EPA Publishes Final Effluent Limitation Guidelines for the Construction and Development Industry

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MGKF Special Alert

On March 6, 2014, the U.S. Environmental Protection Agency ("EPA") published a final rule in which it dropped, at least for the foreseeable future, its efforts to impose numeric limitations and sampling requirements for permits to discharge stormwater from construction and real estate development sites. 79 Fed. Reg. 12661. In a move that is sure to make the construction and development industry heave a collective sigh of relief, EPA announced that it was withdrawing the previously announced turbidity discharge limits applicable to larger development sites, while also stating that it "has reserved these [regulatory sections] should EPA decide to propose and promulgate additional effluent limitation guidelines and monitoring requirements in future rulemaking," which means that this issue may emerge again one day.

By way of background, under the National Pollution Discharge Elimination System ("NPDES") permitting program authorized by the federal Clean Water Act, EPA or delegated states issue NPDES permits for the discharge of stormwater from certain earth disturbances at construction and land development sites. Generally, the NPDES permitting program for construction and land development sites requires the implementation of a suite of best management practices ("BMPs") to control erosion and sedimentation, stabilize soils, and provide for periodic site inspections. The required BMPs are usually extensive and challenging to implement and maintain, but managing stormwater with BMPs has always been strictly qualitative.

When EPA first proposed these regulations, called the "C&D Rule," in December 2009, the possibility emerged that stormwater management was about to become quantitative. The C&D Rule established, among other requirements, numeric effluent limits for turbidity in stormwater that would have been incorporated into NPDES permits for certain construction and development sites. To demonstrate compliance with this numeric limit, operators of these construction and development sites would have had to collect samples of the stormwater discharged from the site after a rainfall event and analyze the samples for turbidity. If the sampling results showed an exceedance of the maximum allowable turbidity level, the permittee would have been in violation of its NPDES permit and subject to civil penalties and/or enforcement action. The C&D Rule also included non-numeric requirements to implement erosion and sedimentation controls, stabilize soils, and manage dewatering activities at construction and development sites.

The C&D Rule faced strong opposition from the beginning, especially because the turbidity limit (1) would have been costly to comply with, (2) seemed to have no scientific basis and (3) may not have been achievable, even at a construction site that was well designed and maintained. Several trade associations filed challenges
in the Fifth, Seventh, and DC Circuits. Even the U.S. Small Business Administration filed a request with EPA for administrative reconsideration of the C&D Rule. Ultimately, EPA stayed the numeric effluent limitation for turbidity and entered into a settlement agreement with the trade associations, which required the withdrawal of the numeric effluent limitation for turbidity announced in this most recent rulemaking. The non-numeric requirements of the C&D Rule remain in place.

Also of note, EPA used this rulemaking to define the term "infeasible" as applied to the NPDES regulations regarding stormwater discharges from construction and development sites. The C&D Rule provides that, "unless infeasible," permittees must provide and maintain natural buffers between earth disturbances and waters of the United States, direct stormwater from earth disturbances to vegetated areas, maximize stormwater infiltration from earth disturbances and preserve topsoil when performing earth disturbance activities. In these instances, the term "infeasible" is defined to mean "not technologically possible, or not economically practicable and achievable in light of best industry practices."

Because EPA has delegated NPDES permitting authority for construction and development sites to most of the states, many states already require the sorts of non-numeric requirements set forth in the C&D Rule in the NPDES permits they issue. However, the real estate development industry can take comfort in the fact that numeric turbidity limits will not be required under federal law.

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