

Environmental Alert

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EPA Revises Effluent Guidelines and Standards for Construction and Development

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On April 1, 2013, the United States Environmental Protection Agency (EPA) proposed changes to the Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category (the Proposed Rule) under the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program. See 78 Fed. Reg. 19434 (Apr. 1, 2013). The Proposed Rule withdraws controversial numeric turbidity limits adopted for discharges from most construction sites in 2009 (the 2009 Rule). See 74 Fed. Reg. 62995 (Dec. 1, 2009). EPA stayed the numeric limitation in November 2010 following industry challenges in the U.S. Circuit Courts of Appeal for the Fifth, Seventh, and D.C. Circuits and a petition for administrative reconsideration filed by the Small Business Administration. See 75 Fed. Reg. 68215 and 75 Fed. Reg. 68305 (Nov. 10, 2010). The non-numeric requirements of the 2009 Rule (which also provided for implementation of erosion and sediment controls, soil stabilization requirements, management of dewatering activities, pollution prevention measures, utilization of surface outlets for discharges from impoundments, and prohibitions on certain types of discharges) remain in effect. The Proposed Rule arises out of a settlement agreement between EPA and the industry challengers and proposes the use of Best Management Practices (BMPs) in lieu of the turbidity limit.

The comment period for the proposed guidelines and standards ends on **May 31, 2013**.

Do These Proposed Standards Apply to Me?

The 2009 Rule generally applies to stormwater discharges from construction activity that disturbs an acre or more of land. Construction activity includes clearing, grading and excavation. 40 C.F.R. § 122.26(b)(14)(x)&(15). The 2009 Rule applies only to stormwater discharged during construction. It does not apply once construction ceases and the site is stabilized. The Proposed Rule does not change the universe of activities covered by the 2009 Rule. It primarily clarifies the scope of industry's obligations.

What Are the Proposed Regulations?

The Proposed Rule amends 40 C.F.R. Part 450 to add a definition, clarify language, and withdraw the numeric turbidity effluent limitation and monitoring requirements.

EPA proposes to amend 40 C.F.R. 450.11(b) to include a definition of "infeasible." The existing regulations relieve permittees from certain requirements when they are "infeasible," but industry complained that the lack of a definition for that term would lead to inconsistent interpretations by permitting authorities. EPA is soliciting comments on the following proposed definition: "Infeasible means not technologically possible, or not economically practicable and achievable in light of best industry practices." In addition, EPA proposes to amend the existing language of 40 C.F.R. 450.21(a) (2) as follows: "Control stormwater discharges, including both peak flow rates and total stormwater volume, to minimize channel and streambank erosion *in the immediate vicinity of discharge points*." These changes are intended to differentiate between increased erosion caused by the construction site and discharges caused by other sources. This change is also intended to clarify that permittees are responsible only for stabilizing erosion in the areas of permitted outfalls rather than for streambank erosion caused by upstream sources.

EPA further proposes to revise 40 CFR 450.21(a)(6) as follows: "Provide and maintain natural buffers around *waters of the United States*, direct stormwater to vegetated areas and maximize stormwater infiltration to *reduce pollutant discharges*, unless infeasible." The substitution of "waters of the United States" for "surface waters" is due to the fact that "surface waters" is undefined in the regulations, and the defined term, "waters of the United States," was what EPA intended. The phrase "increase sediment removal" was stricken and "reduce pollutant discharges" was added to clarify that the goal of

the requirement to direct stormwater to vegetated areas and to maximize stormwater infiltration is to reduce pollutant discharges.

EPA also proposes to alter the regulations covering soil compaction by revising 40 CFR 450.21(a)(7). That provision currently requires permittees to “Minimize soil compaction and, unless infeasible, preserve topsoil.” EPA proposes to amend the requirement and to separate it into two separate requirements: 1) “Minimize soil compaction. Minimizing soil compaction is not required where the intended function of a specific area of the site dictates that it be compacted,” and 2) “Unless infeasible, preserve topsoil. Preserving topsoil is not required where the intended function of a specific area of the site dictates that the topsoil be disturbed or removed.” These changes clarify that in areas where soil compaction is necessary or part of the site design, such as foundation pads, the minimization and topsoil preservation requirements will not apply.

The Proposed Rule also reorganizes the 14-day stabilization requirement of 40 CFR 450.21(b) to improve its clarity and adds language recognizing that, in limited circumstances, stabilization may not be required “if the function of a specific area of the site necessitates that it remain disturbed.” EPA views this exception as limited and describes a motocross track as an example of where it might apply.

The Proposed Rule adds a provision to the existing requirement that the exposure of trash and other potential pollutants to precipitation and stormwater be minimized. The new language provides that there is no obligation to minimize exposure where a material is not a source of pollutants (such as inert materials) or may contribute only negligible pollutants (such as steel members for construction).

The final proposed change is the removal of the numeric turbidity discharge standard and related monitoring requirements, now found at 40 CFR 450.22(a)&(b). EPA advises that “it continues to be interested in data and information regarding numeric discharge standards for construction sites.”

Why Comment?

Controlling stormwater at construction sites can be a very costly component for any development project. It is important that those involved in construction activities understand how the proposed regulations may affect their operations and provide EPA with feedback on any areas of concern. To the extent that one supports EPA’s proposed amendments, it is important to express that support to EPA.

The comment period for the proposed guidelines and standards ends on May 31, 2013.

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