



## NEW EPA EFFLUENT GUIDELINE RULE RAMPS UP ENFORCEMENT OF STORMWATER REQUIREMENTS ON CONSTRUCTION PROJECTS

The United States Environmental Protection Agency (“EPA”) and states have stepped up enforcement of stormwater regulations at construction sites. The result could very well mean additional costs and responsibilities for construction contractors if these risks are not addressed and allocated at the pre-planning stages of the project.

EPA has recognized that typical construction activities such as clearing, excavating and grading, significantly disturb soil and sediment and that, if not managed properly, can easily wash off the construction site during storms, polluting nearby water bodies. Last year, four consent decrees were lodged with the federal court in Virginia for violations of the Clean Water Act and analogous state statutes and regulations. All four consent decrees resolved EPA enforcement actions against developers of large scale properties that encompassed several states, and involved enforcement of stormwater management regulations on construction sites. The decrees required rectifying the violations, as well as paying large civil penalties of up to \$1.5 million and the implementation of supplemental environmental projects.

Stormwater discharges associated with construction projects that affect more than one acre of land require a permit. In 2008, EPA reissued its Construction General Permit (“CGP”) adding new stormwater management requirements including: (1) the education of employees and subcontractors so that they understand their roles in implementing stormwater controls, and (2) the removal of sediment from silt fences before the deposit reaches fifty percent of the above-ground fence height.

EPA and the states have ratcheted up enforcement of stormwater regulations. But beyond that, the most significant regulatory development for contractors occurred very recently. On December 1, 2009, EPA published its final rule for “*Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category*”. Among other things, the rule sets effluent limitation guidelines for turbidity from stormwater runoff for all permitted construction and development sites. The rule has been several years in the making, and EPA has estimated that over 10,000 highway, street and bridge construction firms, among others, will be affected.

The rule imposes new nationwide monitoring requirements and enforceable numeric limits on

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the amount of sediment that can run off any construction site that impacts 10 or more acres of land at any one time. The rule also specifies the types of erosion and sediment controls that contractors must use (i.e. best management practices or “BMP’s”) requiring the control of stormwater runoff on all construction sites that disturb one or more acre of land. The new rule will take effect in February 2010 and will be phased in over approximately four years. EPA did not address post-construction issues, but has initiated a separate rulemaking to develop post-construction guidelines by November 2012.

Specific requirements include: Mandatory BMPs using the best practicable control technology currently available relating to *Erosion and Sediment Controls*, *Soil Stabilization BMPs*, *Dewatering BMPs*, *Pollution Prevention Measures*, and *Prohibited Discharges*.

EPA will include the new provisions in a five-year Construction General Permit (CGP) to be reissued no later than July 2011. Most states issue their own construction general permits, and the new requirements will have to be incorporated into any new general permits issued after the effective date of the regulation. The requirements also apply to individual permits issued by states or EPA. EPA currently issues permits for construction activities in four states (Idaho, Massachusetts, New Hampshire, New Mexico), the District of Columbia and in certain U.S. territories and tribal areas.

On all projects where the numeric limit applies, the rule requires contractors to collect numerous stormwater runoff samples from all discharge points during every rain event and calculate the levels. The data is then averaged. If that average reading exceeds the “daily stated maximum limits, the site will be in violation of the new requirement.

The new requirements will not directly apply to construction site “operators” until they are incorporated into an individual or general stormwater permit that applies to the specific project. That is, the construction stormwater permit language is what will become the legally enforceable requirement that construction site “operators” must meet or face potential fines and penalties. Therefore, the implementation date of the new requirements will vary from state to state, depending on when states reissue their permits and whether projects are covered by individual or general permits.

EPA expects compliance with the new regulation to reduce the amount of sediment and other pollutants discharged from construction and development sites by approximately 4 billion pounds per year. EPA puts the annual cost of the rule at about \$959 million, once fully implemented.

With this increased regulatory scrutiny of construction projects and the new rule, it is imperative that in the pre-planning stages of a project, the designated responsible party fully identify and understand the applicable program and rule requirements. For the EPA



# Client Alert

CGP, the “operator” of the construction site is responsible for obtaining a stormwater permit. There can be a single site operator, or multiple operators. That depends on the relationship between the owner, architect, general contractor, or any other team members, who may have contractual responsibility or similar duties. What is important is that from a regulator’s perspective there is overlap on the definition of “operator.” That is, the regulator may be able to seek penalties from both the owner and contractor, and, perhaps, others, for not obtaining a permit or for violation of permit conditions. So, it is critical for the project team members to communicate on the stormwater issue upfront and designate responsibility for obtaining the stormwater permit, including addressing all the permitting protocol such as producing a stormwater pollution prevention plan and daily compliance with the plan during the construction process.

Overall, the “operators” at a construction site, even if they did not obtain the permit, will be responsible for compliance and implementation of the conditions of the permit.