



MEMORANDUM

DATE: MARCH 28, 2016
TO: REGION TRANSPORTATION DIRECTORS, PROGRAM ENGINEERS, RESIDENT ENGINEERS, REGION ENVIRONMENTAL PROGRAM ENGINEERS
FROM: JOSHUA LAIPPLY, P.E. CHIEF ENGINEER 
SUBJECT: EPA AUDIT FINDING - COMPLIANCE WITH SPECIFICATION 208.09 FAILURE TO PERFORM EROSION CONTROL

This Chief Engineer Memorandum is being issued to announce stormwater management process changes initiated by the findings of the March 2015 Environmental Protection Agency (EPA) Audit. A Construction Bulletin will be issued under separate cover to provide more detailed information to address these EPA Audit Findings and achieve program compliance.

The EPA conducted an inspection of the CDOT Municipal Separate Storm Sewer System (MS4) Stormwater Permit March 30 - April 2, 2015. The inspection was part of EPA's "Municipal Infrastructure National Enforcement Initiative". The inspection included a statewide documentation review of the program and field inspections of applicable program areas.

The inspection report was delivered to CDOT by EPA on September 30, 2015. CDOT has reviewed the findings and, in early December 2015, provided preliminary responses back to EPA addressing the findings and implementing corrective action. Attached is Appendix C of the EPA Audit Report which contains those findings relevant to CDOT's Regulatory Authority and CDOT's responses.

While CDOT's responses to the EPA are preliminary, we are actively pursuing the Corrective Actions/Recommendations stipulated by the EPA to document compliance throughout our program. It is our hope that by moving forward on addressing these corrective actions we can get our program in compliance that much sooner. The one finding and specific change I would like to address in this memorandum is EPA's finding 3CS (2nd page of Appendix C attachment) relating to CDOT's Regulatory Authority described in the specification - 208.09 Failure to Perform Erosion Control. More specifically, the failure to implement the stipulations of issuing Liquidated Damages and Stop Work Orders as outlined in subsection 105.01. This specification applies to all projects regardless of type of contracting mechanism.

As documented in ESCAN, the percentage of findings corrected within the 48 hour timeframe is reported in the Department's Lead Lag performance measure report. The ESCAN report indicates that CDOT is not achieving the stated goals regarding water quality erosion and sediment control inspections. This metric is viewed by CDOT executive management as instrumental to the performance success of the permit compliance and avoidance of project stop work orders or fines which affect project schedule and costs.

Here is where I need your assistance in ensuring that CDOT properly administers erosion control on all CDOT projects and remains in compliance on this issue:

- Understand and follow the specification as this is our Regulatory Authority. Therefore, compliance with subsection 208.09 is commensurate with compliance with the Construction Program in accordance with the MS4 permit.
- The new specification changes "may" to "will" with respect to the CDOT Project Engineer issuing 105's, LD's and Stop Work Orders. Note the new escalation procedure stated in the new specification (to be included in all projects with AD on or after 4/21/16) if the contractor fails to address the Finding.



- Please note that with the issuance of the revised subsection 208.09 specification there will be two different versions of this specification in use within CDOT this 2016 construction season (one for projects advertised before April 21st and one for projects advertised on or after 4/21/2016).
- For current projects advertised before 4/21/16 the EPA Finding 1CS (Appendix C) noted that CDOT was not following the specification in issuing stop work orders after the corrections were not completed within 48 hours and/or discharges into state waters. Revised language in the new specification subsection 208.09 changes from “may issue the stop work” to “will issue the stop work order”. Based on the EPA Audit, Project Engineers need to therefore interpret the “may” as “will” and shall issue liquated damages and/or stop work orders and require the Contractor to submit a corrective action plan per 208.09. Documenting your decisions/actions can make the difference in demonstrating meeting compliance for those challenging times where the Contractor is doing their best to address the situation. For any assistance, contact your Region Water Quality Pollution Control Manager.
- ESCAN is the CDOT computer application used to track thousands of Headquarters and Region inspections that are required by CDPHE, CDOT Construction Manual, and Specifications. ESCAN reporting is important because CDOT depends on these queries as proof of compliance and assurance that we are following our procedures.
- If Headquarters or Region inspections resulting in corrective actions are not reported in the ESCAN tool- Corrective Action Response Log (CARL), the report will show the finding as not completed within the 48-hour period, even if the Project Engineer and the Contractor have come to an agreement about the fix.
- Note that the ESCAN is currently being updated to include the new Deferment process which has been written into the new 208.09. The Deferment process allows for a period of time (to be determined by PE, RWPCM and Contractor) that penalties will be suspended, temporarily, for extraordinary circumstances where it is impossible to meet the 48-hour deadline. Until the updated version is released, continue to use, within the existing version of ESCAN, the interim option to extend the final completion date for approved exempted Findings that are justified in requiring more than 48 hours of time to complete.
- It is important that the Project Engineer uses ESCAN to track the CDOT Form 105’s associated with compliance to the MS4 process and stormwater related Form 105’s. This importance is based on how CDOT tracks compliance on project sites and the need for this information to be readily accessible within the ESCAN software to determine our Lead/Lag performance measures, the required CDPHE Annual report, compliance within CDOT MS4 Program and the ability to flag those projects that are out of compliance and address internally in a timely manner.
- Several of the audit findings will be handled in upcoming training classes to be developed and delivered by the Environmental Programs Branch.

Thank you all in advance in assisting with these important compliance issues. More information will be forthcoming related to addressing the EPA Audit findings. Know that this information is important and we need everyone to do his or her part by following the specifications and the process to keep the program in compliance. Please share this Memorandum with all of your design and construction staff and also consultants working on CDOT projects.

Attachment
Appendix C of the EPA Audit Report



Appendix C:

EPA Findings concerning CDOT's Regulatory Process

III. Response to Construction Sites (CS) Program Findings

1CS – The Standard Specifications does not require stop work orders to be issued for discharges to state waters or other egregious non-compliance instances.

1CS Finding:

Regarding stop work orders, section 208.09 of the Standard Specifications states under which circumstances a stop work order *may* be issued. Although the Standard Specifications states a stop work order *may* be issued under various circumstances, it does not require the issuance of a stop work order for discharges to state waters or other egregious non-compliance instances.

CDOT Clarification:

A stop work order was one of four items that was stated in the permit, so “may” was used in specification 208.09 since other options were also available tools for instances of non-compliance. Specifically, the Standard Specifications, specification 208.09 states, “If all other failures are not corrected within 48 hours after liquidated damages have begun to be assessed, the Engineer may issue a Stop Work Order in accordance with subsection 105.01. Work shall not resume until the Engineer has approved a written corrective action plan submitted by the Contractor that includes measures to prevent future violations and a schedule for implementation.” In addition, a Stop Work Order may also be used when a spill occurs on a construction site.

1CS Corrective Actions:

CDOT’s new permit, issued in 2015, no longer requires a stop work order in specific instances.

CDOT Response:

CDOT is in the process of updating the Standard Specifications to reflect current MS4 Permit and/or MS4 Construction Program requirements. Progress will be noted with the assessment submitted under 1PM. The word “may” in the new specifications to be released has been changed to “will”. In addition, a memorandum from the Chief Engineer is being prepared to emphasize the CDOT Regulatory Authority process to CDOT’s Professional Engineer’s (PE) and the need to impose Stop Work Orders when Liquidated Damages are insufficient to correct the non-compliance.

2CS – CDOT failed to ensure compliance with the Construction General Permit, enforce according to the Standard Specifications, and implement sanctions for chronic failures at design-bid projects.

CDOT Finding Clarification:

CDOT does not have Design-bid projects, only Design-bid-build, Design-build, or Construction Management General Contractor projects. The 2 projects noted by the EPA are Design-build projects, therefore our response addresses the Design-build project process.

2CS Corrective Actions:

CDOT's new permit, issued in 2015, no longer incorporates the Construction General Permit by reference. The new permit incorporates specific contractor requirements which CDOT must ensure that contractors are adhering to. Update and implement the Construction Sites Program to ensure CDOT requires contractors implement the requirements listed in CDOT's new permit.

CDOT Response:

CDOT agrees with the corrective action to incorporate specific contractor requirements by updating specification 208 of the Standard Specifications and is also preparing Construction Program Descriptions Documents (PDDs) per our new MS4 permit. CDOT will provide an update on the new MS4 Construction Program to the EPA in conjunction with the resource assessment (1PM).

2CS Recommended Actions:

It is recommended that CDOT develop an alternative enforcement structure that provides additional pathways to enforcement escalation including oversight of PE decisions by the Water Quality Control Manager and does not rely only on the PE for the construction site to be the responsible party for ensuring that projects remain on schedule *and* for making final enforcement decisions at the sites (e.g., issuing stop work orders, assessing liquidated damages/assets, etc.). It is also recommended that CDOT evaluate its design-build process to determine why these projects tend to have more problems, and then address the root cause(s) of the problems.

CDOT Response:

CDOT will review its alternative enforcement structure that provides additional pathways to enforcement escalation and process for design-build projects. These 2 recommendations will be taken to Executive Management for further comment. An update will be provided to EPA in conjunction with the resource assessment (1PM).

3CS – CDOT failed to follow the Standard Specifications procedure for several construction sites across Regions by failing to issue and collect liquidated damages for corrective actions that went beyond 48 hours.

3CS Corrective Actions:

Follow the Standard Specifications procedure for construction sites by issuing and collecting liquidated damages for corrective actions that go beyond 48 hours. Indicate in a response how CDOT plans to ensure this is achieved.

CDOT Response:

CDOT agrees with this corrective action. A Chief Engineer's memorandum is being prepared for distribution to CDOT's Project Engineers that will provide additional direction on CDOT's regulatory authority process and will be provided to EPA upon its completion.

4CS – CDOT has no formal mechanism to address chronic noncompliance by contractors as long as corrective actions occur within 48 hours.

4CS Corrective Actions:

Update the Standard Specifications to include a process to address chronic noncompliance by contractors even if corrective actions are always completed within 48 hours. Ensure there is an infrastructure in place to track chronic noncompliance by contractors. Submit this update to EPA.

CDOT Response:

CDOT agrees with this corrective action. The Construction Program and 208 specifications are being updated. The new MS4 Construction Program will include an escalation process and will address chronic noncompliance by contractors and associated frequency of MS4 Compliance Inspections described in the new MS4 Permit. An update on CDOT's progress will be provided to EPA in conjunction with the resource assessment (1PM).

5CS - Contractors' failures to meet Construction General Permit and Standard Specifications requirements were not identified by CDOT inspectors and a contractor Transportation Erosion Control Supervisor inspector during oversight inspections at CDOT construction sites.

5CS Corrective Actions:

CDOT's new permit, issued in 2015, no longer incorporates all of the requirements from the Construction General Permit. Ensure contractors as well as CDOT are in compliance with the Permit and the Standard Specifications. This includes ensuring CDOT and TCES inspectors are trained on the requirements and enforce those requirements. Indicate in a response how CDOT intends to ensure compliance.

CDOT Response:

CDOT agrees with this corrective action and CDOT is in the process of updating specification 208 of the Standard Specifications and will also provide training. In addition, the TECS certification will be reviewed and modified as necessary. An update on CDOT's progress will be provided to EPA in conjunction with the resource assessment (1PM).