, titled, “Individual Lot Erosion and Sediment Control Plan”, shall include, at a minimum, the following information:

- For residential development projects, Standard Detail No. DE-ESC-3.7.1 titled ESC for Minor Development,
- A separate sequence of construction for individual lot construction if not included in the Standard Detail, and
- Notes defining who is responsible for cleanup of transported sediment and maintenance of sediment and stormwater best management practices (BMPs) during the lot construction phase

The Erosion and Sediment Controls Operations and Maintenance Responsibilities matrix attached to this Guidance Document as Appendix A should be used as a guide to define items that require maintenance throughout the construction phase. Construction, operation, or maintenance of each of these items must be assigned to one or more permittee for the site and defined in an agreement to accompany the co-permittee form when it is submitted to DNREC.

Adding a co-permittee on the original NOI does not relieve the original permittee from responsibility for compliance with the permit. If the original permittee makes changes to the Plan without notification to the co-permittees, that original permittee assumes full responsibility for implementation of the Plan. In enforcement action the original permittee, or overall owner/developer, will be held jointly responsible for any violations of the Plan or permit with any of the subsequent co-permittees. Individual co-permittees, such as individual lot developers, will be responsible in an enforcement action only for construction activities that have occurred on their lot(s), or for violations and/or damages that have occurred as a result of construction activities that have occurred on their lot(s).



IV. Termination of Coverage

Individuals who submit for coverage under the permit must terminate coverage once construction activities have been completed. The original permittee or the transferee must submit the Notice of Termination (NOT) form (FORM 2) to DNREC; individual co-permittees need not submit individual NOTs (see below for termination of individual coverage for co-permittees). The NOT should not be submitted until the following conditions have been met, as determined by the local plan approval agency:

- All items and condition of the Plan have been satisfied in accordance with the Delaware Sediment and Stormwater Regulations,
- As-built documentation verifies that the permanent stormwater management measures have been constructed in accordance with the approved Plan and the Regulations, and
- Final stabilization of the site has been achieved in accordance with the definition in Section 9.1.02.0.

Following final inspection, the local plan approval agency will notify the permittee when they consider the project to be complete and recommend submittal of the NOT to DNREC. When DNREC receives the NOT form from the permittee, DNREC will await verification from the local plan approval agency that the project has indeed met all of the above conditions before terminating permit coverage. Individual delegated agencies will agree with DNREC on the best way to provide this verification (ie. final inspection report, closeout letter, etc.). It is noted that permit coverage in multi-lot projects, such as residential development projects, may not be terminated until construction of each individual lot has been completed.

When a co-permittee has met all of the termination of coverage conditions for their individual lots within the total project site, the co-permittee shall submit to DNREC a Notice of Termination of Shared Operational Control form (FORM 5). For example, a homebuilder owning a block of 25 lots within a residential development of greater than 25 lots may submit a Notice of Termination of Shared Operational Control to DNREC when each of those 25 lots has been built out, Certificates of Occupancy have been issued, and final stabilization has been achieved in accordance with the definition in Section 9.1.02.0. Once the NOT of Shared Operational Control form is submitted to and accepted by DNREC through verification with the local plan approval agency, the co-permittee is relieved of his responsibility under the permit and will no longer share operational control with the other co-permittees of the site.

V. Fees

Until permit coverage is terminated, the original permittee will be assessed an annual NOI permit fee of \$195. The permittee will be notified to submit the fee to DNREC twice, after which a Notice of Violation will be issued and enforcement action will proceed.



Clarifications:

During the public review period, comments were received requesting clarification of the term “larger common plan of development or sale” used in the definition of Construction Activity. EPA’s Fact Sheet on NPDES General Permit for Storm Water Discharges from Construction Activities uses the term “common plan” as follows:

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.

In Delaware, land development projects such as residential subdivisions and business or industrial park complexes would include lots and construction activities that may be part of a larger “common plan”. An individual residential lot that is less than one acre in size, but is part of a land development project such as a subdivision of one (1) acre or more, is not precluded from permit coverage because it is part of that larger “common plan”. Individual residential or commercial lots that fall within a larger “common plan” that has already gained permit coverage through approval of the Sediment and Stormwater Plan and submittal of the NOI will also have permit coverage under that Plan and NOI. If the ownership or operator of the individual parcel is different than the ownership or operator of the larger “common plan”, a Co-permittee Form must be filed to allow for Shared Operational Control of the parcel.

Definitions:

“Standard Plan” means a set of pre-defined standards and/or specification for minor land disturbing activities that may preclude the preparation of a detailed plan under specific conditions.



Appendix A.

Erosion and Sediment Control Operations and Maintenance Responsibilities

Prior To Bulk Grading	Bulk Grading And Infrastructure	Home Building Phase	Post Home Building Phase
Stabilized Construction Entrance	Maintenance of SCE Road Stabilization	Lot Silt Fence	Clean Sediment out of Pipes and Drainage
Dikes, Berms, Diversions	Swales, Berms, Diversions, Tracking	Lot Stabilized Driveway Entrance	Other Repairs to Stormwater Conveyance
Sediment Basins, Traps	Maintenance of Traps and Basins	Maintain Perimeter Controls/Traps/Basins	Remove other E&S Controls
Silt Fence	Maintenance of Silt Fence	Maintain Inlet Protection	Sediment Basin Conversion
	Temporary Stabilization of Bulk Fill Areas	Downspout Slope Drains	As-Builts
	Stone Check Dams	Permanent Lot Stabilization	
	Inlet Protection	Street Cleaning/Sweeping	
	Stabilization of the Lot Areas		