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## ENVIRONMENTAL LAW

### Managing Stormwater Discharges From Construction Sites in Pa.

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*Special to the Legal*

Within the last several months, there has been much regulatory activity, both at the federal and state levels, regarding the permitting programs associated with stormwater discharged from construction sites. Individuals interested in real estate development need to keep track of these new regulatory changes because they will radically affect the way land development is permitted and implemented.

Stormwater discharges from construction sites generally need to be permitted pursuant to the National Pollution Discharge Elimination System permitting program set forth in the federal Clean Water Act. Authority to issue these discharge permits, also called NPDES permits, has generally been delegated to various state environmental agencies by the U.S. Environmental Protection Agency. Pennsylvania, through its Department of Environmental Protection, is one of the states delegated with this permitting authority by the EPA. Although it has been delegated NPDES permitting authority, the DEP's permitting program cannot be any less stringent than the federal program.

#### NEW FEDERAL REGULATIONS

On Dec. 1, 2009, the EPA published new requirements for the discharge of stormwater from construction sites. These requirements, labeled Construction and Development



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Effluent Limitation Guidelines (C&D ELG), are significant because they impose for the first time numeric limits on stormwater discharged from construction sites.

What are the new limits? Prior to the adoption of these regulations, NPDES permits issued for the discharge of stormwater from construction sites generally only contained non-numeric, performance-based effluent limitations in the form of properly installed and maintained best management practices, or BMPs. Proper implementation of BMPs minimizes the sediment in stormwater discharged from a construction site, as well as reduces the velocity of stormwater leaving the site. NPDES permits also require periodic inspection of the BMPs and timely correction to any malfunctioning BMPs so that the stormwater discharged from a construction site does not adversely impact the receiving water body.

In the new regulations, the EPA set a maximum daily average numeric limit of 280 NTU (a turbidity measurement) for covered construction sites nationwide. The numeric

limit set forth in the C&D ELG is not applicable on days when the construction site receives rainfall in excess of a two-year, 24 hour storm. The EPA also required a series of mandatory BMPs to control stormwater from construction sites.

The imposition of this C&D ELG means that construction-related NPDES permittees, in addition to maintaining stormwater BMPs, will be required to monitor their stormwater discharges for turbidity; report the results of the monitoring to the permitting agency; and use the appropriate control technologies to ensure that their stormwater discharges do not exceed the numeric standard of 280 NTU. The EPA's new rule allows delegated states like Pennsylvania to set their own requirements for sampling discharges, although the EPA intends to issue guidance on this topic shortly.

The C&D ELG sets forth a phase-in schedule for the turbidity limitation as follows: For construction sites with 20 acres or more of earth disturbance in existence at one time, the C&D ELG is effective on Aug. 2, 2011. For construction sites with 10 acres or more of earth disturbance in existence at one time, the C&D ELG is effective on Feb. 2, 2014. The EPA's notice states that when the earth disturbance at a construction site goes below the minimum acreage, the C&D ELG is no longer applicable; if the site should subsequently exceed the minimum acreage, the C&D ELG would again be applicable.

The feasibility of meeting the 280 NTU limit set forth in the C&D ELG has been

questioned by commenters of the proposed rule, and the imposition of any numeric limit represents a radical new environmental permitting requirement for the construction and development industry. In addition, some have suggested that there is no methodology to accurately determine whether a certain suite of BMPs and control technologies will meet EPA's numeric standard, leaving permit applicants to guess whether they have "done enough" to keep their development site in compliance with these new standards. For these reasons, it is possible that the C&D ELG will be the subject of legal challenges.

How does this affect state-delegated programs? Since NPDES permitting authority has generally been delegated to the states, the EPA's notice states that "the implementation date of the new requirements will vary depending on when the [delegated] states reissue their permits." The DEP recently reissued its NPDES General Permit for Stormwater Discharges Associated with Construction Activities (known as PAG-02), and in the notice that accompanied its reissuance, the DEP acknowledged that the EPA recommended that PAG-02 be renewed for only two years, which it was, rather than for five years, to allow for more timely incorporation of the C&D ELG into the next reissuance of PAG-02.

Of looming significance, the EPA also announced that it is developing minimum national standards for effluent limitation guidelines to be imposed on development sites post-construction. The EPA stated its intention to announce these post-construction ELGs by November 2012. Currently, the EPA is hosting a number of "listening sessions" to hear from the regulated public on this issue.

## PROPOSED STATE REGULATIONS

At the state level, the DEP is in the middle of its own proposed regulatory changes to the stormwater management program. On Aug. 29, 2009, the Pennsylvania Environmental

Quality Board (EQB) published for public comment proposed regulations that would significantly change the current rules governing erosion and sedimentation control and stormwater management in Pennsylvania. If finalized in their current form, the proposed regulations would largely be implemented through the administration and enforcement by County Conservation Districts and the DEP of the NPDES permit program, and Pennsylvania's erosion and sedimentation control program.

Among the most significant of the proposed changes are the following:

- Imposition of mandatory riparian forest buffers in areas 150 feet from each side of surface waters classified as Exceptional Value (EV). Additional riparian forest buffer requirements are included for land disturbing activities located in non-EV watersheds when an NPDES permit-by-rule is sought (a new permitting option in the proposed regulations summarized below). With limited exceptions, development in riparian forest buffer areas will be prohibited.

- Codification of the DEP's current practice to require that a Post-Construction Stormwater Management (PCSM) plan be submitted with an NPDES permit application for stormwater discharges during construction activities. New requirements for the contents of PCSM plans are intended to standardize the contents of such plans and to ensure that post-construction stormwater management requirements are implemented and maintained in perpetuity following the completion of construction activities.

- Creation of a new "permit-by-rule" option for low-impact projects located outside of an EV watershed that meet other eligibility requirements, such as preserving riparian forest buffers.

- Imposition of additional erosion and sedimentation control requirements in connection with agricultural activities, including but not

limited to agricultural plowing and tilling activities and animal heavy use areas such as barnyards or feedlots.

Permit application fees will increase dramatically under the proposed regulations, from \$250 to \$2,500 for an NPDES general permit, and from \$500 to \$5,000 for an individual NPDES permit.

## WHAT'S THE STATUS?

The EQB accepted public comments on the proposed rulemaking until Nov. 30, and received approximately 1,300 comments on the proposed regulations, with a significant portion of these being "form" comments. Significantly, there were numerous comments submitted by state senators and representatives that took issue with various provisions of the proposed regulations. In addition, the Independent Regulatory Review Commission also submitted comments to the EQB, which comments questioned certain aspects of the proposed regulations and for which it asked for a response.

At present, the DEP is reviewing the comments and determining how to proceed with the proposed regulations. In any event, given the changes that are mandated by the EPA, there will surely be significant changes to the regulatory programs associated with the management of stormwater from construction and development sites, which changes need to be incorporated into the planning for any real estate development that will be under construction in the next year or two. •

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