

Silt as a Pollutant Under the CWA

Storm Water Runoff *Important Facts*

Larry W. Caudle, Jr.



www.kraftsoncaudle.com
703-873.5500



Silt as a Pollutant Under the CWA

1972 Amendments -- Clean Water Act

- ❑ Absolute prohibition against discharges of pollutants into streams and waterways unless in accordance with a permit
- ❑ National Pollutant Discharge Elimination System Permit (“NPDES”)

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1987 Amendments -- Clean Water Act (Water Quality Act)

- ❑ Expressly included Storm Water Runoff within reach of CWA
- ❑ Established a phased approach to enforcement due to enormous administrative burden placed upon EPA
- ❑ Storm Water Runoff includes runoff from construction sites!

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1987 Amendments -- Clean Water Act (Water Quality Act)

PHASE I (1992)

“Construction activity” disturbing 5 or more acres or an area less than 5 acres if part of a common plan or development of greater than 5 acres.



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PHASE II (2003)

“Construction activity” disturbing less than 5 acres and greater than 1 acre.



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The logo for Kraftson Caudle. It consists of a black square containing the letters 'KC' in white, followed by the name 'KRAFTSON CAUDLE' in a green, sans-serif font.

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*“Construction activity” includes clearing,
grading and excavation.*



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PHASE I REQUIREMENTS

- ❑ **NPDES Permit Required**
 - ◆ *Notice of Intent filed 2 days before work*
 - ◆ *Notice of Termination*
- ❑ **Construction General Permit (CGP)**
 - ◆ *Not site specific*
 - ◆ *From EPA-developed permit*

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PHASE I REQUIREMENTS

Storm Water Pollution Prevention Plan (SWPPP)



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PHASE I REQUIREMENTS

*Who Must Apply for the NPDES Permit?
“Construction Site Operators”*



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A Construction Site Operator is someone who:

- ◆ *Maintains overall operational control over construction plans and specifications, including the ability to change these plans (OWNER);*
- ◆ *Maintains day-to-day operational control over activities which ensure compliance with the Storm Water Pollution Prevention Plan (CONTRACTOR).*

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PHASE II REQUIREMENTS

- ❑ *Same as Phase I (CGP, Notice of Intent, Notice of Termination)*
- ❑ *Additional flexibility for EPA*
 - ◆ *Waiver granted if applicant demonstrates potential for water pollution is very minimal*
 - ◆ *Smaller parcels may require a permit if EPA determines it is likely to affect water quality*

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ISSUES

Criminal and Civil Penalties (suits by EPA)

- ◆ *Operator fails to obtain a permit*
- ◆ *“Operator” fails to adhere to CGP*
- ◆ *Cease Work Orders*

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ISSUES

Citizen Suits

- *“Operator” fails to obtain a permit*
- *Failure to adhere to CGP*
- *Injunctions (delay)*
- *Attorneys fees to prevailing party*

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ISSUES

Citizen Suits -- Caveat

Citizen suits are mooted/dismissed if EPA/State Agency files suit against the violator within 60 days of Citizen's Notice of Intent to Sue . . . But attorney fees may be awarded on rationale that Citizen suit prompted EPA/State Agency's enforcement action.



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Cases and Violations

Wilmington Delaware -- Allied Properties, Inc.

- *\$30k fine*
- *Permit obtained*
- *Owner/Contractor failed to adhere*
- *Several warnings issued*

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Cases and Violations

Mobile Alabama -- Clearing Contractor

- \$30k fine (developer)
- Contractor jailed and paid \$250k fines
- Violations of permit
- Several warnings issued

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Cases and Violations

Southern Alabama Campaign

- *Toll free Environmental Hotline established*
- *Local police trained to issue violations*

“Instead of having almost no reporting and no enforcement . . . We’re going to have an army of policemen -- a wide array of people who know just what to look for.”



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Cases and Violations

North Carolina passed law in effect March 1, 1999, subjecting developers and contractors to fines of \$10k per day for silt from wetland projects escaping into local streams.



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Contractor Liability Under CWA is Inequitable for the Contractor

- ◆ *Most erosion control plans are developed by the owner on both public and private projects*
- ◆ *Contractor merely follows such plans (a contractual requirement) and maintains controls for the duration of the project*
- ◆ *What if erosion control plan is found by EPA authorities to be insufficient in accomplishing the objectives and requirements of the CGP?*

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Contractor Liability Under CWA is Inequitable for the Contractor

Spearin Doctrine

An owner who issues detailed design drawings warrants to the contractor that the design represents what the owner desires to be built and if the contractor builds the project in accordance with such plans, the contractor is not liable for costs to modify the end product.



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PARTING SUGGESTIONS

- ❑ *Indemnity provision protecting contractor from runoff liability where controls are installed in accordance with plans and are maintained during the project*
- ❑ *Avoid indemnifying owner or design professional “broadly” for liability arising from erosion runoff*
- ❑ *Ascertain local agency “permit holder” requirements*



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PARTING SUGGESTIONS

- ❑ *Realize that if contractor devises E/C plan, probability of contractor liability under CWA increases remarkably*
- ❑ *Establish clear lines of responsibility for maintaining controls where heavy contractor is absent from the site*
- ❑ *Require subcontractors to indemnify prime contractor for runoff related to their work*

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PARTING SUGGESTIONS

- ❑ *Consider providing for Notice of Termination at completion of your work -- another contractor files Notice of Intent covering the remainder of the project*
- ❑ *Establish written internal procedures for on-site personnel to check controls daily*
- ❑ *Pre-rain event and Post-rain event inspections of controls*

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PARTING SUGGESTIONS

Document...Document...Document!

- ❑ *Video or photo offsite streams and drainage areas most likely to be impacted by a runoff/release event (two-edge sword)*
- ❑ *Indicate on daily reports inspections of controls and corrective action (cleaning filters and checks)*

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PARTING SUGGESTIONS

Document...Document...Document!

- ❑ *Record observations of pre-rain and post-rain event inspections*
- ❑ *Confirm in writing to owner/prime contractor the transfer of control of E&S responsibility*

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