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EPA Issues Final Rule on Effluent Limitations Guidelines for Construction and Development Sites

On December 1, 2009, the U.S. Environmental Protection Agency (EPA) promulgated effluent limits on stormwater discharges from many construction and development sites (the Construction Rule). (74 Fed. Reg. 62,996)¹ The Construction Rule became effective February 1, 2010, and imposes the following general requirements:

Non-numeric effluent limitations apply to construction activity that disturbs one or more acres;

Beginning August 2, 2011, a numeric turbidity limit and related monitoring requirements will apply to construction activity that disturbs 20 or more acres at one time; and

No later than February 2, 2014, a numeric turbidity limit and related monitoring requirements will apply to construction activity that disturbs 10 or more acres at one time.

Construction and development activity currently operating under a stormwater discharge permit will not be subject to the Construction Rule until the permitting authority re-issues the discharge permit.

New non-numeric effluent limitations include requirements to address erosion and sediment controls, soil stabilization, de-watering, pollution prevention measures, certain discharge prohibitions and use of outlet structures to withdraw water from the surface. The numeric turbidity limit will require that owners and operators of larger construction and development projects

monitor discharges and not exceed a daily average turbidity limit of 280 nephelometric turbidity units (NTU).

EPA's decision to regulate turbidity using a numeric standard was based on the agency's conclusion that turbidity is an "indicator pollutant" that will serve to assist in controlling the discharge of other pollutants, such as metals and nutrients, from construction and development sites. The numeric limitation for turbidity is being phased in over a four-year period to provide permitting authorities sufficient time to develop appropriate monitoring requirements and to give the regulated community time to prepare for compliance with the numeric limitation. The turbidity limit does not apply to stormwater discharges resulting from storm events larger than the local two-year, 24-hour storm.

The Construction Rule creates a technology-based "floor" of minimum requirements for discharges of stormwater associated with construction activity, including clearing, grading and excavation (*see*, 40 C.F.R. §§ 122.26(b)(14)(x) and 122.26(b)(15)), that are subject to the National Pollutant Discharge Elimination System (NPDES) permit program established by the Clean Water Act. The new effluent limitation guidelines are intended to work in concert with existing federal, state and local programs to accomplish the following goals

Preserve and improve water quality on a national scale; and

Reduce the amount of sediment discharged from construction sites by approximately four billion pounds each year.

In all but four states, NPDES permits are issued by state or local environmental authorities. In many cases, this requirement is satisfied by a general permit that focuses on minimizing the impact of stormwater discharges using erosion and sediment control measures that reflect best engineering practices, as well as control measures for other pollutants.

EPA has issued a general permit for use in those states that do not have their own permitting authority – Idaho, Massachusetts, New Hampshire and New Mexico. On January 28, 2010, EPA extended the expiration date for the existing federal general permits covering stormwater discharges from construction activities to June 30, 2011, to provide sufficient time to incorporate the requirements of the Construction Rule into a renewed general permit. (75 Fed. Reg. 4,554)

States are not required to re-open their existing general permits, although they may choose to do so before they expire. The implementation date for the new requirements will vary depending on when individual states reissue their permits and whether projects are covered by general or individual permits. Thus, as noted above, companies and facilities currently operating under an effective stormwater discharge permit will not be affected by the Construction Rule until the permitting authority re-issues their permit.

Rulemaking Process to Begin for Post-Construction Stormwater Rule

EPA noted that it received comments encouraging the agency to include in the Construction Rule controls on stormwater discharges occurring after construction, or “post-construction.” While these comments were outside the scope of the Construction Rule, EPA made it clear that the agency was committed to initiating rulemaking to address post-construction stormwater discharges from newly developed sites.

On December 28, 2009, EPA published a notice announcing plans to begin a rulemaking on this issue and to make other regulatory changes to strengthen its stormwater program. (74 Fed. Reg. 68,617) In its notice, EPA stated that, “[t]o address the degradation of water quality caused by stormwater discharges from impervious cover, EPA is exploring regulatory options that would strengthen the stormwater program, including establishing specific post-construction requirements for stormwater discharges from, at a minimum, new development and redevelopment.” (74 Fed. Reg. 68,620) The agency expects to issue a final rule by November 2012.

EPA conducted several “listening sessions” in January 2010 to receive input on the performance, effectiveness and cost of stormwater control measures; ecological benefits from stormwater controls; technical information on design, implantation, operation and maintenance of stormwater control measures; and to receive other information that may help in the development of improvements to the existing program, including better control of pollutants in stormwater associated with new development and redevelopment. EPA also intends to distribute questionnaires to owners, operators, developers and contractors at sites under development; owners and operators of municipal separate storm sewer systems; and states and U.S. territories. The industry questionnaire will target establishments that develop and redevelop sites for:

New housing construction;

New industrial, commercial and institutional building construction;

Land subdivisions;

Highway, street and bridge construction; and

Other heavy and civil engineering construction.

What This Means to You

The Construction Rule significantly expands the standards that apply to the discharge of stormwater from construction and development sites. Owners and operators of affected projects should carefully review the new requirements as this regulation represents the first time that EPA has imposed both monitoring requirements and express numeric turbidity limitations on stormwater discharges from

construction activity. EPA's Construction Rule could have a significant impact on companies that are involved in the construction industry (commercial and residential), including earth-moving contractors, the highway construction industry and natural resource extraction companies. Based on the importance of this issue to EPA, it is reasonable to expect continued vigorous enforcement by EPA at construction sites.

The environmental attorneys at Husch Blackwell Sanders will monitor developments in this rulemaking process and continue to provide timely updates to assist our clients who may be affected by new stormwater regulations.

Contact Info

If you have any questions about this or any other environmental matter, please contact your Husch Blackwell Sanders attorney or one of the following attorneys:

Kansas City

W.C. Blanton - 816.983.8151

St. Louis

John Collins - 314.480.1644

David Dyroff - 314.480.1809

Jane Fedder - 314.480.1846

Jason Flower - 314.480.1769

Megan Fuchs - 314.480.1648

Brad Hiles - 314.345.6489

Coty Hopinks-Baul - 314.480.1883

Charles Merrill - 314.480.1952

Alison Nelson - 314.480.1592

Jerry Ronecker - 314.480.1831

Amy Wachs - 314.480.1840

Robert Wilkinson - 314.480.1842

Washington, D.C.

James Hoecker - 202.378.2316

[1] In September 2008, a federal appeals court upheld a decision requiring EPA to set stormwater runoff limits for construction activities by December 1, 2009. *Natural Resources Defense Council v. U.S. EPA*, 542 F.3d 1235 (9th Cir. 2008).

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