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## EPA's New Water Quality Rules For Construction Sites Will Impact California Projects

On November 23, 2009, only a few days before expiration of a court-ordered deadline, the United States Environmental Protection Agency (EPA) released its final rules for water quality in runoff from construction sites.

EPA's new rules—termed effluent limitation guidelines—follow on the heels of the new construction water quality permit issued by the California State Water Resources Control Board (State Water Board) in September 2009. The requirements of EPA's new rules and the California permit differ, but also contain some common elements, and both will seriously impact construction projects in California.

EPA's new rules ultimately will apply to all construction sites throughout the country that are one acre and larger (or sites smaller than one acre if part of a larger common plan of development). The EPA rules will be incorporated into the water quality permits applicable to these construction sites, which for most states, including California, are issued by state authorities. Furthermore, EPA's new rules will apply to linear projects (e.g., utility lines and roadway projects) and traditional construction projects alike.

Key elements of EPA's final rules are:

- A numeric limit for turbidity (a measure of sediment and other pollutants) in storm water runoff. The limit applies to sites disturbing 10 or more acres of soil at any one time. Beyond the acreage trigger, only interstate natural gas pipeline projects are given an exemption to application of the numeric limit.
- Minimum requirements for all construction sites in the categories of: sediment and erosion controls, soil stabilization, pollution prevention measures, and outlet controls.
- For all construction sites, prohibitions on certain discharges including: dewatering and concrete wastewaters (unless properly controlled); wastewater washouts of stucco, paints, and other construction materials; fuels or oils; and soaps and solvents.

### Stringent Numeric Effluent Limit Targets Sediment

For the first time, EPA has adopted a numeric limit for storm water flows from construction sites. The turbidity numeric limit will be phased in over a four-year period once EPA's rules become effective this coming February. By phasing in the requirements, EPA means to give the industry time to "experience several years of growth before all

[EPA's New Rules](#)

[California's Statewide Construction Water Quality Permit](#)

[Summary of the California Permit's Requirements](#)

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the rule requirements are in effect.”

The numeric limit will apply first to sites that disturb 20 acres or more of soil at any one time then to sites disturbing 10 or more acres regardless of whether or not the disturbed acres are contiguous.

The specific numeric limit set by EPA (280 nephelometric turbidity units (NTU)) applies regardless of the soil conditions, site conditions, weather conditions, or natural levels of sediment present in the waters into which a construction site runoff may drain. During the rulemaking process, construction industry stakeholders raised concerns that a numeric turbidity limit would be lower than natural storm water conditions in certain areas (particularly in the arid southwestern United States); however, EPA disagreed with these comments.

Details of the monitoring required to determine compliance with the limit was not set forth by EPA, but rather, will be determined by EPA and state authorities as they incorporate the new rules into the various construction permits applicable throughout the nation.

### Comparing EPA's Number to California's

Many aspects of the numeric turbidity limit from EPA differ from a similar numeric limit adopted as part of the statewide California construction water quality permit. The California permit sets a turbidity limit of 500 NTU—higher than the 280 NTU established by EPA. Also, the recently-adopted California permit applies its limit only to sites meeting the high risk category definition (based upon high erosion potential of site soils and sensitivity of receiving waters). Whereas, EPA's numeric limit applies to all sites regardless of environmental conditions, so long as the disturbed acreage threshold (10 acres) is triggered. EPA's “design storm”—the storm size beyond which adherence to the numeric limit is not required—is more lenient than California's design storm, with EPA's design storm set at the 2-year event and California's design storm set at the 5-year event. Both EPA's rule and California's permit will utilize daily averages of samples to determine compliance with the numeric limit. Also, while EPA has set only a numeric turbidity limit, California's permit also contains limits for pH and debris.

### Comparing the Other Components of EPA's New Rules to California

The non-numeric requirements set out in EPA's new rule are similar in nature to the minimum best management practice requirements used in California's new construction water quality permit, although the EPA minimum controls are less specific than California's. Also, EPA establishes certain prohibitions on discharges (e.g., wastewater discharges from painting operations) that differ from those prohibitions included in California's permit.

A key element not contained in EPA's new rules is a requirement for post-construction controls. EPA has stated that it intends to address water quality from new development projects in a separate rulemaking in the future. By contrast, the new California construction water quality permit contains stringent design controls applicable to new development projects—essentially demanding that new development mimic pre-development hydrologic conditions once construction has been completed.

## Implementing EPA's New Rules in California

The new EPA rules will not automatically apply to California sites. Rather, the new rules will be incorporated into the existing and future construction water quality permits adopted by the State Water Board or the regional water boards. The California statewide construction water quality permit, contains language specifically allowing for a reopener during the permit's term to incorporate the new EPA rules. It is as yet unknown if the State Water Board will act quickly to reopen the California permit or will wait until the permit expires in five years time incorporating EPA's rules into the next generation permit. Consequently, construction site operators and project developers should continue to prepare for implementation of the California permit's current requirements by the permit's effective date of July 1, 2010.

Once the new EPA requirements are incorporated into applicable construction industry permits, violation of those requirements can subject site owners to penalties of up to \$37,500 per day per violation, and in California, violation of numeric limits can also subject site owners to mandatory minimum penalties.

### Challenges to the New Rules

EPA's rules will become effective 60 days after publication in the Federal Register. Construction and development industry trade groups are expected to react to the new rules once published in the Federal Register. It is possible that one or more of the trade groups, or other stakeholders, could pose a legal challenge to the EPA rules. A lawsuit has already been filed by construction industry trade groups challenging the California statewide construction water quality permit, targeting primarily the numeric limits.

Please contact us if you have questions regarding the new EPA rules and how they will apply in California or elsewhere.

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