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## EPA Further Regulates Storm Water Discharges From Construction and Development Activities

On November 23, 2009, the United States Environmental Protection Agency ("EPA") issued a final rule ("Rule") establishing effluent limitation guidelines ("ELG") and performance standards for discharges related to construction and development sites. While the construction and development sector is already subject to stormwater permitting and must implement control measures for construction-related stormwater discharges, this new Rule promulgates additional standards. These standards serve as national minimum requirements for not only controlling, but also *monitoring* discharges.

### Background

EPA regulates industrial effluent discharges under the Clean Water Act and is charged with restoring and maintaining the integrity of United States waters. Pursuant to this authority, EPA promulgated this Rule to address sediment, turbidity, and other pollutants discharged into surface waters as a result of construction site development activity. The Rule will have a significant reach. The construction and development industry represents the largest category of wastewater dischargers. Once implemented, EPA estimates that the Rule will impact 84,000 firms, will result in \$953 million per year of compliance costs, and reduce sediment released at construction sites by about 4 billion pounds annually.

### Summary of the Final Rule

#### Scope

This Rule applies to all discharges associated with regulated construction sites. Regulated construction sites are those requiring National Pollutant Discharge Elimination System ("NPDES") permit coverage. This coverage is required when construction activity results in the disturbance of one or more acres, including clearing, grading, excavating, or other earth remodeling activities.

While the Rule's primary focus is on stormwater discharges, its scope is not limited exclusively to stormwater. All discharges from regulated construction sites are subject to these new guidelines and limitations.

#### Implementation

The Rule takes effect on February 1, 2010. After this effective date, state delegated<sup>1</sup> permitting authorities must incorporate these new requirements into their state discharge permits. For individual permits, these requirements are effective immediately upon publication. For general permits, the new limitations and guidelines must be incorporated into the next construction general permit issued after the Rule's effective date. Thus, the applicability of the new rule can vary from state to state.

#### Numeric Effluent Limitation

A significant aspect of the Rule is a new effluent monitoring requirement. The final Rule implements a numeric limitation for turbidity in discharges from covered construction sites. EPA estimates that 21,000 projects covering 623,000 acres will require numeric monitoring.

EPA chose turbidity as the pollutant to monitor because it is an indicator of other types of pollutants, like sediment. Turbidity is also relatively easy and cost effective to monitor. The Rule requires that the average daily value for turbidity not exceed 280 NTU<sup>2</sup> in discharges from regulated construction sites. This is a more stringent standard than that imposed currently in California. The monitoring limit does not apply if the discharge occurs on the same day as a storm larger than the local 2-year, 24-hour storm.

In order to allow permitting authorities and regulated construction sites adequate time to develop monitoring procedures, EPA decided to implement the monitoring requirement in two phases. The first sites required to monitor turbidity are construction sites with 20 or more acres of disturbed land. These sites will be required to begin monitoring 18 months after the Rule's effective date. For sites with 10 or more acres but less than 20 acres of disturbed land, the monitoring requirement begins four years from the effective date.

Sites that are larger than 10 acres but which have fewer than 10 acres of disturbed at one time do not have to monitor turbidity. There is also an

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exception to the numeric monitoring requirement for construction of FERC regulated interstate natural gas pipelines.

Many important details regarding the nature of turbidity monitoring, such as frequency or monitoring location, have yet to be decided. EPA has delegated these decisions to the relevant permitting authority (either states with approved NPDES programs or in some cases the EPA itself).

### Non-Numeric Effluent Limitations

Apart from monitoring requirements, all regulated sites (those that are one acre or more) must comply with the Rule's non-numeric limitations. These limitations are intended to further minimize and control construction site discharges. The Rule contains control requirements relating to each of the following:

- Erosion and sediment controls;
- Soil stabilization;
- Dewatering;
- Pollution prevention measures; and
- Surface outlets.

Further, the Rule prohibits discharges from concrete washout, as well as washout and cleanout of certain construction materials, discharges of certain pollutants used in vehicle and equipment operation and maintenance, and soaps or solvents used in vehicle and equipment washing.

Requirements similar to these are already well established in the construction and development industry. These limitations are based on industry averages, however, some aspects of this Rule may be more stringent than those currently in place in some jurisdictions under the existing stormwater program. For example, the soil stabilization guidelines contained in the Rule are more stringent than those in the EPA Construction General Permit ("CGP"). The Rule requires that soil stabilization be conducted on any portion of the site *immediately* after earth disturbing activities permanently cease or cease for more than 14 days. This is a change from the EPA CGP's requirement to initiate these procedures *as soon as practicable* after activities cease permanently or temporarily for more than 14 days.

### Conclusion

The ELG Rule further extends EPA's emphasis in regulating and controlling sediment discharges from construction sites. The Rule integrates well with the existing general permit program. Questions left unaddressed include details concerning monitoring requirements, such as the time, frequency, and location of sample collections. Responsibility for collection of samples and compliance with the numeric discharge limitations will be an issue the regulated community will need to be mindful of, particularly at multi builder/developer construction sites.

### Endnotes

- 1 Note that the EPA remains the permitting authority for four states.
- 2 Nephelometric turbidity units.

### About the Authors

Gerald J. Pels is a partner in the Environmental Section of LLB&L. He focuses in the areas of multimedia environmental compliance, counseling, and litigation support and provides strategic guidance on corporate compliance strategies, environmental investigations, sustainability initiatives and stakeholder relations and management. His 26 years of wide range experience includes agency negotiations, assessing and counseling air, water, stormwater, and waste permit compliance, representing clients at permit and other hearings, and providing comprehensive representation to potentially responsible parties and steering committees at both state and federal superfund sites.

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