**THOMPSON
HINE**

January 2009

ENVIRONMENTAL UPDATE**Construction Industry Would Face Significant Costs Under Proposed EPA Stormwater Rule**

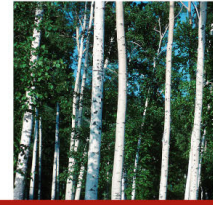
The U.S. Environmental Protection Agency (EPA) has published for comment a proposed rule (<http://edocket.access.gpo.gov/2008/pdf/E8-27848.pdf>) that would, among other things, establish stormwater effluent limitations for all construction sites and establish new nationwide effluent limitations on turbidity for stormwater discharges from construction sites that disturb 10 or more acres at a time. 73 FR 72562 (Nov. 28, 2008). The proposal also would require all construction sites to implement erosion and sediment control best management practices to manage stormwater runoff. The annual costs of the proposed rule are estimated to be \$1.9 billion. EPA is accepting public comment on the proposed rule through February 26, 2009.

BACKGROUND

The Clean Water Act (CWA) prohibits discharges of pollutants by any person from point sources into waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. NPDES permits contain limitations on the type and quantity of pollutants that can be released into the nation's waters and "effluent limitations," which are specific restrictions on the quantities, rates and concentrations of chemical, physical or other constituents, such as sediment or turbidity, discharged from point sources. NPDES permits typically are issued by state environmental agencies, since most states have sought and received delegation of the NPDES permitting program from EPA.

The specific effluent limitations incorporated into NPDES permits are established using more general effluent limitations guidelines (ELGs) and new source performance standards (NSPSs). ELGs and NSPSs impose technology-based requirements for categories of point source dischargers. ELGs apply to existing sources of pollution and NSPSs apply to new sources of pollution.

In 2002, EPA published a proposed rule that contained several options for addressing stormwater discharges from construction sites, including issuing ELGs and NSPSs for the construction industry. In 2004, EPA opted not to propose ELGs for stormwater discharges from construction sites, but continued to rely on existing federal, state and local laws and regulations to control stormwater discharges from construction sites. At that time, EPA believed that stormwater discharges were already being adequately controlled, insofar as existing NPDES regulations required permits for most construction sites nationwide. EPA also cited the cost of additional regulation at that time, \$500 million per year, coupled with the loss of a number of jobs, compared with its analysis that existing permit programs were capable of controlling 80 to 90 percent of sediment runoff, and only an additional 1 percent of control would be gained from additional regulation. Further, EPA decided not to promulgate NSPSs after concluding that construction



activity was not appropriately characterized as new sources, and thus the definition of “new source” under the CWA should not include construction sites.

Following EPA’s rulemaking decision, the Natural Resources Defense Council, among other environmental groups, filed a complaint in district court to force EPA to promulgate stormwater discharge standards for the construction industry. In *NRDC v. EPA*, 437 F. Supp.2d 1137 (C.D. Cal. 2006), the United States District Court for the Central District of California held that EPA had a duty to promulgate technology-based discharge standards and guidelines to control stormwater discharges from construction sites because it had identified the construction industry as an industrial category source under the CWA. The district court gave EPA until December 1, 2008 to propose ELGs and NSPSs for the construction and development industry and until December 1, 2009 to promulgate the new regulations. The Ninth Circuit affirmed the district court’s decision. EPA’s proposed construction stormwater rule is in response to the *NRDC* decision.

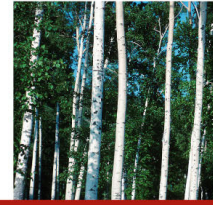
THE PROPOSED RULE

The rule contains three distinct components. First, the proposed rule requires construction companies or land developers to install a sediment basin to contain and settle sediment from stormwater runoff at active construction sites disturbing **10 acres** of land or more. While the proposed rule does not impose specific design criteria for the sediment basins, it does impose minimum design and performance standards. Alternatively, compliance with the rule can be achieved through the use of an equivalent sediment control mechanism where approved by the permitting authority.

Next, the proposed rule requires all construction sites to implement sediment and erosion control measures to limit discharges of pollutants in stormwater and other wastewater from construction sites. Among other requirements, the proposed rule mandates that dischargers implement certain minimum sediment control measures on site, such as limiting sediment and other contaminants from dewatering activities and the use of perimeter controls. It also requires dischargers to maintain effective pollution prevention measures in accordance with established industry practices, such as prohibitions on discharges of construction wastes, trash and wastewater from washout of concrete, paint and other materials.

Finally, the rule establishes strict numeric effluent limits on the amount of turbidity that may be present in stormwater discharges from large sites of **30 or more acres** that are located in areas of the country with high rainfall and that have soils with high clay content. Active pretreatment consisting of polymer-assisted clarification followed by filtration would be required for stormwater discharges at such sites.

The terms of the proposed rule could significantly increase costs at construction and development sites of 10 or more acres. Most significantly, the cost for larger development projects that trigger the strict numeric effluent limitations is estimated to be \$1.9 billion per year by EPA’s own calculations. The imposition of the effluent limit for turbidity could require many sites to



implement expensive chemical treatment and filtration methods in order to achieve compliance. Implementing treatment and filtration is likely to drive up the costs of construction and development for such projects.

FOR MORE INFORMATION

Thompson Hine can assist companies or individuals who wish to comment on or possibly challenge EPA's proposed rule. For more information on our services, please contact

Wray Blattner	937.443.6539	Wray.Blattner@ThompsonHine.com
Chris Wiest	513.352.6660	Chris.Wiest@ThompsonHine.com

or your primary Thompson Hine Environmental lawyer. For a list of our Environmental lawyers, go to **www.ThompsonHine.com/practices/environmental/**.

Thompson Hine sends Environmental Updates as a service. If you do not wish to receive future bulletins, please email **Environmental@ThompsonHine.com** with the phrase "Unsubscribe: Environmental Bulletin" as the subject line.

This advisory may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.