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EPA Walks Back Numeric Limit for Stormwater Discharges

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Special to the Legal

The U.S. Environmental Protection Agency recently proposed to jettison a numeric turbidity limitation that it had previously established for stormwater discharges from construction sites. Under a proposed rule issued in early April, the EPA would instead rely exclusively on best management practices, or BMPs, to minimize the pollutants that stormwater carries away from these sites and delivers to nearby waterways. While the agency retreat marks a victory for the industry groups that challenged the imposition of the numeric limitation, there are reasons to believe that this victory could be short-lived.

The Clean Water Act prohibits certain discharges of pollutants to waterways without a National Pollutant Discharge Elimination System (NPDES) permit. Among other things, NPDES permits often contain numeric limitations that restrict the levels of pollutants that may be discharged to navigable waters. The EPA derives some of these limitations from national technology-based performance standards for categories of industries. These standards, which the act requires the EPA to develop and update periodically, are meant to represent the greatest pollutant reductions that are economically achievable for a given industry. In establishing these standards, the EPA assesses the performance of the best pollution control technologies or prevention practices available for the industry, as well as the economic achievability of those technologies and practices.

The road to the original rulemaking that established the numeric turbidity limitation for stormwater discharges from construction sites was, like so many of the waterways that it was seeking to protect, a meandering



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one. The act requires the EPA to periodically publish a plan identifying industrial categories for which the agency intends to develop performance standards. In 2000, the EPA formally listed the “Construction and Development” category in its plan. Even though this category was the largest of any category of dischargers in the NPDES program, there were no applicable national performance standards or monitoring requirements. In support of the listing, the EPA cited the fact that sediment, nutrient and metal loadings from construction site discharges can be higher, sometimes by orders of magnitude, than those from undisturbed areas. The agency also noted the lack of uniformity among state and local requirements for erosion and sediment controls and stormwater best management practices.

In 2002, the EPA proposed a rule that identified several options for controlling stormwater discharges from construction sites. Then, in 2004, the EPA completely and abruptly reversed course and withdrew the proposed rule. In its notice of withdrawal, the EPA found that uniform national technology-based standards were not at the time the most effective way to address stormwater discharges from construction sites, citing cost considerations, the effectiveness of existing permit programs,

and projected modest gains from the proposed rule. Shortly after the EPA withdrew the proposed rule, a national environmental organization, the Natural Resources Defense Council, filed a lawsuit to challenge the agency action, arguing that once the EPA formally listed an industrial category in its plan, the agency was required to promulgate performance standards for that industry. Based on the plain language of the act, the district court, applying traditional *Chevron* analysis, agreed with the NRDC and issued a permanent injunction compelling the EPA to promulgate the standards on a fairly tight schedule (at least as far as national rulemakings go). In *Natural Resources Defense Council v. EPA*, 542 F.3d 1235 (9th Cir. 2008), the U.S. Court of Appeals for the Ninth Circuit affirmed.

In 2009, pursuant to the schedule set forth in the permanent injunction, the EPA promulgated a rule, commonly referred to as the C&D rule, establishing performance standards for the “Construction and Development” industrial category. The rule imposed several non-numeric, BMP requirements on operators of construction sites, including requirements to implement erosion and sediment control, stabilize soils, manage dewatering activities, implement pollution prevention measures, prohibit certain discharges, and utilize surface outlets for discharges from basins and impoundments. Far more controversial than these non-numeric, BMP requirements, however, was a numeric limitation on the allowable level of turbidity in discharges from certain construction sites that the rule imposed, along with associated monitoring requirements.

Turbidity refers to the cloudiness of water caused by suspended solids, including particles delivered from stormwater that runs off of construction sites. High turbidity can impair water quality and harm aquatic life. Because suspended solids absorb heat, high

turbidity can increase water temperatures to levels that can no longer sustain certain organisms, like trout, which require a cold water environment. Because high turbidity warms and reduces the amount of light entering the water, it also can reduce the levels of dissolved oxygen essential to the growth and reproduction of certain aquatic life, including fish. Suspended solids also clog fish gills, which can reduce resistance to disease, lower growth rates, and interfere with egg and larval development. As these solids settle on stream beds, they can smother fish eggs, as well as the insect community that supports larger organisms.

An instrument called a nephelometer, which contains a detector that receives more light in the presence of more suspended solids, is used to measure turbidity in units called nephelometric turbidity units, or NTUs. In the C&D rule, the EPA established a numeric maximum daily discharge limitation of 280 NTUs. The limitation would be implemented in two phases but would eventually apply to all sites disturbing 10 acres or more at any given time. The EPA purported to base this limitation on a passive treatment system involving the pre-storm addition of a polymer that attaches to suspended solids to help them settle out in basins instead of discharging to waterways. Based on the cost of that technology, the EPA estimated that the total annual industry-wide cost of the rule would be in the range of \$953 million.

Following promulgation of the C&D rule, several industry groups filed petitions for review to challenge the EPA action. Those petitions were consolidated in the Seventh Circuit in *Wisconsin Builders Association v. EPA*, Nos. 09-4113, 10-1247, and 10-1876 (7th Cir.). Separately, the Small Business Administration filed with the EPA a petition for administrative reconsideration. Among the arguments that the industry groups made in their briefs and the SBA made in its petition was that the EPA established its numeric limitation using data collected not just from passive treatment systems, but also from advanced treatment systems. In addition to a polymer component, advanced treatment systems rely on several other features to reduce turbidity, including a sophisticated computerized monitoring and data collection system element. The industry groups and the SBA argued that a true passive treatment system cannot reliably meet the 280 NTU performance standard, and

that the total annual industry-wide cost of a rule requiring an advanced treatment system that could reliably meet that standard would be more in the range of \$10 billion.

Apparently, these arguments were not entirely without merit, because not long after the industry groups filed their briefs, the EPA asked the Seventh Circuit not once, but twice, to vacate the numeric limitation portion of the rule. After the court refused both of these requests, the EPA issued proposed and final rules to stay the numeric limitation indefinitely. That stay effectively relieved the states of their obligation to incorporate the numeric turbidity limitation and monitoring requirements into NPDES permits.

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Then, late last year, the EPA entered into a settlement agreement with the industry groups to resolve the litigation. The agreement provided for the EPA to propose a rule that withdraws the numeric turbidity limitation and associated monitoring requirements and that makes certain other changes relating to the non-numeric, BMP portions of the C&D rule. As mentioned at the outset of this article, the EPA recently issued the proposed rule, Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 78 Fed. Reg. 19434 (proposed Apr. 1, 2013) (to be codified at 40 C.F.R. pt. 450). Under the terms of the settlement agreement, the proposed rule is to be finalized by February 28, 2014, following a public comment period, which concluded at the end of last month.

The proposed changes to the non-numeric, BMP portions of the C&D rule mostly serve to provide additional clarity. Because several of the provisions of the C&D rule require permittees to implement controls unless infeasible, the rule proposes to add a definition for the term “infeasible.”

Under the proposed rule, infeasible “means not technologically possible, or not economically practicable and achievable in light of best industry practices.” Other changes to the non-numeric portions of the rule appear to have been made to more closely align BMPs with their legitimate Clean Water Act purposes. For example, a BMP that under the original C&D rule required permittees to “control stormwater volume and velocity within the site to minimize soil erosion” was amended to require permittees to “control stormwater volume and velocity to minimize soil erosion in order to minimize pollutant discharges.” Additional changes clarify that a permittee is only required to address erosion that occurs in the immediate vicinity of permitted outfalls and create limited exemptions that acknowledge that certain BMPs may be inappropriate in certain circumstances.

While greater clarity in environmental regulations is always welcome, the real victory achieved by industry groups in the proposed rule is the removal of the numeric discharge standard and monitoring requirements. If industry estimates were correct, implementing a technology capable of complying with these requirements would have demanded considerable expenditures. Industry has cause to celebrate the avoided implementation costs.

The preamble to the proposed rule, however, appears to foreshadow future agency actions that could throw cold water on any victory parade. There, the EPA noted that it “is proposing to withdraw the numeric limitation but reserve the paragraphs in the regulation in the event that a numeric limitation is proposed and finalized in the future.” And toward the end of the preamble, the agency offered the following parting jab: “EPA continues to be interested in data and information regarding numeric discharge standards for construction sites.” Cold water, indeed. •