Stormwater Enforcement Case in Point – *Do Things Right the First Time!*

by Carol Lamb-LaFay

On April 30, 2008, the New York State Department of Environmental Conservation (NYSDEC) levied the largest penalty in New York State history for dry weather violations of the stormwater permit. An Administrative Order on Consent was executed with a large retail developer for violations of the terms and conditions of the SPDES (State Pollutant Discharge Elimination System) permit. A penalty of $100,000 was collected.

Photo courtesy of NYSDEC–Region 4

This aerial image of the development site was taken during the final phase with major pads completed and stabilized with stone or vegetation, and work being completed on another retail pad (in the center). The approval required that the developer phase the project so that there were limited exposed areas – stabilizing one area before moving to another.

The Phase II Stormwater Regulations make it unlawful to discharge stormwater associated with certain activities unless authorized by a NPDES (National Pollutant Discharge Elimination System) permit. New York, (an EPA delegated state for NPDES), utilizes the SPDES General Permit for Stormwater Associated with Construction Activities (the Construction General Permit) to satisfy the Phase II requirements for activities that will ultimately disturb one or more acres of soil without creating excessive delays associated with obtaining a permit. The Construction General Permit requires the owner or operator to comply with specific conditions found in the permit. Owners/operators who wish to obtain coverage under the permit must certify that they have read or been advised of the permit conditions and understand them. By signing the Notice of Intent (NOI), the owner agrees to comply with all the terms and conditions of the general permit.

High Priority Threshold

A high priority for enforcement are those operators disturbing five or more acres of land who are either un-permitted operations or permit holders in significant non-compliance (SNC) with SPDES permit conditions. The SNC constitutes failure to develop a SWPPP (Stormwater Pollution Prevention Plan), gross failure to implement the SWPPP, and gross failure to provide post construction runoff controls where such controls are required.

The Construction General Permit specifically prohibits the disturbance of greater than five acres at any given time without prior written approval from NYSDEC. The reason for this condition is that experience has shown that large areas of exposed soils are difficult to control and often result in adverse impacts to water quality. In order for an applicant to receive NYSDEC approval, the applicant must submit a request that identifies the site specific circumstances that necessitate the large area of exposed soils, the specific sequencing and phasing that will be done to minimize the amount and duration of exposed areas to the maximum extent practicable, and identify aggressive erosion and sediment controls that will be employed beyond the minimum required by the permit.

Early in 2008, the developer requested authorization to exceed the five-acre threshold to allow construction of a proposed retail development located in Columbia County, New York. The project consisted of a multi-use development consisting of 14 retail buildings with associate parking and utilities. Of the 14 retail buildings, three were large anchor tenants. The development of the 128-acre site would require the disturbance of approximately 89 acres of soils.

Significant cuts and fills were required to prepare the site for the proposed development. The unique moisture content of the soils required earth work operations to take place during the drier summer months. Due to the poor nature of the soils and substantial amounts of exposed areas needed, NYSDEC spent considerable time in reviewing the phasing and sequencing plans and associated erosion and sediment controls. The phasing and sequencing plan submitted for approval specified that silt fence, perimeter swales and temporary sediment traps or basins would be installed as the first element of construction prior to any mass grading within the associated drainage area. According to the request for authorization, these controls would be maintained and reconstructed as construction progressed such that runoff would be diverted away from sloped areas and directed to appropriate treatment basins.

Formal Enforcement

The NYSDEC issued written authorization for the disturbance of up to 28 acres for the time period between April 28 and September 30, 2008. The authorization included several conditions, one being that a pre-construction meeting be held so that all parties were

familiar with the requirements of the approval prior to exceeding the five-acre threshold. Upon arrival at the site for the pre-construction meeting, NYSDEC representatives found that they had far exceeded the five acres and the maximum allowable exposed area (28 acres) set by the approved phasing plans. More importantly, they totally disregarded the phasing and sequencing that was the basis of their request. Consultation with the other regional offices had found that a similar incident had previously happened. In that case, the violation was addressed with informal enforcement. They were issued a Notice of Violation for failure to implement the more aggressive controls that were required by a five acre approval but were not maintaining the practices that were installed. Based on this pattern of non-compliance, NYSDEC elected to proceed directly to formal enforcement.

A Notice of Violation setting forth the violations of the permit was sent to the owner. In consideration of the severity of the violations and circumstances of the case, the NYSDEC ordered an immediate stop to all construction activity at the site until the non-compliance was remedied. During this shutdown period, the owner was required to stabilize all exposed soils, and implement the erosion and sediment controls set forth in the stormwater pollution prevention plan.

An Administrative Order on Consent was swiftly executed and settled within two weeks of the observed noncompliance. As part of the settlement, the NYSDEC required enhanced oversight of the project. In addition to daily inspections by a qualified inspector, the developer had to retain an independent inspector to monitor the site and report directly to the NYSDEC with weekly reports detailing compliance with all applicable laws and regulations. The Order also required that the developer provide the site tenants with a copy of the Order on Consent. In response to receiving their notification, one of the major retailers enforced the provisions of their development agreement placing additional pressure on the developer to return the site to compliance.

The NYSDEC monitored the facilities inspection reports and periodically inspected the site. The combination of swift formal enforcement with stringent penalties and oversight requirements achieved its goals for formal enforcement. The project quickly returned to compliance and sustained that compliance for the remainder of the project.

The NYSDEC's enforcement efforts need be fair such that the violator does not have an unfair advantage over those who comply. The sizable penalty and stop work order offset any advantage that the developer achieved, sending the message that it is better to do things right the first time.

In an attempt to broadly advertise this

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Photo by Jeffrey McCullough, Stormwater Unit, NYSDEC–Region 4

Construction occurred onsite in May 2008 of temporary swale and check dams to direct sediment-laden runoff and trap sediment.

Photo by Jeffrey McCullough, Stormwater Unit, NYSDEC–Region 4

A temporary sediment trap was installed to intercept sediment-laden runoff and catch sediment (June 2008).

Photo by Jeffrey McCullough, Stormwater Unit, NYSDEC–Region 4

A double row of silt fence was installed along the perimeter and vegetation begins to take root on the slopes.

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message and deter violations across the regulated community, NYSDEC issued a press release placing all developers and contractors on notice that the agency was enforcing the stormwater regulations. The regional director was quoted in it saying: "[The developer] exhibited a blatant disregard for the stormwater regulations of the state and created the potential for a significant water quality violation … The magnitude of this penalty, which is the largest stormwater penalty in the state's history, reflects the seriousness with which DEC views violations of this sort."

Thankfully, a long stretch of dry weather during the noncompliance period had averted any significant runoff into Claverack Creek, which is adjacent to the site; nonetheless, the regional director noted that the developers' action had "created the potential for a significant water quality violation."

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Photo by Jeffrey McCullough, Stormwater Unit, NYSDEC–Region 4

This pond served as a temporary sediment basin to remove sediment generated during construction and will be converted to a wet pond to treat runoff from the parking lot after construction is completed. Side slopes have significant vegetation growth established by October 2008.

Photo by Jeffrey McCullough, Stormwater Unit, NYSDEC–Region 4

Left, middle: This riser for the pond controls the rate of release of water from the pond to provide extended detention for settling of solids prior to discharge.

Photo by Jeffrey McCullough, Stormwater Unit, NYSDEC–Region 4

Dense vegetation covers the area along the perimeter of the site.