

New EPA Requirements Control Surface Water Contamination on Construction Sites

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A potential harbinger of construction regulatory pressures to come, in January of this year, Beazer Homes USA, Inc., agreed to pay a \$925,000 civil penalty and institute remedial measures to resolve allegations of violations of Clean Water Act storm water control requirements at multiple sites across several states.

These violations relate to Environmental Protection Agency (EPA), as well as state requirements for the control of stormwater from construction sites. These requirements apply to construction companies that engage in activities that have the potential of causing pollution into surface waters during construction activities.

Recently, the EPA has proposed changes to the Construction General Permit (CGP) related to stormwater runoff from construction sites, including erosion and sediment control, pollution prevention and stabilization. The EPA seeks to control surface water contamination related to clearing, excavating and grading activities that may result in impairment of surface waters. Specifically, the EPA is seeking to control sediment, turbidity and nutrients.

The Clean Water Act regulates the discharge of any contaminant into United States waters. In essence, no one can discharge anything into waters without first obtaining a National Pollution Discharge Elimination System (NPDES) permit. The Act requires NPDES permits for point and non-point discharges into lakes, rivers and streams.

"Point" sources are defined as discrete conveyances of pollutants. "Non-point" source generally refers to runoff that has no discrete sources of contaminants. In the construction setting, non-point discharges pertain to runoff from sites that carry sediments, chemicals, herbicides, and other types of contaminants that eventually reach surface waters.

Rather than issue distinct permits for each and every construction site, activities at construction sites are governed by CGPs, which means that general terms and conditions apply to every similar location.

The new EPA rule, known as the "Construction and Development Rule" or "C&D Rule," seeks to establish a "floor" for construction permits, and states must regulate such discharges (at least) as strictly as the EPA rule, although they can be stricter than the national standards. The C&D Rule

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requires both non-numeric limitations and numeric limitation for turbidity at large construction sites.

With respect to the non-numeric limitations, construction site operators must institute control measures that minimize pollution runoff in stormwater using certain techniques and practices called “best management practices” or “BMPs” and institute other control measures like litter control, maintaining construction debris and segregating construction chemicals. Despite these efforts, the EPA concluded that more could be done to prevent runoff from impairing waters, and the new rules seek to reduce discharges from construction sites by four billion pounds per year.

The types of activities that the new EPA rule will govern includes building construction (including development and general contracting) and heavy and civil engineering construction, including land subdivision. The new rule anticipates limitations that establish a specific set of erosion and sediment controls and, for the first time, establishes numeric requirements.

The non-numeric requirements include controlling stormwater volume and velocity, minimizing the amount of exposed soils, minimizing disturbance of steep slopes, providing and maintaining natural buffers, minimizing soil compaction, stabilizing soils immediately after construction activity, minimize discharge from dewatering activities, using vehicle and wheel washing, using sedimentation ponds and prohibiting specific discharges.

In the past, the EPA had concluded that the establishment of numeric-based limitations would be impracticable. However, the Agency concluded that such monitoring could now be done. However, EPA intended to have Aug. 1, 2011 as its first phase-in date for the new numeric limit for construction activity that disturbs more than 20 acres (including non-contiguous parcels) and after Feb. 2, 2014, construction activity that disturbs 10 acres of land or more up to 20 acres (including non-contiguous parcels).

The limit was to be 280 nephelometric turbidity units (NTU), which is a measurement of how much particulate matter is suspended in a liquid, but EPA concluded that this figure was based on misinterpreted data. It is in the process of recalculating the new limit and will issue an update. In the meantime, EPA intends to publish the new numeric limit before the expiration of the 2008 CGP, extended to February 15, 2012.

The rule allows individual states to determine how often construction sites must sample on a daily basis. If the discharge exceeds the turbidity level, the construction site is in violation of its permit limitation and it can face fines, penalties and will most certainly have its non-numeric controls and systems reviewed by regulators, who will determine where the controls and systems can be made more restrictive.

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These new rules will certainly change how construction and development occurs at many sites. Some states may also opt to impose stricter standards than the national EPA requirements, primarily by applying these standards to smaller sites or requiring multiple samplings per day. The EPA has provided a long lead time for the construction and development industry to develop practices and standards to comply with the new requirements.

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