

EPA Storm Water Regulations - Potential Impediment to Development

by Timothy R. Hughes, Esq., LEED® AP
AIA Northern Virginia Legal Columnist

The Environmental Protection Agency is in the process of developing proposed national rulemaking to strengthen its storm water program. The proposed rulemaking announced in the Federal Register on December 28, 2009 could dramatically alter the playing field for development of all types. This is particularly true in the D.C. region given its placement in the Chesapeake Bay watershed. While civil engineers are highly attuned to these developments, all design professionals should be aware of these regulations and their potential for significant financial and feasibility impacts on development projects regionally.

Background on the EPA and Virginia Proposed Limits

The EPA recently proposed sediment limits for the Chesapeake Bay in addition to previously issued limits for nitrogen and phosphorous. The Commonwealth of Virginia's efforts to regulate storm water run-off were tabled after industry pushback and in the wake of the election of Governor Bob McDonnell. EPA's efforts appear to go far beyond the limited regulatory changes proposed and eventually suspended by Virginia. The National Association of Home Builders has quoted, and Associated Builders and Contractors has supported, an estimate of up to \$10 billion in cost annually to meet the overall national regulations as proposed by EPA.

Recent Litigation and Challenges to the Regulations

On August 13, 2010, EPA was forced to withdraw a portion of its proposed storm water management regulations in the context of a pending court challenge by NAHB and other parties. In the pending

appeal to the United States Court of Appeals for the Seventh Circuit, the EPA filed an unopposed motion to vacate part of its final rule regarding "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category."

The rule proposed to establish a numeric effluent limitation on pollutants from construction and development. The rule limited turbidity to an average daily level of 280 "nephelometric turbidity units" (NTUs). EPA concedes in its motion that, "[T]he Agency has concluded that it improperly interpreted the data and, as a result, the calculations in the existing administrative record are no longer adequate to support ..." the rule. By agreement, the motion requested that the case be held in abeyance for 18 months until February 15, 2012, to allow EPA to address the flaw. It will be quite interesting to see whether the partial retreat by EPA sets off a chain reaction of challenges or delays in other aspects of the pending regulations.

What is Next?

Given the potential for financial impact to the industry, public attention to the regulations has been surprisingly muted. Civil engineers and national organizations have tuned in. The homebuilders have been active on the state level as well. Interested parties should pay close attention to this process, both to voice opinions and to grasp the impact of the regulations on future projects.

Timothy R. Hughes is Of Counsel to the Arlington, Virginia law firm of Bean, Kinney & Korman, P.C. and a LEED Accredited Professional. He is Lead Editor of the firm's blog which is located at <http://www.valanduseconstructionlaw.com> and may be reached at thughes@beankinney.com or by phone at (703) 525-4000.

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