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EPA Publishes New Rule to Reduce Stormwater Pollution From Construction Sites

The U.S. Environmental Protection Agency (EPA) recently published a final rule to reduce stormwater pollution from construction sites (“Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category”). The new rule takes effect in February 2010 and will be phased in over four years. Federal stormwater regulations (40 C.F.R. § 122.26) require certain dischargers engaged in construction activity to obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act and to implement certain control measures to manage discharges. Construction activities, the largest category of dischargers under the NPDES permitting program, include among other things clearing, excavating, and grading. As such, these new regulations will impact a large number of businesses and a broad range of activities.

Current NPDES regulations for construction sites lack national performance standards and monitoring requirements. The new rule, however, is intended to work with existing state and local stormwater programs to provide a technology-based “floor,” including Effluent Limitation Guidelines (ELG) and New Source Performance Standards (NSPS) for all construction dischargers. This is the first time that EPA has imposed national monitoring requirements and enforceable numeric limitations on construction site stormwater discharges.

Construction site owners and operators that disturb one or more acres will be required to use best management practices (BMPs) to control discharges from certain activities. Regulated parties will have the discretion to choose a range of BMPs that will minimize the discharge of pollutants based on the characteristics of the particular site. The primary pollutants of concern associated with construction activities include soil and sediment runoff, turbidity, and nutrient discharges.

The more stringent aspects of the rule phase in over the next four years, depending on the size of the construction project. Beginning 18 months after the effective date of the final rule (*i.e.*, August 2011), construction sites that disturb 20 or more acres at one time will be required to comply with new monitoring requirements and numeric effluent limitations. Construction sites that disturb 10 or more acres at one time must meet the same provisions beginning four years after the effective date of the final rule (*i.e.*, February 2014). The EPA is phasing in the numeric effluent limitation over four years to allow state and local permitting authorities adequate time to develop monitoring requirements, which may exceed the federal limitations.

As a practical matter, the new rule means that construction and development projects (new construction, additions, building modifications, etc.) will face more stringent NPDES permitting and discharge management requirements. These requirements will include pollution prevention measures, grading, buffers, and monitoring, depending on the size of the construction activities. Failure to comply may result in penalties of up to \$32,500 per day of violation.



If you have any questions regarding this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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SUTHERLAND

Jennifer W. Fletcher
Daniella D. Landers
Jennifer R. Van Ness
Susan G. Lafferty
Benjamin Norris
Gregory R. Staiti

404.853.8145
713.470.6110
404.853.8433
202.383.0168
202.383.0917
202.383.0833

jenny.fletcher@sutherland.com
daniella.landiers@sutherland.com
jennifer.vanness@sutherland.com
susan.lafferty@sutherland.com
benjamin.norris@sutherland.com
greg.staiti@sutherland.com