

Chasing Mud – Emerging Perspectives on Storm Water Management at Construction Sites **By Michael P. Carvalho, Esq. ♠**

My late father first introduced me to the term “Red Georgia Clay” while describing his parachute “Jump School” training at Ft. Benning with the 101st Airborne. “I remember hitting the ground so hard,” he liked to say, “that I was pulling Red Georgia Clay out of cracks in my body I didn’t know I had.” So it is more than 40 years later that I find myself immersed in the stuff, in ways my father never would have considered. Indeed, chasing mud has become a cornerstone of environmental law and regulation in connection with commercial development in Georgia and elsewhere. This article addresses important considerations raised under the federal Clean Water Act (CWA) and various corresponding state laws and regulations for the management of storm water run-off from construction sites and the potential for environmental, legal and regulatory liability.

Yes, Mud is a “Pollutant”

For the uninitiated, the first thing you need to know is that mud is a “pollutant” under the CWA and, as such, is subject to considerable regulation and management. Specifically, problems with storm water run-off from construction sites can wreak legal havoc on development projects and the environment when not properly controlled or contained. Understanding the environmental legal and regulatory scheme in this area is critical to avoiding costly delays and significant legal liability.

Many clients have come to me over the years waving a copy of yet another Notice of Violation (“NOV”), or the even more inflammatory Stop Work Order (“SWO”) received from a local community development official. “But it is just muddy water...” is not an uncommon refrain. Nevertheless, what we commonly call “mud” is often regulated as a pollutant under state and federal law when it is associated with run-off from construction sites. Accordingly, an understanding of the legal and regulatory implications is critical to avoiding NOV’s and SWO’s, as well as third party claims from adjoining landowners.

Generally, the discharge of sediments associated with storm water run-off affect surface water (e.g. ponds, lakes, streams, etc.) clarity, as well the chemical and biological integrity. By increasing the turbidity of water, sediments and suspended solids prohibit sun light (critical to photosynthesis) from penetrating into the water column. This, in turn, causes water flora to die off, which increases biochemical oxygen demand (BOD), while decreasing the amount of dissolved oxygen (DO) available for fish. Some aquatic species such as trout are highly susceptible to fluctuations in DO levels, which are capable of producing significant fish kills. Erosion and sedimentation can also lead to loss of habitat, and considerable impacts on aesthetic issues.

Further complicating matters in this regard are state “pollutant” disclosure requirements whereby sellers of certain types of property are required to disclose the presence of “pollutants” at closing.

Such disclosures in the residential setting often fall into the “*Oh, by the way...*” category and can cause angst and delay in closing an otherwise uncomplicated transaction.

Non-point Source Program

Passed in 1972, the focus of the CWA has shifted over the years and now considers such “non-point” sources of storm water run-off to have a considerably detrimental impact on watersheds and degrading water quality. This is particularly true in states, such as Georgia, that have geologic conditions (e.g. the above-referenced Red Georgia Clay) that compound the effect of erosion and sedimentation. According to the EPA, “the CWA does not provide a detailed definition of non-point sources. Rather, they are defined by exclusion -- anything not considered a “point source” according to CWA and EPA regulations.” All non-point sources of pollution are caused by runoff of precipitation (rain and/or snow) over or through the ground surface. Typical examples of non-point sources include agricultural run-off, etc.

Point Sources & Permit Requirements

Section 401(a) of the CWA requires that before issuing a license or permit that may result in any discharge to waters of the United States, a federal agency must obtain from the state in which the proposed project is located, a certification that the discharge is consistent with the CWA, including attainment of applicable state ambient water quality standards. CWA provisions to which Section 401 certification applies include 404 permits from the Corps of Engineers and EPA-issued National Pollutant Discharge Elimination System (NPDES) permits.

Each state has developed one or more state laws to implement the requirements of the CWA in this regard. Complicating matters further, the Corps of Engineers’ jurisdiction and enforcement creates a patchwork of occasionally inconsistent interpretations of when 404 permits are and are not necessary. For example, removal of sediments from an impacted pond *may* be considered maintenance and no permit is required. On the other hand, the removal of any sediment may be considered dredging and a permit will be necessary. Careful consideration of regional precedent in this regard is highly recommended.

NPDES Program

For the commercial development community, construction site run-off is considered a point source discharge. The CWA makes it illegal to discharge pollutants from a point source to the waters of the United States, which are very broadly defined. Section 402 of the Act creates the NPDES regulatory program. Point sources must obtain a discharge permit from the proper authority, which is typically the state or local issuing authority. According to EPA, “the CWA does contain a long-range goal of zero discharge of pollutants, (however) these permits do not, as the name of this program might suggest, simply say “no discharge.” Rather, they set limits on the amount of various pollutants that a source can discharge in a given time. “

As stated above, storm water discharge from construction sites is considered a point source requiring a permit under the CWA. Typically, the state will set limits on the turbidity levels of

storm water run-off leaving a site. Turbidity levels are often measured in nephelometric turbidity units (NTUs). Acceptable NTU levels can vary depending on the susceptibility of the aquatic environment to be impacted. For example, 50 NTUs may be acceptable for most environmental conditions, but where a trout stream is present, the more restrictive standard of 25 NTUs may be applied. Such permit discharge limitations, combined with stringent stream buffer requirements form the basis for the protection of surface water from construction/development related activities.

In addition to construction-related activities, numerous types of precipitation-induced runoff are treated as point sources rather than as non-point sources under the CWA -- including storm water associated with industrial activity, and discharges from municipal separate storm sewer systems (MS4s). Pollutants commonly associated with NPS include nutrients (phosphorus and nitrogen), pathogens, clean sediments, oil and grease, salt, and pesticides – all of which can arise in connection with construction and development.

Section 404 Program

Although most commonly associated with activities that involve filling of wetlands, Section 404 actually deals with one broad type of pollution -- placement of dredged or fill material into "waters of the United States". Wetlands are one component of "waters of the United States;" however, there are numerous other types -- intermittent streams, small perennial streams, rivers, lakes, bays, estuaries, and portions of the oceans, according to EPA.

One of the controversial aspects of Section 404 involves the legal definition of what constitutes a wetland. Federal regulations define wetlands as:

"Those areas that are inundated or saturated by surface or ground *water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of *vegetation* typically adapted for life in saturated *soil*." [33CFR328.3(b)]

For an area to be declared a wetland, it should exhibit all three of the key features -- hydrology, wetland-dependent vegetation, and soil types associated with water-saturated conditions. However, some kinds of wetlands, such as bottomland hardwood swamps, are dry during some periods. The absence of water or saturated soil at any given moment does not render a plot "not a wetland," if the vegetation and soils indicate that wet conditions often do occur and hydrological data support this conclusion. In short, it is often difficult for the untrained eye to determine whether a wetland (and, therefore, regulated) condition exists. For these reasons, developers often employ experienced environmental professionals to address wetland delineation concerns.

The Cost of Non-Compliance

Violations of the CWA can prove to be quite costly. The CWA has Citizen Suit provisions that allow private citizens to bring lawsuits on behalf of the federal government for violations of the federal statute, together with state and common law claims. Such Citizen Suits are initiated through a 60-Day Notice of Intent to Sue (NOI) letter and often seek hefty fines and penalties on behalf of the private party. Receipt of an NOI letter is *not* a good thing, unless you happen to be

the plaintiff's attorney who drafted it. In such cases, the citizen/plaintiff will seek to use the aforementioned NOVs and SWOs to support the contention that an unlawful discharge has occurred. If successful, the plaintiff is entitled to recover damages including attorney fees and costs for having to bring what amounts to a private enforcement action, in addition to civil penalties on behalf of the United States.

Common law claims such as negligence, negligence *per se*, nuisance, trespass and riparian rights are frequently included with the federal CWA claim. Such claims can be equally erroneous and should be taken seriously. For example, a trespass to land in Georgia is considered an intentional tort and as such invokes a species of "bad faith" supporting the award of punitive damages. In practice, jury verdicts in such cases routinely range from several hundred thousand dollars to more than \$1,000,000. Other development considerations that may arise under a CWA claim include requests for injunctive relief and the filing of liens on the development project, both of which may affect construction finance, among other considerations.

Conclusion

Unlike my father, I have never had the desire to jump out of a perfectly good airplane - even if he was being pushed. However, I have come to agree with my Dad that Red Georgia Clay has a way of ending up in the most unwanted places. An appreciation of the risks associated with storm water discharges, careful planning and performance-based construction management practices are the first step to the management of storm water run-off from construction sites and the potential for environmental, legal and regulatory liability.

♠ About the author

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