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The Federal StormWater Association (FSWA) submits the following comments regarding the U.S. Environmental Protection Agency’s (EPA) proposed modifications to its 2017 National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Construction Activities (2017 CGP)(83 Fed. Reg. 63,858 (December 12, 2018)).

Founded in 2005, FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state NPDES permitting authorities under the Clean Water Act (CWA or the Act). FSWA member entities or their members own and operate facilities located on or near waters of the United States. Many conduct operations that generate “stormwater from construction activity” as defined at 40 CFR § 122.26(b)(14)(x) and (15) and are subject to NPDES permitting in states in which EPA is the permitting authority. Hence, FSWA has standing to submit these comments. FSWA also has engaged EPA since its founding regarding all aspects of the Clean Water Act’s stormwater permitting program.

EPA has proposed modifications to its 2017 CGP to address the following three major issues:

1. Remove examples of operators in the definition of “operator”;
2. Align three requirements that implement the Construction and Development Effluent Limitations Guidelines (C&D ELGs) to more closely reflect the specific regulatory language contained in 40 CFR Part 450;
3. Clarify the roles and responsibilities of individual operators in multiple operator arrangements.


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1 A list of FSWA members is available upon request.
FSWA generally concurs with the proposed modifications for issues (1) and (2) above. FSWA supports EPA’s proposal to remove the examples of operators from its definition of operator, but FSWA recognizes that there remains confusion regarding EPA’s definition of “operator” and responsibilities of various “owners” as “operators” even without the examples that EPA proposes to remove.2

FSWA commented on EPA’s proposed and revised C&D ELGs and reiterates that the language agreed to in those final non-numeric ELGs regarding related pollution prevention and best management practices resulted from specific negotiations. EPA should finalize the proposed changes to ensure that this and future CGPs adhere strictly to the precise regulatory language in the C&D ELGs.

The third issue in EPA’s proposed modifications – clarifying the roles and responsibilities of individual operators in multiple operator arrangements – is key because EPA proposes to remove the “joint and several liability” language from the 2017 CGP. FSWA strongly believes that joint and several liability is inappropriate for any NPDES permit. The following comments focus on improving EPA’s proposed modifications to clearly delineate responsibilities among multiple “operators” in permit language and EPA's definition of “shared control.”

Eliminating language creating “joint and several” liability

In its proposal, EPA proposes to “clarify an individual operator’s legal responsibility for permit compliance in situations where there are multiple operators who divide permit compliance” by removing “references to joint and several liability from the current permit since they are, in the Agency’s view, an inaccurate explanation of what the permit compliance duties are for multiple operators who share implementation responsibilities under the permit.” 83 Fed. Reg. at 63,863. Thus, EPA proposes to recraft and merge footnotes 52 and 53 from the 2017 CGP. As an initial point, FSWA strongly supports the revised first sentence of proposed Footnote 52 that, “The SWPPP [stormwater pollution prevention plan] does not establish the effluent limits and other permit terms and conditions that apply to your site’s discharges; these limits are established in this permit.” Id.

FSWA further supports EPA’s attempt to “clarify that operators who divide responsibilities do not have to duplicate permit-related functions if one operator is appropriately implementing the requirement for the rest of the operators to be in full compliance with the permit.” Id. Specifically, where there is a common plan of development with multiple operators, they may “divide amongst themselves various permit related functions provided that each SWPPP, or a group SWPPP, documents which operator will perform each permit-related function, including those related to the installation and maintenance of the shared control.” Id.

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2 Later in these comments, FSWA outlines some of the issues related to confusion EPA has caused by conflicting regulations, guidance, and permit terms that focus on whether or not an “owner” may be an “operator” and related permitting responsibilities, particularly in the situation in which a property owner hires a general contractor (or other party) for a construction project requiring CGP coverage. FSWA believes that more discussion should occur between industry representatives and EPA to help clarify EPA’s definition of “operator” and when an “owner” may be required to obtain permit coverage as an “operator” or not.
Again, FSWA agrees with EPA’s goal of ensuring that multiple operators that agree to specifically divide permit compliance related responsibilities must then document how they have divided those responsibilities.

EPA’s proposal would allow (if not encourage) operators in common plan areas to divide permit-related responsibilities and then to document how they have divided those responsibilities in their (individual or group) SWPPP(s). Although not addressed by EPA, FSWA asserts that similarly situated operators that elect not to share responsibility with other operators should also document how they will achieve permit compliance through responsibilities/obligations that do not include any other operators “shared controls” at the common plan of development. Hence, in all cases in where there are multiple “operators,” FSWA believes that EPA should require an operator’s compliance strategy and permit related controls to be clearly documented in its SWPPP.

However, in its proposed revisions to Part 7.1, related Footnote 52 and the definition of “shared control,” FSWA is concerned that EPA continues to impose joint and several liability for permit compliance. Specifically, EPA is proposing to hold an operator individually responsible for complying with the permit’s terms and conditions, “notwithstanding how the SWPPP(s) may divide each operator’s responsibilities.” Id.; see also revised Part 7.1 and related Footnote 52. That final phrase disregarding what has been documented in the operator’s SWPPP appears to FSWA to be counter-intuitive and will cause confusion within the construction industry and be interpreted differently by the various permitting authorities across the country. EPA should remove from the CGP all statements that impose liability beyond an operator’s scope of responsibility. The phrase should be deleted.

**Definition of “shared control”**

FSWA supports EPA’s proposed revisions to the 2017 CGP definition of “shared control” that eliminates the last sentence (“Any operators that are contributing stormwater from their construction activities to a shared control are considered to rely upon a shared control.”). An operator may contribute stormwater to a control that is shared by others, but not needed nor relied upon by that operator. FSWA suggests that, as an alternative to merely deleting the sentence, EPA should rewrite it as follows in order to further reinforce the importance of documenting one’s intent in their SWPPP:

Operators that are contributing stormwater from their construction activities to a shared control must document in their SWPPP whether or not they are relying upon that shared control for permit-related functions.

Further, FSWA believes that EPA’s proposed modification to the definition of “shared control” is less precise and will cause confusion by replacing the terms “relies on” with “used by.” FSWA believes that the concept of reliance is critical to whether an operator is utilizing a control to achieve compliance or not. While one operator’s stormwater discharge might travel

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3 The operators dividing responsibilities likely will have separate contractual agreements related to costs, indemnity, etc. But because the SWPPP must be maintained on site and subject to permitting authority review, for the purposes of the CGP, appropriately documenting how responsibilities are divided must occur in the SWPPP.
through a shared control such as a settlement pond, that operator’s stormwater discharge may comply with its permit prior to entering that pond, so that operator does not “rely” upon the pond for permit compliance, which should be documented in its SWPPP. As an alternative to EPA’s proposal, FSWA proposes a more simple definition that appropriately incorporates the concept of reliance and documentation:

A “shared control” is a stormwater control at a construction site (associated with a common plan of development or sale or that has multiple operators) that is intended to minimize pollutants and manage regulated stormwater discharges (such as a sediment basin or pond), and which is relied upon by two or more operators and documented in their SWPPP(s).

[When combined with the rewritten sentence above, a Shared Control is:

a stormwater control at a construction site (associated with a common plan of development or sale or that has multiple operators) that is intended to minimize pollutants and manage regulated stormwater discharges (such as a sediment basin or pond), and which is relied upon by two or more operators and documented in their SWPPP(s).

Operators that are contributing stormwater from their construction activities to a shared control must document in their SWPPP whether or not they are relying upon that shared control for permit-related functions.]

FSWA’s proposed modifications above are consistent with the explanations in EPA’s proposed revisions to the 2017 CGP Fact Sheet, except that EPA would have to delete one instance in which the Agency adds the phrase “notwithstanding how the SWPPP(s) may divide each operator’s individual responsibilities” from the Fact Sheet.

Permitting issues for “owners” and “operators”

As stated above, FSWA supports EPA’s proposal to remove the examples from its definition of “operator” because it believes those examples added confusion. FSWA’s support should not be interpreted as an endorsement of EPA’s definition of “operator,” which it finds confusing even without the deleted examples. In fact, there is not unanimity currently within FSWA regarding how EPA should better define “operator,” only that the current definition is problematic and confusing to all, and sometimes for different reasons from different perspectives. While EPA’s views may be evolving, there appears to be plenty of conflicting regulations, guidance, and approaches to whether a party is an “operator” and whether it must apply for a permit as such.

In its original stormwater rulemaking, EPA explains:

*In response to these comments, EPA would clarify that the operator will generally be responsible for submitting the permit application. Under existing regulations at § 122.21(b), when a facility is owned by one person but operated by another, then it is the duty of the operator to apply for the permit. Due to the temporary nature of construction activities, EPA believes that the operator is the most*
appropriate person to be responsible for both short and long term best management practices included on the site. EPA considers the term "operator" to include a general contractor, who would generally be familiar enough with the site to prepare the application or to ensure that the site would be in compliance with the permit requirements. General contractors, in many cases, will often be on site coordinating the operation among his/her staff and any subcontractors. Furthermore, the operator/general contractor would be much more familiar with construction site operations than the owner and should be involved in the site planning from its initial stages. 55 Fed. Reg. at 48,034 (Nov. 16, 1990).

The cited regulation, 40 CFR § 122.21(b), has not changed. EPA’s NPDES Permit Writer’s Manual essentially reiterates EPA’s 1990 preamble and also cites to 40 CFR § 122.21(b) for favoring permitting the “operator” over the “owner.” NPDES Permit Writer’s Manual at 4-1. However, EPA’s approach and justification for treating more “owners” as “operators” as evolved within the CGP over time. EPA attempts to explain its “preferred” approach in the 2017 CGP Response to Comments Document:

One commenter suggested that the party that “has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications” has limited control over compliance with the permit, and requested removing this part of the definition of “operator.” EPA disagrees, as this party is decidedly considered to be an operator subject to the NPDES regulations. The NPDES regulations at 40 CFR § 122.2 define "owner or operator" as "the owner or operator of any 'facility or activity' subject to regulation under the NPDES program."

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EPA appreciates the suggested modifications to the definition of “operator” in the permit, and understands that in some scenarios, owners (i.e., those having operational control over construction plans of specifications, including the ability to make modifications to those plans and specifications) have limited involvement on the construction site. However, EPA has found that it is necessary to require permit coverage of both the owner (i.e., the party with operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications) and the general contractor (i.e., the party with day-to-day operational control of those activities at a project that are necessary to ensure compliance with the permit conditions) to ensure that all parties with responsibilities over the control of erosion and sediment on the site are regulated. For example, EPA is aware that it has been the experience of some general contractors on especially large transportation and commercial construction projects, where the contract is awarded the lowest bid, and the site design may have been developed without sufficient regard for stormwater management and permit compliance, that it is very difficult to then later develop a Stormwater Pollution Prevention Plan (SWPPP) that complies with the permit, but conflicts with the site plans. It is EPA’s view that, although in some cases the owner has limited involvement, owners do have the ability to approve and/or make modifications to site plans, including SWPPPs, and EPA thinks, therefore, that owners ultimately have the ability and responsibility to ensure
permit compliance. See EPA Response to Comments at 2

One the one hand, FSWA recognizes that EPA is attempting to protect the general contractor that may be squeezed financially or through some other “fault” of the owner and its solution is to bring in the “owner” as an “operator” to increase leverage over and potentially enforce against the owner. However, FSWA also has witnessed enforcement actions against an “owner” that had assigned all compliance authority (with sufficient resources) to a general contractor and, even though the site was in full compliance with the CGP, the failure of the “owner” to separately obtain its own permit was a serious Clean Water Act enforcement action for “operating without a permit.”

FSWA believes that there are better approaches that could add clarity to EPA’s definition of “operator” that protect permitting authorities (to enforce against appropriate, responsible parties), owners (to protect against illogical duplicative permitting liabilities) and general contractors or other similarly situated parties (to protect against an owner meddling or impacting project compliance without also assuming commensurate permitting/enforcement responsibility). This is an issue that EPA should work with industry representatives to fix and FSWA is more than willing to assemble industry stakeholders to meet with the Agency.

**General permits should be subject to the RFA framework**

Finally, FSWA notes that EPA’s proposed modifications to the 2017 CGP were determined to be “not significant” pursuant to Executive Orders 12866 and 13563, which implement the Regulatory Flexibility Act (RFA). FSWA agrees that the modifications to the 2017 CGP themselves probably do not rise to the level of review expected by the RFA. However, FSWA notes that the proposed 2017 CGP was not subject to RFA analysis, but should have undergone such an analysis. See 81 Fed. Reg. at 21,334 (April 11, 2016). In promulgating the 2008 CGP, EPA committed to applying the RFA framework and requirements to all NPDES general permits whether or not the Agency considered them “rules” or not under the APA. See 73 Fed. Reg. at 40,342 (July 14, 2008). FSWA hopes that EPA’s failure to treat the proposed 2017 CGP was an anomaly and that all future proposed and final general permits will be subject to appropriate RFA analyses.

If you have questions, seek clarifications, or wish to discuss these comments further, please contact the undersigned.

Respectfully,

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cc: FSWA Membership