



## KEEP an EYE OUT for CHANGING STORMWATER REGULATIONS and THEIR EFFECT on YOUR BUSINESS

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In December 2009, the [United States Environmental Protection Agency \(“EPA”\)](#) published new federal requirements on the discharge of rain water from construction sites. A key piece of these new regulations was the imposition, for the first time nationally, of a numeric limit on the [turbidity](#) of stormwater discharges (a measure of the cloudiness of the water) from construction sites disturbing 10 or more acres at one time. In an August 13, 2010 filing in a lawsuit brought against EPA by the [National Association of Homebuilders \(NAHB\)](#) and others, EPA asked a federal court to vacate the numeric limit for turbidity it had set forth in the new federal requirements and grant it 18 months to review the scientific basis it used to set the numeric limit and take final action on it. The court subsequently entered an order to that effect on August 24, 2010. EPA’s decision on this regulation will have a significant effect on anyone involved with real estate development. It is important as general counsel to track the changing regulations to assure your organization is in compliance.

It is undisputed that rain water that washes over disturbed soil, which is typically found at construction sites and elsewhere, may erode the ground and mobilize sediments and other pollutants that, if left uncontrolled, can pollute nearby streams and waterways. Under the federal [Clean Water Act](#), real estate developers generally need to obtain permits, called [National Pollution Discharge Elimination System \(“NPDES”\)](#) permits, to be allowed to discharge stormwater from construction sites. Generally, EPA has delegated authority to issue NPDES permits to almost every state. These NPDES permits require real estate developers and any contractors involved with earth moving to implement [best management practices \(“BMPs”\)](#) to control erosion and sedimentation from the construction site, and to perform periodic inspections of the BMPs to ensure that they are working properly.

Prior to EPA’s new regulations, the federal requirements for NPDES permits did not require that the rain water discharged from construction sites meet any numeric standard. With the new standards, permittees are required to sample rain water discharged from construction sites which have 10 acres or more disturbed at one time and analyze the sample for turbidity. Rain water samples cannot exceed 280 nephelometric turbidity units (“NTU”).

[NAHB and others sued EPA](#) in federal court, contending among other things, that that data EPA used to support its decision to adopt the 280 NTU limit was deficient. After it reviewed the opponent’s brief, EPA stated that it had “improperly interpreted the data” used to develop the 280 NTU limit, and that

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the "calculations in the existing administrative record are no longer adequate to support the numeric limit." EPA therefore asked, and the court granted, an 18 month extension to review the data, solicit additional public comment, and announce a new numeric limit.

General counsel for real estate developers, builders and earth moving contractors, as well as environmental groups who are equally concerned with the adverse effects of erosion and sedimentation on the nation's waterways, should be watching EPA as it reevaluates the data. States that have been delegated NPDES permitting authority will also need to know of any new EPA limits, because they will be required to impose them in their state programs. No matter what happens, EPA's decision on new numeric limits will be sure to spark more controversy.

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