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EPA Proposes New Water Requirements for All Construction Activities

Long-awaited effluent limitations guidelines (ELG) and new source performance standards to control the discharge of pollutants from construction and development (C&D) activities will be published in the November 28 *Federal Register*. The ELG includes, for the first time, numeric effluent limits for stormwater discharges for certain large sites.

The rule, which was signed November 19 by U.S. EPA Administrator Stephen Johnson, must be finalized by December 2009, pursuant to a court order from *NRDC v. EPA*, 437 F. Supp. 2d 1137 (C.D. Cal. 2006). Comments on the proposed rule will be due February 26, 2009. The rule is available at: www.federalregister.gov/OFRUpload/OFRData/2008-27848_PI.pdf.

According to the EPA, sediment is the leading cause of water quality impairment for streams and rivers, causing water quality impairments in nearly 700,000 miles of streams nationwide and more than 375,000 acres of lakes and reservoirs. The EPA projects that the proposed rule will reduce the amount of sediments discharged from construction sites by up to 27 billion pounds each year, at an annual cost of \$1.9 billion.

The proposed rule establishes a technology-based “floor” or minimum

requirements on a national basis, requiring all construction sites to implement a range of erosion—and sediment-control best management practices. C&D sites disturbing 10 or more acres would be required to install sediment basins to treat stormwater discharges. Sites 30 acres or larger would be required to meet a numeric limit of 13 nephelometric turbidity units for turbidity, based on an active treatment system consisting of polymer-assisted clarification augmented by filtration (e.g., chitosan-enhanced filtration).

The C&D proposal is applicable to all “construction activity,” which under the proposal is defined as “clearing, grading, excavation, and other site preparation work related to construction of residential buildings and non-residential buildings, and heavy construction (e.g., highways, streets, bridges, tunnels, pipelines, transmission lines and industrial non-building structures).” The proposal is tied to the EPA’s existing stormwater program and, therefore, would apply to any construction activity that affects one or more acres, or less than one acre if part of a larger common plan that ultimately will disturb one or more acres of land.

What Specific Action Is The EPA Requiring?

As proposed, C&D activities will be required to provide and maintain effective erosion and sediment controls and pollution prevention measures.

Erosion Controls

Under the proposal, erosion controls will be deemed effective when “bare soil is uniformly and evenly covered with vegetation or other suitable materials, stormwater is controlled so that rills and gullies are not visible, sediment is not visible in the runoff...and channels and stream banks are not eroding.” At a minimum, such controls must be designed to achieve, among other things:

- stabilizing disturbed areas immediately after any earth-disturbing activities have “permanently or temporarily ceased” (stabilization must occur when final grade is reached or when earth-disturbing activities will not resume for 14 calendar days);
- controlling stormwater volume and velocity;
- minimizing amounts of exposed soil for the project duration and at any single time;
- providing and maintaining natural stream buffers;
- minimizing stream crossings and disturbance of steep slopes; and
- diverting stormwater away from disturbed soils.

Sediment Controls

Under the proposal, effective sediment controls include a variety of practices designed to remove sediment, taking into consideration rainfall, topography, soil types, climate, vegetation and proximity to storm drain inlets and

receiving waters. Such controls must include, at a minimum:

- providing perimeter controls such as diversion dikes, storm drain inlet protections, filter berms and silt fencing;
- using vegetated filter strips or buffers no less than six feet wide for silt fence discharges;
- stabilizing construction site entrances and exits and using wheel wash stations;
- removing sediments from paved surfaces on a daily basis;
- prohibiting dewatering activities, unless treatment is used to minimize sediment discharges;
- for sites of 10 acres or more, installing sediment basins or alternative controls with equivalent pollutant reductions;
- designing sediment basins subject to the following minimum standards:
 - must withstand a two-year, 24-hour storm event or, alternatively, a water storage volume of 3,600 ft³ per acre of total watershed;
 - must provide for sediment storage volume of at least an additional 1,000 ft³ per acre of disturbed land;
 - length must be four times the width;
 - must include an outlet device, such as a skimmer, designed to withdraw surface water; and
 - must allow minimum residence time for stored water of not less than 24 hours (and possibly longer)

and

- directing stormwater discharges from sediment controls to seep berms and level spreaders or using spray or drip irrigation systems to increase sediment removal and maximize infiltration.

Pollution Control Measures (PCMs)

Effective PCMs include a variety of practices that minimize the discharge of pollutants from a site, taking into account site-specific circumstances.

At a minimum, each site must implement the following PCMs:

- prohibits the discharge of construction wastes, trash and sanitary waste;
- prohibits the discharge of wastewater from washout of concrete, stucco, paint and cleanout of other construction materials;
- prohibits the discharge of fuels, oils or other vehicle/equipment pollutants;
- prohibits the discharge of equipment wash water, unless treated;
- minimizes exposure of stormwater to building and landscape materials, fertilizers, pesticides, herbicides, detergents and other liquid or dry products; and
- prevents exposure of stormwater to uncured concrete.

How Does This Relate to Other Federal Stormwater Requirements?

Since the 1990s, the EPA’s Phase I and II stormwater regulations have required National Pollutant Discharges Elimination System (NPDES) permits for construction sites involving at least one acre of land-disturbing activity. To date, the vast majority of construction activities have been covered through the EPA’s construction general permit (CGP) or a comparable state stormwater general permit. Once final, the ELG will establish the default standards applicable to the entire construction industry. In July of this year, the EPA finalized the 2008 CGP, which requires dischargers to develop and implement a comprehensive stormwater pollution

prevention plan (SWPP). The 2008 CGP will expire by July 2010, at which time the EPA is expected to revise the 2010 CGP to reflect the new requirements of the final C&D ELG. In addition, the C&D ELG will apply to discharges from oil and gas construction activities, which until November 2008 were exempt from NPDES permits under a 2006 EPA rule.

How Will This Rule Affect State Stormwater Programs?

Most state NPDES stormwater programs track the EPA's CGP format and requirements, with some states, such as Washington, Oregon and Vermont, imposing more stringent requirements. However, once the C&D ELG is finalized, all states will be required to adopt the new standards as minimum requirements. Where technology-based standards are not sufficient to protect state water quality standards, a

discharger may be required to obtain a permit using more stringent water quality-based limits. Such a scenario may occur in waterbodies that are already impaired for sediments, whether or not a total maximum daily load has been developed.

Further information regarding the state stormwater permitting authority is available online at: <http://cfpub1.epa.gov/npdes/stormwater/authorizationstatus.cfm>.

Given the current regulatory uncertainty, dischargers are encouraged to coordinate with the respective state or local permitting authorities where projects are located. Also, given the confusion and burden that results from overlapping local, state and federal stormwater requirements, permitting authorities should consider adopting the EPA's "qualifying local program," whereby only one authority is responsible for administering

stormwater permitting requirements. Such programs must be expressly incorporated into the EPA or state CGP.

About our Practice

The Hunton & Williams water and natural resources practice attorneys have extensive experience with federal and state regulatory programs, including stormwater requirements. The firm routinely advises clients on all aspects of compliance with the Clean Water Act and permitting requirements. Our clients seek the most efficient way to evaluate and implement compliance with increasingly complex water regulations.

If you have questions regarding the EPA's proposal or compliance with stormwater requirements generally, please contact us.

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