



The 5 Most Common Mistakes Developers Make in Controlling Erosion and Storm Water

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Every developer has to deal with erosion and sediment control and storm water management. Considering the number of claims that are brought in this area, it is surprising that more attention is not given on how best to prevent these claims. This is particularly the case since most of these claims are not covered by insurance. Here is our list of five common mistakes during development that can lead to litigation.

1. Reliance on the county's approval or lack of enforcement

Inevitably, the first reaction to a claim or problem with sediment or storm water is the observation that "we did everything the county asked" or "we followed the code." However, most county erosion and sediment control ordinances provide that compliance with the ordinance will not protect you from liability to another person or property. For example, the Fulton County ordinance states that "neither the approval of a plan under the provisions of this article, nor the compliance with provisions of this article, shall relieve any person from responsibility for damage to any person or property otherwise imposed by law..." Sec. 26-48. Likewise, the general construction storm water permit also contains two often overlooked statements: (1) that the permit does not relieve one from following other laws, and (2) that neither county approval nor lack of enforcement is a defense to a violation of the permit.

2. Only doing the minimum instead of site specific BMPs

Hand in hand with the above is the tendency to use a minimal or cookie-cutter approach to erosion control measures. State law requires all Land Disturbing Activities to employ the Best Management Practices (BMPs) consistent with the Manual for Erosion and Sediment Control in Georgia (more commonly referred to as the Green Book), which provides detail on the BMPs to be used. However, while each BMP listed in the Green Book is a legitimate technique, whether to use it on a particular site should be determined considering, among other factors, the topography of the site, the soils found on the site, the duration of the use of the BMP, and the maintenance required. For example, while a ring of silt fencing around a site is common, silt fencing along the toe of a slope is not effective and is almost certain to lead to sediment discharges to neighboring properties the owners of which may sue for trespass or nuisance. It is important to select the right BMP for the site and for each portion of the site. In addition to selecting the right BMPs, some sites

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may require BMPs that are beyond the minimum required by law in order to prevent off-site discharges. Paying attention to the goals of the Georgia Erosion and Sedimentation Act, to prevent the discharge of sediment instead of simply following the minimal plan helps ensure that there are no incidents or habits of behavior which could lead to litigation.

3. Lack of BMP maintenance

Over and over, the most common mistake is the failure to regularly maintain erosion and sediment controls after installation. The law requires not only that BMPs be designed and installed, but also that they be maintained. For many commonly used BMPs, the maintenance is what actually permits it to control erosion and sedimentation. For example, matting, silt fences, and inlet sediment traps all require regular inspection to ensure that they have not shifted and that the sediment that has collected in them has not made them ineffective. The failure to maintain can eventually cascade into a catastrophic failure of the BMP. Indeed, a majority of sedimentation cases can be traced directly to either poor maintenance or a total lack of maintenance. Ultimately, regular inspections and dedicated maintenance are the best prescription to avoid costly litigation.

4. Failure to consider volume in storm water planning

Most local storm water regulations require that a hydrology study assess the flow of storm water discharged from a site. Water flow in this context has two components: rate and volume. The standard engineering practice, and what relevant code requires, is to keep the post-development rate of storm water discharges consistent with or less than the pre-development rate of discharge. The belief is that then the developer will not be liable to downstream property owners despite an increase in volume of the storm water discharged. Unfortunately, this faith is not rewarded as the increase in volume of water discharged can still create serious impacts downstream. Georgia courts have held on numerous occasions that increases in volume of storm water discharged from a site amounts to a nuisance and trespass, and have awarded the injured parties considerable amounts of money to compensate them for the damages incurred. Therefore, to avoid litigation it is advisable to consider increased storm water volume in planning the development either with structural measures to control storm water discharges or purchasing drainage easements to have the legal right to discharge increased storm water volume.

5. Using a downstream pond or lake as part of your storm water plan

The last common mistake is using someone else's downstream pond or lake as part of your storm water management system. At this point, the problem here should be obvious. If your project is increasing the rate or volume of storm water flowing into the downstream lake, it will be a trespass or nuisance. It does not matter how conveniently located it is or whether "it looks like it can handle my water." The downstream lake was almost certainly not designed or sized to handle anything more than the property it serves and natural, undeveloped runoff from the rest of the watershed. Although there are certainly instances where a downstream lake is created to serve more than one portion of a larger development, in that instance the development would have to match what was included in the original regional plan. The best advice here is to never assume that you can make use of any structure that is not on your property. Unless you have prior permission, increasing the rate or volume of water discharged to the downstream lake is a trespass or nuisance.

The authors have significant experience in erosion and storm water litigation on both sides of the issue. For additional information, contact Martin Shelton at martins@wncwlaw.com or Ashley van der Lande at ashleyv@wncwlaw.com. 