On March 6, 2014, the U.S. Environmental Protection Agency (EPA) published a final rule easing and clarifying the requirements of its 2009 Construction and Development Rule (2009 C&D rule), which regulates stormwater discharges from large construction sites. See Effluent Limitations, Guidelines, and Standards for the Construction and Development Point Source Category, 79 Fed. Reg. 12,661 (Mar. 6, 2014). According to EPA, the 2014 revisions should also resolve litigation over the 2009 C&D rule. Specifically, EPA notes that the 2014 revisions satisfy its “commitments under the settlement agreement” in Wisconsin Builders Association v. EPA, Case Nos. 09-4113, 10-1247, 10-1876 (7th Cir.). 79 Fed. Reg. at 12,663. Developers in jurisdictions where EPA has retained National Pollutant Discharge Elimination System (NPDES) permitting authority should welcome these revisions to the 2009 C&D rule; the final rule signals a retreat, or at least a temporary reprieve, from the steady march toward numeric effluent limitations for stormwater discharges—a prospect that many in the construction industry claim could cost billions of dollars.

Consistent with EPA’s authority to set a floor for technology-based effluent limits that apply to specific point source categories, the 2009 C&D rule established effluent limitation guidelines and new source performance standards for construction activities. See Effluent Limitations, Guidelines, and Standards for the Construction and Development Point Source Category, 74 Fed. Reg. 62,996 (Dec. 1, 2009). These effluent limitation guidelines included nonnumeric requirements to implement erosion and sediment controls, stabilize soils, manage dewatering activities, prohibit certain discharges, provide for and maintain buffers around surface waters, and utilize surface outlets for discharges from impoundments. More importantly, the 2009 C&D rule also included a numeric limit of 280 nephelometric turbidity units (NTU) for turbidity, ostensibly based on passive treatment systems (i.e., systems that rely on filtration and settling to remove sediment and turbidity), and compliance monitoring to ensure that developers would meet the new numeric limit. Petitions for review followed.

After the petitions for review had been consolidated before the U.S. Court of Appeals for the Seventh Circuit, and while briefing in the case was ongoing, the Small Business Administration (SBA)—an independent federal agency created to protect small business interests—asked EPA to reconsider the 2009 C&D rule. See Letter from Walthall, Chief Counsel, SBA Office of Advocacy, to Jackson, EPA Administrator (Apr. 20, 2010). The SBA explained that EPA’s numeric turbidity limit would “cost businesses, including small businesses, in excess of $9.7 billion per year,” id. at 3, and that EPA had misinterpreted data in setting the numeric limit, id. at 4–6. EPA thereafter filed an unopposed motion with the Seventh Circuit asking the court to vacate and remand the 2009 C&D rule’s numeric limit. The Seventh Circuit remanded the issue back to EPA, but decided not to vacate the numeric turbidity limit. EPA subsequently published a direct final rule staying the numeric turbidity limitation and, in December 2012, entered into a settlement agreement with the petitioners in Wisconsin Builders Association where it agreed to revise the 2009 C&D rule, including the numeric limit. See Direct Final Rule Staying Numeric Limitation for the Construction and Development Point Source Category, 75 Fed. Reg. 68,215 (Nov. 5, 2010).

EPA’s March 6, 2014, revisions to the 2009 C&D rule remove the numeric effluent limit for turbidity, and the accompanying compliance monitoring requirements. Other revisions to the nonnumeric limitations in the 2009 C&D rule include a definition for the term “infeasible” to mean “not technologically possible, or not economically practicable and achievable in light of best industry practice,” providing clarity for the exceptions in the 2009 C&D rule that apply when certain controls are infeasible. 79 Fed. Reg. at 12,667. Revisions to the nonnumeric standards should similarly clarify the applicability of erosion control, soil stabilization, and buffer requirements.
To be sure, the withdrawal of EPA’s numeric turbidity limit is the aspect of EPA’s final rule that will have the most far-reaching effect. As the SBA explained, meeting the 280 NTU limit would have required many to utilize advanced treatment systems (i.e., an expensive system of pipes, pumps, valves, chemical agents, and computerized data collection and monitoring) rather than the simpler and less expensive passive systems contemplated by EPA.

EPA nevertheless notes that it is still studying the data and comments submitted to it in 2012, and might yet propose numeric limits and monitoring requirements in the future. But, for now, removal of the numeric standard of 280 NTU is good news for developers.

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The U.S. Army Corps of Engineers (USACE or the Corps) released the Great Lakes and Mississippi River Interbasin Study (GLMRIS) report on January 6, 2014. The report “presents a comprehensive range of options and technologies available to prevent the interbasin transfer of aquatic nuisance species (ANS) between the Great Lakes and Mississippi River through aquatic pathways.” GLMRIS, at ES-1 (http://glmris.anl.gov/glmris-report/). The Corps presents eight alternatives to reduce the risk of 35 different aquatic nuisance species transferring either way between the Great Lakes and the Mississippi River, but all anyone wants to talk about is Asian carp getting into the Great Lakes. See, e.g., video at Asian Carp: Threat to Great Lakes—QUEST Wisconsin, 2011 (http://www.youtube.com/watch?v=j9fgqA8kpYA&feature=youtu.be).

Chicago and Two Watersheds

Some theorize that the original 1840s-era canal built to connect Lake Michigan to the Mississippi River system tipped the balance of growth in the Midwest from St. Louis to Chicago. Before railroads, trucks, and planes, water was the most economical way products could be transported over long distances. Chicago grew and developed where it is because it straddles both watersheds. Lakeside the Chicago River and, ten miles or so to the west, the Des Plaines River, drain separate watersheds.

By 1850, the 1840s canal was already being used to channel wastewater away from Lake Michigan, the source of Chicago’s 30,000 residents’ drinking water, because of deadly cholera and dysentery outbreaks. By 1900, when Chicago’s population had soared to almost 1.7 million, a new canal, the Chicago Sanitary and Ship Canal (CSSC), was built to provide both transportation and wastewater removal. See The Encyclopedia of Chicago, 2004, at www.encyclopedia.chicagohistory.org.