

# “What keeps you up at night?”

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## EPA promulgates effluent limitations guidelines for the construction and development point source category

By Carl B. Everett

For years, EPA has periodically published effluent guidelines under the Clean Water Act setting forth limitations consistent with the statutory requirements of applying best practicable control technology, best available control technology, best control technology for conventional pollutants, new source performance standards and pretreatment standards for categories of sources. On December 1, 2009, EPA published limitations for the construction and development (“C&D”) category that become effective February 1, 2010. 74 Fed. Reg. 62995-63058.

Currently, permit coverage is required for stormwater discharges associated with industrial activity. 40 CFR 122.26(a)(ii). Those discharges are defined to include facilities engaging in construction activity, including grading and excavation, except operations that disturb less than five acres of total land area. 122.26(b)(14)(x). The definition also reaches small construction activity affecting one to five acres, however, the permit requirement may be waived based on a low rainfall erosivity factor or where stormwater controls are not needed based on an approved total maximum daily load, or, in the case of non-impaired waters that do not require a TMDL, based on an equivalent analysis that determines allocations for small construction sites or determines that such allocations are not needed to protect water quality. 122.26(b)(15). In most instances permit coverage is obtained by use of a general permit, focusing on minimizing discharge of pollutants by control measures that reflect best engineering practices through erosion and sediment control and control measures for other pollutants, all contained in a stormwater pollution prevention plan. Frequently the permitting authority is a local governmental entity.

With the exception of discharges associated with interstate natural gas pipeline construction activity (already regulated by FERC), EPA’s new rules subject all construction and development activities involving one or more acres to requirements addressing erosion and sediment controls, soil stabilization, dewatering, pollution prevention measures, certain discharge prohibitions and use of outlet structures to withdraw water from the surface. Beginning August 2, 2010, those performing construction activity that disturbs 20 or more acres, (10 or more acres beginning February 2, 2014) must monitor their discharges and achieve an average turbidity for any day that does not exceed 280 Nephelometric turbidity units. The NTU limit does not apply to stormwater discharges resulting from storm events larger than the local two-year, 24-hour storm.

## “What keeps you up at night?”

The phasing in of the turbidity limit is intended to provide time for permitting authorities to develop monitoring requirements and for the regulated community to prepare for compliance.

The acreage thresholds include non-contiguous land disturbances that take place at the same time and are part of a larger common plan of development or sale. Thus, it is possible to phase development and avoid monitoring requirements and turbidity limits, assuming they are not required by state or local programs. See Preamble at 74 Fed. Reg. 62999.

The December 1 rulemaking expands the requirements applicable to industrial activity by imposing a national technology-based floor. All covered facilities will be subject to the following non-numeric requirements:

- a. Erosion and sediment controls must be designed, installed and maintained to:
  1. control stormwater volume and velocity within the site to minimize soil erosion;
  2. control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize erosion at outlets and to minimize downstream channel and streambank erosion;
  3. minimize the amount of soil exposed during construction activity;
  4. minimize the disturbance of steep slopes;
  5. minimize sediment discharges from the site.  
The design, installation and maintenance of erosion and sediment controls must address factors such as the amount, frequency, intensity and duration of precipitation, the nature of resulting stormwater runoff, and soil characteristics, including the range of soil particle sizes expected to be present on the site;
  6. provide and maintain natural buffers around surface waters, direct stormwater to vegetated areas to increase sediment removal and maximize stormwater infiltration, unless infeasible; and
  7. minimize soil compaction and, unless infeasible, preserve topsoil.

- b. Soil stabilization must be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. Alternative measures are authorized in arid, semi-arid and drought-stricken areas.
- c. Discharges of pollutants from dewatering trenches and excavations are prohibited unless managed by appropriate controls.
- d. Effective pollution prevention measures to minimize the discharge of pollutants must be designed, installed, implemented and maintained. At a minimum, such measures must:
  1. minimize the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters. Wash waters must be treated in a sediment basin or alternative control that provides equivalent or better treatment prior to discharge;
  2. minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and stormwater; and
  3. minimize the discharge of pollutants from spills and leaks and implement chemical spill and leak prevention and response procedures.
- e. The following discharges from C&D sites are prohibited:
  1. wastewater from washout of concrete, unless managed by an appropriate control;
  2. wastewater from washout and cleanout of stucco, paint, form release oils, curing compounds and other construction materials;
  3. fuels, oils, or other pollutants used in vehicle and equipment operation and maintenance; and
  4. soaps or solvents used in vehicle and equipment washing.

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When discharging from basins and impoundments, permittees are required to utilize outlet structures that withdraw water from the surface, unless infeasible.

The above requirements comprise EPA's determination of best practicable technology currently available and are also incorporated into the effluent limitations reflecting best conventional pollutant control technology. The regulations reflecting best available control technology and new source performance standards also incorporate the BPT determination but add the turbidity monitoring and limits in situations described above. 40 CFR 450.10 et seq.

Many of the requirements set forth above are already incorporated into the permitting process, which is generally managed at the local or regional level. However, some requirements are new and will require relatively prompt preparation by covered facilities.

EPA's new regulations will have a direct and immediate impact on companies that are involved in the construction industry

(commercial and residential), including earth-moving contractors, the highway construction industry and natural resource extraction companies. Affected parties need to be aware of the more stringent controls that are being mandated and the relevant acreage thresholds.

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