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TEMPORARY RELIEF FOR CONTRACTORS AND DEVELOPERS: THE EPA STAYS NUMERIC LIMIT OF NEW EFFLUENT GUIDELINES FOR CONSTRUCTION SITES

By Brad C. Friend

On December 1, 2009, the Environmental Protection Agency ("EPA") issued an important new regulation relating to stormwater runoff on construction sites. The EPA's regulation established effluent guidelines for the construction and development industry and set forth a numeric limit for the amount of turbid water that can be discharged from a construction site – initially set at 280 Nephelometric Turbidity Units ("NTU"). The 280 NTU limit was scheduled to take effect August 1, 2011, for construction sites that disturb 20 or more acres of land. However, on January 4, 2011, the EPA stayed the enforcement of the numeric limit.

In most instances, turbid water from construction sites is due to clearing, excavation or grading of the land followed by a rain event that erodes the disturbed land. The erosion sometimes results in sediment-laden stormwater breaching erosion and sediment controls and entering adjacent surface waters. By enacting the new effluent guidelines, the EPA is seeking to reduce the amount of sediment and other pollutants contained in stormwater runoff at construction sites from entering surface waterways.

Prior to enactment of the EPA's new effluent guidelines, the main requirement of the states' General Permits and the EPA's Construction General Permit was that the contractor and developer use Best Management Practices ("BMPs") to control stormwater runoff on their construction sites. BMPs refer to various erosion and sedimentation control measures such as seeding and mulching, silt fence, filter fabric, rock check dams, diversion channels, sediment basins, etc. Under the BMPs standard, if the contractor and developer properly installed and maintained appropriate erosion and sediment control measures, they generally would not be liable for stormwater runoff that breaches such measures. However, the new effluent guidelines have tremendous ramifications for contractors and developers because, for the first time, results will matter, not merely the effort expended. Contractors and developers will now be responsible for ensuring that turbidity levels of stormwater runoff do not exceed the 280 NTU limit.

The EPA based its 280 NTU limit on the use of passive treatment systems ("PTS") rather than active treatment systems ("ATS"). PTS involve all of the BMPs (silt fence, sediment basin, etc.), plus the use of chemical flocculants and polymers to reduce sediment in the stormwater. ATS involve water treatment equipment that filters the sediment out of the stormwater. Contractors and developers were very concerned that they would have to use expensive ATS to meet the 280 NTU limit. However, due to concerns on how the EPA calculated the 280 NTU limit, on January 4, 2011, the EPA stayed the 280 NTU limit and will propose a revised numeric limit on or before June 29, 2011. The EPA's stay of the 280 NTU limit is a temporary relief to concerned contractors and developers. Nonetheless, it remains to be seen what numeric limit the EPA sets.

1 40 CFR Part 450, EPA, Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category; Final Rule, Fed. Reg. Vol. 74, No. 229 (Dec. 1, 2009).
2 Turbidity is a measure of water clarity. Turbid water from construction sites mainly consists of sediment.
3 40 CFR § 450.22(a)(1). The effluent limitations are applicable to construction activity that disturbs 20 or more acres of land beginning August 1, 2011. 40 CFR § 450.22(a) The effluent limitations are applicable to construction activity that disturbs 10 or more acres of land beginning February 2, 2014.

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