

Water Pollution

Effluent Guidelines

EPA Proposes Use of 'Best Practices' To Control Sediment at Construction Sites

Construction companies and developers would have to take steps to control erosion and sediment runoff from building sites under a proposed rule released by the Environmental Protection Agency Nov. 19 that would establish standards for stormwater and wastewater discharges from the industry.

The agency is proposing that all construction sites put in place a range of best management practices to control erosion and sediment, which EPA said is one of the leading causes of poor water quality in the United States.

The proposed rule at 40 C.F.R. Part 450 would, in general, set a "non-numeric" limit for turbidity—a measure of how clear the water is—and allow companies to decide which type of controls to use to minimize sediment runoff and reduce turbidity.

The proposal covers more than 81,000 firms, including residential and commercial construction companies and civil engineering firms involved in highway, street, and bridge construction.

Large construction sites would have to meet additional requirements.

In addition to the best management practices that would apply to all sites, sites disturbing 10 or more acres would be required to install sediment basins to treat their stormwater discharges.

Those with 30 acres or more that are located in areas of the country with high rainfall and soils with a high clay content would have to meet a numeric limit for turbidity, measured as nephelometric turbidity units, or NTUs. EPA is proposing a standard of 13 NTUs.

The standards, known as effluent limitations guidelines, are used by federal and state regulators in writing National Pollutant Discharge Elimination System permits that allow companies to legally discharge under the Clean Water Act.

The proposed numeric turbidity limit is intended to remove fine-grained and slowly settling or non-settleable particles contained in stormwater, EPA said.

Of the estimated 590,000 acres of construction each year, EPA estimates that approximately 40 percent, or 234,000 acres, would be subject to the proposed numeric effluent limit. The non-numeric standards would generally apply to all construction sites disturbing one or more acres of land, the agency said.

Higher Turbidity Limit Considered. Particles such as clays and fine silts contained in stormwater discharges from construction sites typically cannot be effectively removed by conventional stormwater management practices, such as use of sediment basins, according to the agency. To meet the proposed numeric limit, many

sites would need to use chemical treatment and filtration of their stormwater discharges, EPA said.

The agency also said it would take comment on a higher turbidity limit, in the range of 50 to 150 NTUs, which it said could be achieved using passive treatment. Comments on that and other aspect of the proposed rule will be accepted for 90 days after the proposal appears in the *Federal Register*.

EPA is under court deadlines to issue a proposed rule by Dec. 1 and a final rule by Dec. 1, 2009.

The U.S. District Court for the Central District of California set the deadlines in a 2006 decision that stemmed from a lawsuit filed by the Natural Resources Defense Council and Waterkeeper Alliance. That ruling was upheld in September by the U.S. Court of Appeals for the Ninth Circuit (*NRDC v. EPA*, 542 F.3d 1235 (9th Cir. 2008); 39 ER 1928, 9/26/08).

Benjamin Grumbles, EPA assistant administrator for water, told BNA the proposed rule would establish "a targeted, risk-based approach" for controlling runoff.

"It lays out a strong foundation for reducing sediment from construction sites," Grumbles said.

Proposal Called Inadequate. NRDC and the Waterkeeper Alliance immediately criticized the proposed rule as inadequate, saying it fails to set a measurable and enforceable standard for most construction and development sites.

The proposed standards do not require industry to implement affordable and effective pollution control technologies for all projects, even though EPA has identified the technologies, the environmental groups said in a statement.

"We welcome EPA's efforts to finally propose to set objective standards for pollution control at construction sites," said Jeffrey Odefey, a staff attorney with the Waterkeeper Alliance. "It's unfortunate, however, that they are only requiring the largest sites to meet the standards and ignored the advice of the best stormwater minds in the country and passed up this opportunity to address the permanent harm development causes after construction is over."

The statement said the proposed rule does not reflect the recommendations made by the National Research Council in a report in October that the groups said supported the use of low-impact development to prevent water pollution (39 ER 2077, 10/17/08).

EPA said the proposal would reduce the amount of sediment discharged from construction sites by up to 27 billion pounds each year, at an annual cost of \$1.9 billion. The benefits, estimated at \$332.9 million annually, include better protection for drinking water supplies, improvements in aquatic environments—such as reduced smothering of streambeds—and less need for dredging of navigation channels and reservoirs, according to the agency.

EPA Identifies Methodologies. EPA identified a number of possible erosion-control methodologies, including phasing construction work so that only a portion of a site is disturbed at a given time and managing the flow of stormwater by use of berms, conveyance channels, and slope drains to divert stormwater away from parts of the site that are being disturbed.

For sediment control, EPA identified measures such as use of silt fences and sediment traps and basins, along with active treatment systems using polymers or other technology to remove pollutants from runoff.

Regarding the possibility of allowing a numeric limit for the largest construction sites higher than 13 NTUs, Grumbles said the agency "is interested in hearing from people whether there is a more cost-effective way to do it. Is 13 the correct number?"

Comments, identified by docket number EPA-HQ-OW-2008-0465, should be submitted to <http://www.regulations.gov>.

By JOHN SULLIVAN

The proposed rule and other information on Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category is available at <http://www.epa.gov/waterscience/guide/construction/#proposed>.

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Wetlands

EPA to Make Determination on Guidance On Wetlands Jurisdiction Issues 'Very Soon'

The Environmental Protection Agency and the U.S. Army Corps of Engineers expect "very soon" to make a determination on whether to revise or reissue guidance aimed at clarifying federal jurisdiction over wetlands, the head of EPA's water office told BNA Nov. 13.

Benjamin Grumbles, assistant EPA administrator for water, said he has been meeting regularly with John Woodley Jr., assistant secretary of the Army for Civil Works, and that determining the next steps in interpreting wetlands jurisdiction is an agency priority.

The joint guidance, issued in June 2007, followed a U.S. Supreme Court opinion on wetlands jurisdiction that many consider confusing. The court failed to agree on the extent of federal jurisdiction over wetlands under the Clean Water Act, which currently applies only to "navigable waters" (*Rapanos v. United States*, 547 U.S. 715, 62 ERC 1481 (2006); 37 ER 1371; 6/30/06).

It said traditional navigable waters, as well as wetlands and streams that flow intermittently, but have a "significant nexus" to traditional navigable waters, will be examined by EPA and the corps on a case-by-case basis to determine Clean Water Act jurisdiction.

"We have been working together and reviewing comments and incorporating experiences from the field and we remain committed to revising, reissuing, or rescinding the guidance by the target date," Grumbles said.

March 2009 is EPA's target date, but Grumbles said the agency hopes to determine what its next steps will be by the end of the year.

The expected revised or reissued guidance is intended to increase clarity and improve the consistency of wetlands jurisdictional determinations across the country, according to Grumbles. EPA also is providing information and technical assistance to Congress, he said.

In addition, Grumbles said EPA plans to conduct training and workshops for regulators and the public to assist with wetlands jurisdiction issues.

"We feel this will be helpful to provide needed clarity," he said, noting that concerns have come not only from the regulated community, but from environmental advocates and "from our own staff."

Enforcement 'Adversely Affected.' At issue is enforcement of protections for waters and wetlands in the wake of the Supreme Court decision and 2007 guidance.

An internal EPA memo obtained by two House committees indicated that a "significant portion" of EPA's Clean Water Act enforcement efforts have been "adversely affected" by the Supreme Court decision and joint EPA/Army Corps of Engineers guidance issued after the decision.

The memo, written in March 2008 by EPA Assistant Administrator for Enforcement and Compliance Granta Nakayama, called for revisions to the guidance to "significantly improve the predictability and efficiency" of EPA's Clean Water Act enforcement program.

Some critics, including the National Association of Home Builders, have said the guidance has slowed the Clean Water Act permitting process.

In August, Rep. Henry Waxman (D-Calif.), chairman of the House Oversight and Government Reform Committee, issued a subpoena to force EPA to release information on Clean Water Act cases that the agency's enforcement office had recently dropped.

"There is still very much an active ongoing investigation," committee spokeswoman Karen Lightfoot told BNA Nov. 13. "We're still in the process of working to get the documents we requested."

By LINDA ROEDER

Water Quality Standards

Agencies Call for Controls on Stormwater To Reduce Phosphorus in Charles River

BOSTON—The Environmental Protection Agency said Nov. 17 that it will begin requiring certain industrial, commercial and high-density residential facilities in three Massachusetts communities along the Charles River watershed to operate under a Clean Water Permit for stormwater discharges.

EPA's Region 1 office said the new pilot program will require facilities with two or more acres of impervious area, such as parking lots and roofs, to reduce phosphorus discharges by 65 percent through a variety of stormwater management practices.

The agency said it is taking this action under the Clean Water Act's Residual Designation Authority. EPA said it has issued a Record of Decision that documents