

ENVIRONMENTAL

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EPA Promulgates Aggressive, Nationwide Stormwater Technology Requirements for the Construction and Development Industry

On Dec. 1, 2009, the U.S. Environmental Protection Agency (EPA) published final Construction and Development Effluent Limitations Guidelines and New Source Performance Standards (C&D ELG) imposing nationally-applicable numeric effluent limits on stormwater discharges from construction sites impacting 10 or more acres of land at any one time. 74 Fed. Reg. 62,996 (Dec. 1, 2009). The rule also specifies erosion and sediment controls that contractors must employ to control stormwater discharges at all regulated construction sites (*i.e.*, that disturb one or more acres of land). EPA estimates that the new rule will reduce approximately four billion pounds of sediment per year (for a monetized benefit of \$368.9 million), at an annual cost of \$810-\$935 million. The rule becomes effective on Feb. 1, 2010 and will be phased in over four years.

EPA issued the C&D ELG under a court order requiring ELGs for the construction and development industry by Dec. 1, 2009. EPA originally evaluated three options for the rule, ranging from non-numeric controls to stringent numeric effluent limits. 74 Fed. Reg. at 63,015. The final rule differs from all of the proposed options, but is believed will result in onerous and costly permit demands on construction site owners and operators. Specific requirements in the final rule include:

- For all construction stormwater permits – EPA identifies a series of *mandatory* Best Management Practices (BMPs) relating to *Erosion and Sediment Controls* (40 CFR § 450.21(a)), *Soil Stabilization BMPs* (40 CFR § 450.21(b)), *Dewatering BMPs* (40 CFR § 450.21(c)), *Pollution Prevention Measures* (40 CFR § 450.21(d)), and *Prohibited Discharges* (40 CFR § 450.21(e)). *Id.* at 63,057.
- For all construction sites that disturb 20 or more acres of land at one time (whether contiguous or not), the average turbidity for any discharge for any day may not exceed a numeric effluent limit of 280 NTU (turbidity measurement units) – the deadline for complying with this numeric limit will be Aug. 2, 2011 (40 CFR § 450.22(a)). *Id.* at 63,058.

- The 280 NTU effluent limit is expanded to include all construction sites that disturb 10 or more acres of land at one time (whether contiguous or not) starting February 2, 2014. *Id.*
- The turbidity effluent limit is limited to the 2-year, 24-hour storm event. *Id.*
- The turbidity effluent limit applies to **all** stormwater discharges from sites that exceed the threshold sizes above, regardless of the number of discharge points.
- All of the BMPs and other restrictions contained in the first bullet above also are enforceable against sites even if the site otherwise meets the 280 NTU effluent limit.
- States with authorized National Pollutant Discharges Elimination System (NPDES) permit programs will be responsible for determining a monitoring protocol and how to incorporate the above standards into their construction stormwater permit programs. *See below.*

These requirements do not apply to “post-construction” stormwater controls; instead, EPA has initiated a separate rulemaking to develop post-construction ELGs by November 2012. *See* <http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm>.

The new ELG requirements become directly applicable to individual construction projects as soon as authorized NPDES states incorporate the standards into the state’s construction stormwater permit program, either through individual or general stormwater permits. Therefore, the “implementation date” for the new requirements may vary from state to state, depending upon when a particular state must reissue its construction stormwater permits and whether specific projects are covered by an individual or a general permit.

Not only are the estimated costs of compliance more than twice the estimated benefits, but EPA also has not demonstrated that any particular “technology” will universally ensure compliance across the country. Hence, actual costs at many construction sites may exceed EPA’s estimates, helping to ensure negative impact on the construction industry and the likelihood of knocking more construction companies (and their workers) out of business. Further, if EPA’s prediction that “passive” treatment systems will provide sufficient treatment proves to be untrue, construction site operators will be forced to rely on expensive and labor-intensive Advanced Treatment Systems (ATS) as the only potential control technique. Ironically, EPA rejected its original ATS proposed options because it could not justify the costs of such an approach relative to the benefits. *Id.* at 63,005.

Interested parties have until April 14, 2010 to file a petition for review of the final C&D ELG in any federal Circuit Court of Appeals.

If you have any questions regarding this alert or the C&D ELG, please contact Jeffrey Longworth at jlongworth@btlaw.com or 202-408-6918; or Fredric Andes at fandes@btlaw.com or 312-214-8310. Visit Barnes & Thornburg online at www.BTLaw.com.

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