

# rights & rules

Changes to EPA's construction & development point source pollution rule

In March 2014, the U.S. Environmental Protection Agency (EPA) issued a final rule related to effluent limitation guidelines and standards for the construction and development point source category. This final rule withdraws the numeric discharge standards and

discharges from construction activities that cause negative physical, chemical and biological impacts on nearby waterways. The C&D rule was based on a variety of best practices, such as best practicable control technology currently available and best available

demonstrated control technology. Initially, the C&D rule contained both non-numeric and numeric limitation for turbidity in discharges from construction sites. The final numeric limitation for allowable

against construction companies for failing to comply with the numeric limitation. On the other hand, construction industry groups encouraged the EPA to consider allowing best practice techniques that consider local site-specific limitations rather than enacting a rigid numeric limitation.

In fact, in response to the EPA's numeric limitation, several construction industry groups filed petitions for review, challenging various aspects of the new rule. These petitions were consolidated with a case in the U.S. Court of Appeals for the Seventh Circuit titled *Wisconsin Builders Association, et al. v. EPA*, case numbers 09-4113, 10-1247, 10-1876 and 12-2470. The petitions identified problems with the dataset EPA used to enact the numeric limitation. In September 2010, the court ordered the petitions held in abeyance until Feb. 15, 2012. In November 2010, the EPA issued a regulation to stay the numeric limitation indefinitely. Consequently, the C&D rule was in effect, but without the numeric limitations on turbidity as such, limitation was stayed.

In December 2012, the EPA settled the Wisconsin petitions by agreeing to propose potential changes to the non-numeric requirements for public comment and withdrawing the numeric limitations of the C&D rule. Also, the EPA solicited site-specific information regarding how the numeric limitation would apply to cold weather and small sites.

The EPA believes the final rule issued in March 2014 satisfies its obligations pursuant to the settlement agreement in



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changes several of the non-numeric provisions of the existing rule. The final rule became effective May 5, 2014.

The Clean Water Act allows discharges of pollutants by persons from point sources into U.S. waters only if an NPDES permit is obtained. The EPA delegated administration of the NPDES program to most states. California and 45 other states administer this program for the EPA pursuant to memoranda of understandings.

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levels of turbidity in discharges was based on passive treatment controls, including polymer-aided settling to reduce turbidity.

## Industry Response

Construction industry groups objected to the numeric limitation on the basis that construction projects take place in vastly different environments throughout the country, making compliance with such numeric limitations impossible at certain locations, particularly given the lack of available treatment equipment in certain areas. Stakeholders also pointed out that the numeric limitation likely would encourage environmental advocacy groups to file lawsuits

the Wisconsin petitions. On March 27, 2014, the Seventh Circuit concurred with the EPA and dismissed the Wisconsin petitions pursuant to Federal Rule of Appellate Procedure 42(b).

### The Rule's Changes

The final rule contains three main changes to the C&D rule. The first change relates to the non-numeric limitations and adds the definition of the term "infeasible" to provide guidance to permitting authorities. This new term will be inserted into 40 CFR 450.11(b). Prior to this change, the C&D rule required permittees to implement storm water controls "unless infeasible," which was an undefined term. This change allows permitting authorities flexibility and guidance in circumstances where a requirement may be infeasible. The second change relates to the non-numeric effluent limitations that are the best practicable control technology currently available, the best available technology economically

achievable, the best conventional pollutant control technology, and the new source performance standards reflecting the best available demonstrated control technology. These changes to best practice techniques are found in 40 CFR 450.21, 450.22, 450.23 and 450.24. The third and perhaps most important change is the withdrawal of the numeric turbidity effluent limitation and monitoring requirements. The EPA withdrew the numeric turbidity effluent limitations from the final rule, yet it reserved these paragraphs in the regulation for potential future revisions if the EPA decides to propose and adopt additional effluent limitation guidelines and monitoring requirements. The EPA noted that it is concerned that a numeric limitation may create a disincentive for environmentally friendly practices, such as green infrastructure techniques for managing storm water from construction sites.

The EPA decided to forego litigation in the Wisconsin petitions and made

changes that made sense to both the environment and the construction industry. Best practice techniques can protect the environment by incorporating site-specific conditions and encouraging the development of green techniques.

Stakeholders provided input that language should be inserted into the rule requiring the management of local scour and to limit erosion in the immediate vicinity of discharge points. However, the EPA declined to implement such requested changes on the basis that the EPA does not have authority under the effluent guidelines program to control erosion in receiving waters, because such guidelines regulate discharges of pollutants from point sources. **SWS**

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