


State Water Resources Control Board

TO: Greg Gearheart
Senior Water Resources Control Engineer
DIVISION OF WATER QUALITY



FROM: Michael A.M. Lauffer
Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: January 31, 2012

SUBJECT: APPLICATION OF VISUAL INSPECTION REQUIREMENTS IN THE GENERAL CONSTRUCTION STORM WATER NPDES PERMIT TO LINEAR UNDERGROUND/OVERHEAD - RISK TYPE 1 PROJECTS LOCATED IN RURAL SETTINGS

ISSUE

Do the visual inspection requirements in Attachment A, section M(3)(a)(iv)(2) and (3) of the *General NPDES Permit for Discharges of Storm Water Associated With Construction and Land Disturbance Activities*, State Water Board Order No. 2009-0009-DWQ, apply to Linear Underground/Overhead - Risk Type 1 projects in rural (undeveloped/unpaved) settings? If so, does a discharger's responsibility to visually inspect excavation closure require physically covering all excavations daily and in all circumstances?

BRIEF ANSWER

Linear Underground/Overhead (LUP) Type 1 projects must comply with daily visual inspection requirements. The specific, daily closure requirements, however, will vary from project-to-project. The discharger must specify suitable daily closure requirements in the Storm Water Pollution Prevention Plan (SWPPP) that reflect the characteristics of the project (including project setting) and the necessary water quality protections associated with the project.

I. Background

On September 2, 2009, the State Water Resources Control Board (State Water Board) adopted Order No. 2009-0009-DWQ (Permit), which became effective on July 1, 2010, and was amended on November 16, 2010 by State Water Board Order No. 2010-0014-DWQ. The Permit regulates discharges of storm water associated with construction and land disturbance activities, from both traditional construction projects and LUP projects. The Permit defines LUPs as follows:

[A]ny conveyance, pipe, or pipeline for the transportation of any gaseous, liquid (including water and wastewater for domestic municipal services), liquescent, or slurry substance; any cable line or wire for the transmission of electrical energy; any cable line or wire for communications (e.g., telephone, telegraph, radio, or television messages); and associated ancillary facilities. Construction activities associated with LUPs include, but are not limited to, (a) those activities necessary for the installation of underground and overhead linear facilities (e.g., conduits, substructures, pipelines, towers, poles, cables, wires, connectors, switching, regulating and transforming equipment, and associated ancillary facilities); and include, but are not limited to, (b) underground utility mark-out, potholing, concrete and asphalt cutting and removal, trenching, excavation, boring and drilling, access road and pole/tower pad and cable/wire pull station, substation construction, substructure installation, construction of tower footings and/or foundations, pole and tower installations, pipeline installations, welding, concrete and/ or pavement repair or replacement, and stockpile/borrow locations.¹

Attachment A of the Permit specifically pertains to LUPs. Pursuant to Attachment A, all LUPs are subject to identical filing requirements and other provisions; however, best management practices (BMPs), monitoring and reporting requirements, and other provisions differ depending on the LUP's threat to water quality. LUPs are divided into three risk levels: Type 1 (lowest threat to water quality), Type 2 (medium threat), and Type 3 (highest threat).²

To obtain coverage under the Permit, all LUPs are required to file permit registration documents, which include the SWPPP. Each SWPPP sets forth a discharger's site-specific plan to control all pollutants in the discharge and their sources, and to ensure that BMPs are effective at reducing or eliminating pollutants during construction and once construction is completed.³ Pursuant to Attachment A, section K, each LUP discharger "shall implement the SWPPP concurrently with commencement of soil-disturbing activities."⁴ Failure to implement the SWPPP may result in enforcement action.

As part of the SWPPP, each discharger must prepare a monitoring and reporting program (M&RP).⁵ The contents of the M&RP depends on the LUP's risk level, and may include visual inspection requirements, monitoring requirements for non-visible pollutants, storm water effluent sampling locations, receiving water monitoring requirements, receiving water sampling locations, and monitoring methods. Each M&RP "must be implemented at the appropriate level to protect water quality at all times throughout the life of the project."⁶ The applicable monitoring and reporting requirements for LUPs are set forth in Attachment A, section M.

¹ Permit, Attachment A, § A.1, p. 1.

² See Permit, Attachment A, § I, pp. 19-20.

³ *Id.*, § K, p. 28.

⁴ *Ibid.*

⁵ *Id.*, § M, p. 31.

⁶ *Ibid.*

At issue here are visual inspection requirements applicable to LUP Type 1 dischargers, specifically section M(3)(a)(iv)(2) and (3).⁷ Section M(3)(a)(iv) provides in pertinent part:

LUP Type 1 dischargers shall conduct daily visual inspections to verify that:

* * *

2. Project excavations are closed, with properly protected spoils, and that road surfaces are cleaned of excavated material and construction materials such as chemicals by either removing or storing the material in protective storage containers at the end of every construction day;
3. Land areas disturbed during construction are returned to pre-construction conditions or an equivalent protection is used at the end of each workday to eliminate or minimize erosion and the possible discharge of sediment or other pollutants during a rain event.⁸

II. Issue

The Permit's visual inspection requirements apply to LUP Type 1 projects in both populated (developed/paved) and rural (undeveloped/unpaved) settings. In a populated environment, daily closure requirements for an open excavation may be an important element of a SWPPP for storm water protection and safety plans because open excavations present a safety hazard to both pedestrians and traffic. However, uncovered excavations in rural settings do not pose as significant a threat to safety. Likewise, it makes sense for LUP Type 1 projects in developed settings to return disturbed land back to pre-construction conditions daily, because of incidental non-storm water discharges in an urban environment and the associated potential for runoff from paved, impermeable surfaces. However, projects in rural settings, are less likely to have impervious surfaces and non-storm water dischargers, and may not present the same threat to water quality.

In both populated and rural settings, dischargers must develop and implement a SWPPP to protect waters of the state from storm water dischargers consistent with the Permit. Reflecting differences among LUP Type 1 projects, though, not all SWPPPs would necessarily specify the same type of daily closure requirements for the entire excavation or the daily return of disturbed land to pre-construction conditions. As a result, must LUP Type 1 projects in developed and rural settings perform the same type of visual inspection requirements and must those requirements include the same type of closure requirements?

III. Analysis

The Permit does not exempt LUP Type 1 projects in rural settings from the visual inspection requirements in Section M(3)(a)(iv), so these projects must comply with the Permit's terms. However, the Permit does not define "closed," "properly protected," "pre-construction

⁷ LUP Types 2 and 3 are not subject to these two visual inspection requirements.

⁸ *Ibid.*, p. 32. It is important to note that the Permit contains a discrepancy with respect to these visual inspection requirements: the Permit does not include corresponding *substantive* requirements in the BMPs section of Attachment A. In other words, the discharger is not required to close the project excavation or return the disturbed land to pre-construction conditions at the end of each construction day, rather, the discharger is merely required to visually inspect that such work was completed. This memorandum does not attempt to resolve this discrepancy.

conditions,” or “equivalent protection.”⁹ The requirements to close an excavation, create a properly protected spoil, and return a site to pre-construction conditions or equivalent protection can be satisfied a number of ways that make sense for each project. For example, closure of a project excavation in a rural setting could look different than closure in a developed setting; the difference between the two is found in the M&RP and in the SWPPP.

For projects in rural and developed settings, a discharger can specify how it will achieve the Permit’s visual inspection requirements, so long as those terms protect water quality and are described in the M&RP. As noted above, each discharger is required to implement its SWPPP or else it is violating the Permit. The terms of the SWPPP are an essential element of compliance with the Permit. An LUP Type 1 discharger can therefore comply with the visual inspection requirements in a manner suitable for rural and developed settings, provided that it properly implements the terms of its SWPPP.

IV. Conclusion

An LUP Type 1 discharger in a rural setting must comply with section M(3)(a)(iv)(2) and (3) of Attachment A. However, the discharger can prescribe in the M&RP and the SWPPP how it plans on satisfying the visual inspection requirements - e.g. which BMPs it will use to attain daily “closure.” As long as the discharger properly develops and implements its SWPPP, it will not be in violation of the Permit.

cc: Sarah Olinger, OCC

⁹ Attachment A.1 of the Permit defines a slightly different term, “Equivalent Condition.” “Equivalent Condition” means “disturbed soils such as those from trench excavation are required to be hauled away, backfilled into the trench, and/or covered (e.g. metal plates, pavement, plastic covers over spoil piles) at the end of the construction day.” State Water Board staff probably intended “Equivalent Condition” to have the same meaning as “equivalent protection.”