EPA Finalizes Revised Effluent Limitation Guidelines for Construction Site Stormwater Discharges

On March 6, 2014, EPA published a final rule (New Rule) that revises the effluent limitation guidelines (ELGs) for stormwater discharges from construction sites with one or more acres of land disturbance. The most significant change between the New Rule and the prior version of the rule, which was issued by EPA in 2009 (2009 Rule), is the deletion of controversial numeric limits for turbidity. However, EPA has left the door open to include such limitations in a future rulemaking by reserving rather than eliminating the sections addressing turbidity. The New Rule, which will take effect on May 5, 2014, was promulgated pursuant to a settlement agreement between EPA and various industry groups that challenged the 2009 Rule.

Rulemaking Background

On December 1, 2009, EPA published “Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category,” which established numeric turbidity limits for stormwater discharges from construction sites disturbing 10 or more acres. The 2009 Rule also set forth monitoring requirements to ensure those limits were met. In addition, it mandated the implementation of various non-numeric requirements, including erosion and sediment controls, soil stabilization practices, management of dewatering activities, pollution prevention measures, establishment and maintenance of buffers around surface waters, prohibition of certain discharges, and utilization of surface outlets for discharges from basins and impoundments.

Following promulgation of the 2009 Rule, several parties – including the National Association of Home Builders – filed petitions for review, which were consolidated in the Seventh Circuit. The petitioners’ primary argument concerned EPA’s dataset and analysis used to establish the turbidity limits. In response, EPA issued a final rule staying the turbidity limits and associated monitoring requirements.

On December 10, 2012, EPA entered into a settlement agreement with the petitioners, under which it consented to withdraw the turbidity limits and take public comment on certain changes to the non-numeric requirements of the 2009 Rule.

Revisions to the 2009 Rule

EPA has made several key revisions to the 2009 Rule. First, it withdrew the turbidity limitation and associated monitoring requirements. It is important to note, however, that EPA chose to reserve rather than remove those sections, which suggests it may include such limitations in a future rulemaking. EPA rejected industry’s argument that numerical limits on turbidity are inherently unworkable because of regional variability in soil and climate. Instead, EPA decided to forgo the limits because certain construction sites would have been forced to utilize sediment basins or other impoundments to achieve compliance at the expense of “green infrastructure techniques,” such as swales.
Second, EPA added a definition for the term “infeasible.” The stated purpose of this change is to clarify when sites are exempt from implementing certain controls. Under the New Rule, a control is infeasible if it is “not technologically possible, or not economically practicable and achievable in light of best industry practices.” The types of controls that might prove infeasible include providing and maintaining natural buffers around surface waters, preserving topsoil, stabilizing soil and utilizing outlet structures to withdraw water from the surface.

Third, EPA revised several of the non-numeric requirements relating to the best practicable control technology currently available, the best conventional pollutant control technology and the best available demonstrated control technology. These include clarifying the applicability of requirements to control erosion caused by discharges, providing additional details on areas where buffers are required, and clarifying requirements for soil stabilization, preservation of topsoil and pollution prevention measures.

Additional information concerning the rulemaking, as well as a link to the full text of the rule, can be found on EPA’s website.

FOR MORE INFORMATION

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