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Construction Sites - EPA Proposes Tightened Storm Water Standards

The EPA has proposing tighter regulation of storm water discharges from construction sites. In the rule proposed on November 28, 2008, EPA establishes minimum requirements that will apply nationally. 73 Fed. Reg. 72562 - 72614 (Nov. 28, 2008).

All construction sites will be required to implement a range of erosion and sediment control best management practices (BMPs) to reduce pollutants in storm water discharges. Erosion controls are considered effective when bare soil is uniformly and evenly covered with vegetation or other suitable materials, storm water is controlled so that rills and gullies are not visible, sediment is not visible in runoff from these areas, and channels and streambanks are not eroding. Effective sediment controls include a variety of practices that are designed to remove sediment within the range of particle sizes expected to be present on the site. The proposed rule provides minimum standards that must be achieved through use of BMPs.

Construction sites disturbing ten or more acres at a time would also be required to install sediment basins to treat their storm water discharges. Sites 30 acres or larger located in areas of high rainfall intensity and soils with a high clay content, would be required to meet a numeric limit on the allowable level of turbidity.

The EPA was ordered by the U.S. Ninth Circuit to publish effluent limitation guidelines (ELGs) and new source performance standards (NSPS) for storm water discharges from construction and development projects. *Natural Resources Defense Council v. EPA*, (US Ninth Circuit (Sep. 18, 2008)). Currently, coverage under a general permit is required to discharge storm water flowing from construction sites. Additionally, a Storm Water Pollution Prevention Plan (SWPPP) is required. The proposed rules establish additional requirements that must be met in response to the ruling.

EPA Proposes to Extend SPCC Compliance Dates - Again!

EPA has proposed to yet again extend the final compliance date for amendments to the Spill Prevention, Control, and Countermeasures (SPCC) Plans. 73 Fed. Reg. 72016 - 72022 (November 26, 2008). The compliance date of the rules, which were originally finalized in July, 2002, has been extended several times. The current compliance date is July 1, 2009. EPA proposed November 20, 2009 as the new compliance date for onshore and offshore facilities.

An oil production facility that becomes operational after November 20, 2009 must have an SPCC Plan within six months of operation. The compliance date for onshore production facilities that are also 'qualified facilities' is November 20, 2013. An oil production facility that is also a 'qualified facility' that becomes operation



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after November 20, 2013 must have an SPCC Plan within six months of operation. EPA also proposed to extend the compliance date for mobile facilities, such as an onshore or barge-mounted offshore drilling or work-over rig or portable fueling facility, to November 20, 2009.

EPA stated that the extension was necessary to provide the regulated community sufficient opportunity to fully understand the rule as amended over time. EPA believes that one full year is appropriate for owners/operators to change their facilities and their SPCC plans to conform to the rule.

Navigable Waters Re-Defined

In response to a judicial decision in *American Petroleum Institute v. Johnson*, 571 F.Supp. 2d 165 (D.D.C. 2008), EPA has restored the definition of 'navigable waters' in existence in 1973. 73 Fed. Reg. 71941 - 71944 (November 26, 2008). The court ruled the EPA definition adopted in the July 2002 SPCC rule violated the Administrative Procedures Act and specifically resorted the 1973 definition. As of November 26, 2008, the definition of 'navigable waters' in the SPCC rule (40 CFR 122.2) is as follows:
Navigable waters of the United States means "navigable waters" as defined in section 502(7) of the FWPCA, and includes:

- (1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92-500), and tributaries of such waters;
- (2) Interstate waters;
- (3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and
- (4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.



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