ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 450

[EPA-HQ-OW-2010-0884; FRL-9794-6]

RIN 2040-AF44

Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing changes to the effluent limitations guidelines and standards for the Construction and Development point source category. EPA is proposing these changes pursuant to a settlement agreement to resolve litigation. This proposed rule would withdraw the numeric discharge standards, which are currently stayed, and change several of the non-numeric provisions of the existing rule.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2010-0884, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.

- Email: *OW-Docket@epa.gov*, Attention Docket Id. No. EPA-HQ-OW-2010-0884.
- Mail: Water Docket, Environmental Protection Agency, Docket Number EPA-HQ-OW-2010-0884, Mailcode: 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: Water Docket, USEPA Docket Center, Room 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC 20004. Attention Docket Id. No EPA-HQ-OW-2010-0884. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-HQ-OW-2010-0884**. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot

read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the USEPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1744.

FOR FURTHER INFORMATION CONTACT: Mr. Jesse W. Pritts at Engineering and Analysis Division, Office of Water (4303T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: 202-566-1038; fax number: 202-566-1053; email address: pritts.jesse@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. *Does this Action Apply to Me?*

Regulated Entities

Entities potentially regulated by this action include:

Category	**Examples of Regulated Entities**	**North American Industry Classification System (NAICS) Code**
Industry	Construction activities required to obtain NPDES permit coverage and performing the following activities:	
	Construction of buildings, including building, developing and general contracting	236
	Heavy and civil engineering construction, including land subdivision	237

EPA does not intend the preceding table to be exhaustive, but provides it as a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria at 40 CFR 450.10 and the definition of "storm water discharges associated with industrial activity" and "storm water discharges associated with small construction activity" in existing EPA regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15), respectively. If you have questions regarding the applicability of this action to a particular site, consult one of the persons listed for technical information in the preceding "FOR FURTHER INFORMATION CONTACT" section.

Overview

This preamble describes the terms, acronyms, and abbreviations used in this document; the legal authority of this proposed rule; background information; and a summary of the proposed changes.

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I. Legal Authority

EPA is proposing these regulations under the authorities of sections 101, 301, 304, 306, 308, 401, 402, 501 and 510 of the Clean Water Act (CWA), 33 U.S.C. 1251, 1311, 1314, 1316, 1318, 1341, 1342, 1361 and 1370 and pursuant to the Pollution Prevention Act of 1990, 42 U.S.C. 13101 et seq.

II. Purpose & Summary of the Proposed Rule

A. Background

EPA promulgated Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category (hereafter referred to as the "C&D rule") (74 FR 62995, Dec. 1, 2009). The final rule established requirements based on Best Practicable Control Technology Currently Available, Best Available Technology Economically Achievable, Best Conventional Pollutant Control Technology, and New Source Performance Standards based on Best Available Demonstrated Control Technology.

The rule included non-numeric requirements to:

- implement erosion and sediment controls;

- stabilize soils;
- manage dewatering activities;
- implement pollution prevention measures;
- prohibit certain discharges; and
- utilize surface outlets for discharges from basins and impoundments.

The December 2009 final rule also established a numeric limitation on the allowable level of turbidity in discharges from certain construction sites. The technology basis for the final numeric limitation was passive treatment controls including polymer-aided settling to reduce the turbidity in discharges.

Following promulgation of the December 2009 final C&D rule, the Wisconsin Home Builders Association, the National Association of Home Builders (NAHB) and the Utility Water Act Group (UWAG) filed petitions for review in the U.S. Circuit Courts of Appeals for the Fifth, Seventh, and D.C. Circuits. The petitions were consolidated in the Seventh Circuit. *Wisconsin Builders Association, et al. v. EPA*, Case Nos. 09-4113, 10-1247, and 10-1876 (7th Cir.). On July 8, 2010, the petitioners filed their briefs.

In April 2010, the Small Business Administration (SBA) filed with EPA a petition for administrative reconsideration of several technical aspects of the C&D Rule. SBA identified potential deficiencies with the dataset that EPA used to support its decision to adopt the numeric turbidity limitation. In June 2010, NAHB also filed a petition for administrative reconsideration with EPA incorporating by reference SBA's argument regarding the deficiencies in the data.

On August 12, 2010, EPA filed an unopposed motion with the Court seeking to hold the litigation in abeyance until February 15, 2012 (see EPA-HQ-OW-2010-0884-

0085) and asking the Court to remand the record to EPA and vacate the numeric limitation portion of the rule. In addition, EPA agreed to reconsider the numeric limitation and to solicit site-specific information regarding the applicability of the numeric effluent limitation to cold weather sites and to small sites that are part of a larger project.

On August 24, 2010, the Court issued an order remanding the matter to the Agency but without vacating the numeric limitation. Subsequently on September 9, 2010, the petitioners filed an unopposed motion for clarification or reconsideration of the Court's August 24, 2010 order, asking the Court again to vacate the numeric limitation. On September 20, 2010, the Court remanded the administrative record to EPA, and ordered the case held in abeyance until February 15, 2012, but did not vacate the numeric limitation. EPA added additional information to the docket to supplement the administrative record for the C&D rule (see EPA-HQ-OW-2008-0465-2124 through EPA-HQ-OW-2008-0465-2134) and an updated response to comment document (see EPA-HQ-OW-2008-0465-2135) during this period.

In November 2010, EPA issued a direct final regulation and a companion proposed regulation to stay the numeric limitation at 40 CFR 450.22 indefinitely (75 FR 68215, November 5, 2010 and 75 FR 68305, November 5, 2010). The proposed rule solicited comment due no later than December 6, 2010. Since no adverse comments were received, the direct final rule took effect on January 4, 2011.

States are no longer required to incorporate the numeric turbidity limitation and monitoring requirements found at § 450.22(a) and § 450.22(b) into NPDES permits

because the numeric limitation was stayed. However, the remainder of the regulation is still in effect and must be incorporated into newly issued NPDES permits.

After issuing the stay of the numeric turbidity limitation, EPA continued to consult with stakeholders regarding next steps with respect to numeric discharge standards. EPA published a Federal Register notice (77 FR 112, January 3, 2012) seeking data on the effectiveness of technologies in controlling turbidity in discharges from construction sites and information on other related issues. The Agency is currently considering data and comments submitted in response to this notice.

EPA also continued to meet with the petitioners in an effort to settle the litigation over the C&D rule. On December 10, 2012, EPA entered into a settlement agreement with petitioners to resolve the litigation (see *Wisconsin Builders Association, et al. v. EPA*, Case Nos. 09-4113, 10-1247, and 10-1876 (7th Cir.)). The settlement agreement provides for EPA to propose for public comment certain changes specific to the non-numeric portions of the rule, as well as withdrawal of the numeric limitation, and take final action on the proposal. Under the terms of the settlement agreement, by April 15, 2013 EPA is to sign for publication in the Federal Register a notice of proposed rulemaking, with at least a 30-day comment period, to amend the C&D Rule in a manner substantially similar to Exhibit A, which is attached to the Settlement Agreement. The settlement then provides that by February 28, 2014, EPA will take final action on the proposed rule. Under the settlement, if EPA takes the above actions by the specified dates, and EPA's final action on the proposed rule amends the C&D Rule in any manner, then Petitioners and EPA will promptly file a joint request with the Court asking it to dismiss the C&D litigation. In addition, if EPA's final action amends the C&D Rule in a

manner substantially similar to Exhibit A, Petitioners will not seek judicial review of those amendments. Finally, within 60 days after EPA signs the proposal mentioned above, NAHB and EPA will file a joint request with the Court to dismiss NAHB's challenge to the 2012 Construction General Permit (CGP), which EPA issued on February 16, 2012 (see 77 FR 12286).

B. Proposed Revisions to 40 CFR Part 450

The proposed revisions to 40 CFR part 450 consist of the following three elements:

- addition of a definition of "infeasible" consistent with the preamble to the 2009 final rule and 2012 CGP;
- revisions to the effluent limitations reflecting the best practicable control technology currently available (BPT), effluent limitations reflecting the best available technology economically achievable (BAT), effluent limitations reflecting the best conventional pollutant control technology (BCT), and the new source performance standards reflecting the best available demonstrated control technology (NSPS) found at 40 CFR 450.21, 450,22, 450.23 and 450.24, respectively; and
- withdrawing the numeric turbidity effluent limitation and monitoring requirements found at 40 CFR 450.22(a) and 450.22(b) and reserving these subparts.

EPA is proposing these revisions in order to meet the terms of the settlement agreement and to make the rules clearer and more transparent to the public. As written, stakeholders believe, and EPA agrees, that there is some ambiguity surrounding when

and where these provisions should apply and what exceptions apply. EPA believes that these proposed changes will provide clarity to permitting authorities on how to implement or incorporate these provisions into permits. EPA solicits comments on the following specific changes.

1. Addition of Definition at 40 CFR 450.11

EPA proposes to add a definition of infeasible at 40 CFR 450.11(b). Several of the provisions of the C&D rule require permittees to implement controls, unless infeasible. EPA did not provide a definition of infeasible in the C&D rule. However, EPA did provide a description of what the Agency meant by infeasible in the preamble to the C&D rule (74 FR 63017), Dec. 1, 2009). This discussion stated:

> "*By infeasible, EPA means that there is a site-specific constraint that makes it technically infeasible to implement the requirement, or that implementing the requirement would be cost-prohibitive. The burden is on the permittee to demonstrate to the permitting authority that the requirement is infeasible.*"

Although this discussion described EPA's intention regarding relief from specific requirements in the C&D rule in cases where a requirement is infeasible, there is concern that since this description is contained in the preamble instead of the rule that there may be inconsistent interpretation by permitting authorities of what constitutes infeasibility. Including a definition of what EPA means by infeasible in the rule would provide clarity and consistency for permittees.

EPA proposes to add the following definition of infeasible, which was derived from EPA's preamble language from the 2009 final rule cited above and the 2012 CGP:

Infeasible means not technologically possible, or not economically practicable and achievable in light of best industry practices.

EPA solicits comment on the inclusion of this proposed definition.

2. Revision of 40 CFR 450.21(a)(1)

This requirement, as currently written, requires permittees to "Control stormwater volume and velocity within the site to minimize soil erosion." EPA proposes to amend this requirement as follows:

Control stormwater volume and velocity to minimize soil erosion in order to minimize pollutant discharges.

EPA is proposing this change in order to link the requirement to control soil erosion to the discharge of pollutants. EPA is proposing to eliminate the "within the site" clause because it is unnecessary as the regulation applies by definition to all discharges from the entire construction site. The proposed change would continue to allow permitting authorities the ability to develop permit language to control stormwater volume and velocity to minimize soil erosion at any location, such as on slopes as well as within channels and conveyances, that may contribute pollutants to discharges from the construction site. EPA solicits comment on this proposed change.

(a) Examples of appropriate controls for this provision.

Control of volume and velocity of stormwater in conveyances where concentrated flow occurs, as well as control of volume and velocity of overland flow, are necessary to reduce mobilization, transport and discharge of sediment and other pollutants. EPA notes that this requirement reflects common practice for water handling on construction sites.

The need for effective erosion control practices is an important component of stormwater management on construction sites and is well-known and described in available references. See, for example, the Virginia Erosion and Sediment Control Handbook, Third Edition, which states at page II-14:

> *"The removal of existing vegetative cover and the resulting increase in impermeable surface area during development will increase both the volume and velocity of runoff. These increases must be taken into account when providing for erosion control."*

Practices described in this handbook, also at page II-14, that are appropriate for managing the volume and velocity of stormwater are described as follows:

> *"Keeping slope lengths short and gradients low and preserving natural vegetative cover can keep stormwater velocities low and limit erosion hazards. Runoff from the development should be safely conveyed to a stable outlet using storm drains, diversions, stable waterways, riprapped channels or similar measures… Conveyance systems should be designed to withstand the velocities of projected peak discharges. These practices should be operational as soon as possible after the start of construction."*

Additional examples of appropriate controls to address this provision include management of concentrated flows through the use of channel liners or other stabilization measures to minimize erosion caused by flowing water in channels, use of pipe slope drains to move water down slopes to minimize erosion, use of check dams in channels to reduce flow velocities and minimize erosion, and use of sediment basins and traps to provide detention and reduction in peak flowrates, which minimizes downslope erosion.

Examples of practices to reduce volume and velocity of stormwater with respect to overland or other non-concentrated flow on site include the use of slope breaks such as berms to slow water as it flows down slopes and the use of cover materials such as mulches and vegetative stabilization on slopes to reduce the velocity of stormwater flowing down the slopes.

During construction, the volume and rate of runoff increases, which relates to a corresponding increase in the discharge of pollutants to receiving waters. Erosion of soil particles is caused by both rainfall impact energy as well as the energy of flowing water. Water flowing over soil as overland flow, as well as concentrated flow overland and in conveyances (such as channels), causes detachment of soil particles and transport of these particles downslope. These particles can be discharged from the construction site along with the stormwater. While removal of some particles in downslope sediment controls (e.g., sediment basins) can be accomplished, these sediment controls are generally not 100% effective in removing entrained soil particles. Therefore, some portion of soil that is mobilized (and the pollutants associated with those soil particles) can be discharged from the construction site even after passing through sediment controls.

Controlling stormwater volume and velocity reduces the amount of erosion caused by flowing water, and therefore can reduce the amount of sediment, turbidity and other pollutants discharged from the site. For example, a particular sediment basin may be capable or removing all particles above 40 microns in diameter through settling. If the stormwater flowing to the sediment basin during a particular storm event contains 1,000 pounds of soil, 80% of which is above 40 microns, then the basin would remove 80% (or 800 pounds) of the sediment while 20% (or 200 pounds) would not be removed and

would be discharged. However, if during this same storm event upslope volume and velocity controls were not implemented, then one would expect a larger quantity of sediment to be eroded and transported to the sediment basin. In this scenario, if the total quantity of sediment transported to the basin for this event is twice as much because upslope volume and velocity controls were not implemented, then the amount of sediment not removed by the basin is 20% of 2,000 pounds, or 400 pounds. This is twice as much as discharged from the example where upslope controls to reduce erosion were implemented. Therefore, reducing the volume and velocity of stormwater, which reduces the amount of erosion, can directly reduce the quantity of sediment and associated pollutants that are discharged.

(b) What does EPA not mean by this requirement?

EPA does not intend for this requirement to apply once construction has ceased and sites have been stabilized. This requirement only applies during the construction phase, and does not apply to post-construction conditions.

(c) What is the appropriate time for implementation of this requirement in the construction process?

The proper time for implementation of controls to manage both the total volume and velocity of stormwater to minimize erosion depends on the nature of the control. Some practices (such as sediment basins) should be installed very early in the construction process so that they are functioning and able to accept runoff from up-slope disturbed areas. Other practices may be installed later in the construction process as they are needed. For example, a sediment basin may be designed to accept water from several catchments in a project, all of which may not be disturbed at the same time. Prior to

disturbance of an area, it may be appropriate to install a channel to divert runoff from the disturbed area to the basin. When this channel is installed, the need for velocity control measures such as a channel lining or check dams would necessitate that they be installed when the channel is constructed. The need for specific controls is site-specific, and will vary based on the nature of the construction activity.

3. Revision of 40 CFR 450.21(a)(2)

This requirement, as currently written, requires permittees to "Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize erosion at outlets and to minimize downstream channel and streambank erosion." EPA proposes to amend this requirement as follows:

> *Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize channel and streambank erosion in the immediate vicinity of discharge points.*

EPA is proposing this change because the current requirement does not differentiate between any contribution to increased erosion caused by the construction site discharges and those caused by other sources. For example, a construction site may discharge to a stream that is being eroded due to changes in flow duration from an up-slope development. As currently written, this provision could be interpreted to require the permittee to minimize downstream erosion caused by the upslope discharges. It is not EPA's intention for this provision to require permittees to address streambank and channel erosion that is caused by other sources. This revision would require permittees to only address erosion that occurs in the immediate vicinity of permitted outfalls. Examples

may include scouring of the stream bed and erosion of the near and far banks at and in the area immediately downstream of where an outfall from a sediment basin discharges to a stream. Permitting authorities can develop specific permit language to address this erosion, and appropriate controls may include the use of stabilized outlets and use of detention practices, such as sediment basins, to limit peak flowrates and flow duration of discharges. EPA solicits comment on this proposed revision.

4. Revision of 40 CFR 450.21(a)(6)

This provision, as currently written, requires permittees to "Provide and maintain natural buffers around surface waters, direct stormwater to vegetated areas to increase sediment removal and maximize stormwater infiltration, unless infeasible." EPA proposes to amend this requirement as follows:

> *Provide and maintain natural buffers around waters of the United States, direct stormwater to vegetated areas and maximize stormwater infiltration to reduce pollutant discharges, unless infeasible.*

EPA is proposing two changes to this provision. The first change would replace "surface waters" with "waters of the United States." EPA is proposing this change because "surface waters" is not defined in the context of the Clean Water Act and EPA always intended this to simply mean waters of the United States. The second proposed change to this provision would replace "increase sediment removal" with "to reduce pollutant discharges" and would move the location of this phrase within the requirement. This proposed change would provide clarity that the goal of the requirement to direct

stormwater to vegetated areas and to maximize stormwater infiltration is to reduce pollutant discharges. EPA solicits comment on these proposed changes.

5. Revision of 40 CFR 450.21(a)(7)

This provision, as currently written, would require permittees to "Minimize soil compaction and, unless infeasible, preserve topsoil." EPA proposes to amend this requirement, as well as separate the two provisions (minimizing soil compaction and preserving topsoil) into two separate requirements as follows:

> *Minimize soil compaction. Minimizing soil compaction is not required where the intended function of a specific area of the site dictates that it be compacted.*
>
> *Unless infeasible, preserve topsoil. Preserving topsoil is not required where the intended function of a specific area of the site dictates that the topsoil be disturbed or removed.*

EPA is proposing to revise this provision because, as currently written, this requirement does not acknowledge that certain areas of the site may require compaction. Examples would be foundation pads for buildings or road subgrade material. Similarly, the requirement to preserve topsoil is being clarified. Although this requirement includes an "unless infeasible" clause, EPA believes that it is worth clarifying that preservation of topsoil is not required (although it may be feasible) where the intended function of a specific area of the site dictates that the topsoil be disturbed or removed.

EPA solicits comment on these proposed changes.

(a) Discussion of minimizing soil compaction and preserving topsoil requirements.

These requirements are designed to reduce the amount of soil eroded and discharged from the site by reducing the amount of runoff generated and by providing conditions conducive to establishing vegetative stabilization. Compacting soil increases the amount of runoff produced. This is because compacted soil does not allow water to infiltrate as rapidly as loose soil. Minimizing soil compaction allows for infiltration and retention of stormwater within the soil, which reduces the amount of runoff. Reducing the amount of runoff will reduce erosion, and therefore reduce the amount of sediment and other pollutants that can be transported to sediment controls and through perimeter controls. Sediment controls and perimeter controls are not 100% effective in removing sediment and other pollutants, therefore reducing the amount of sediment and runoff directed to these controls will reduce the amount of pollutants discharged.

Topsoil improves soil structure and provides a favorable growing medium for temporary and permanent vegetative stabilization measures. Preserving topsoil allows for better vegetative stabilization when disturbance has ceased. Better vegetative stabilization reduces erosion rates of the underlying soil and also increases the infiltrative capacity of the soil. As stated above, reducing erosion rates and reducing the runoff volume will reduce the amount of sediment transported to downslope sediment and perimeter controls. Sediment controls and perimeter controls are not 100% effective in removing sediment and other pollutants, therefore reducing the amount of sediment and runoff directed to these controls will reduce the amount of pollutants discharged.

Preservation of topsoil also means limiting disturbance and removal of the topsoil and associated vegetation. Limiting clearing and grading to only those areas where necessary to accommodate the building footprint is an example of topsoil preservation.

Preserving topsoil in this manner would reduce the volume of stormwater produced as well as the quantity of sediment and other pollutants mobilized from these areas of preservation, which would reduce the amount of pollutants discharged from the site.

Topsoil stockpile areas, if used, should be prevented from eroding, which can be accomplished by using various cover materials. Use of temporary vegetative stabilization measures for topsoil areas may also be considered if the stockpiles are to remain on-site for an extended period of time before being used.

(2) What EPA does not mean by this requirement.

EPA notes that the "minimize soil compaction" language is meant to apply to those areas of the site where soil compaction is not necessary for structural or stability concerns. For example, EPA would not expect permittees to minimize compaction in areas where soil compaction is necessary by design, such as where roads, foundations, footings or other similar structures are to be built. Rather, this requirement is intended to apply to other areas of the site, such as those where vegetation is to be preserved or restored once disturbance has ceased. Although not a requirement of this rule, minimizing soil compaction may be necessary in areas of the site where post-construction controls are to be designed to infiltrate stormwater. Examples of these areas would be areas underneath porous pavement systems or areas where infiltration basins are to be installed. Consideration of soil compaction during the construction phase would be critical to ensuring proper operation of these types of practices.

EPA notes that some projects may be designed to be highly impervious after construction, and therefore little or no vegetation is intended to remain. In these cases (and perhaps others), preserving topsoil at the site would not be feasible since the topsoil

would not be necessary for establishing vegetation. Another case where it may not be feasible to preserve topsoil would be if the topsoil is of poor quality or contaminated such that it would not be beneficial for establishing vegetation. Although poor topsoil may be improved through addition of soil amendments, there may be cases where this is not feasible. There may also be cases where keeping the topsoil on-site would conflict with other regulations or programs with respect to contaminated soils. For some projects where the construction envelope may encompass the entire land area, there may not be space available on-site to stockpile topsoil that is removed. In these cases, the use of off-site borrow or storage areas may be appropriate. In addition, topsoil may be sold for use on other projects where more topsoil is available than needed on-site. An example of an instance where it is not feasible to preserve all topsoil would be a situation where the topsoil is diverted to other uses because it is not needed on-site.

6. Revision of 40 CFR 450.21(b)

This provision, as currently written, would require permittees to stabilize disturbed areas. The requirement reads: "Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. Stabilization must be completed within a period of time determined by the permitting authority. In arid, semiarid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, alternative stabilization measures must be employed as specified by the permitting authority."

EPA proposes to amend this requirement as follows:

Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. In arid, semiarid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, alternative stabilization measures must be employed as specified by the permitting authority. Stabilization must be completed within a period of time determined by the permitting authority. In limited circumstances, stabilization may not be required if the intended function of a specific area of the site necessitates that it remain disturbed.

The changes to this provision include re-arranging the requirements for clarity as well as providing a potential exemption from stabilization for certain areas of a site that the permitting authority has determined must remain disturbed. EPA can envision only limited cases where a disturbed area would not require stabilization because it should remain disturbed. An example would be a motocross track where unstabilized soil areas are present and are intended to remain present. EPA believes that permitting authorities should have the flexibility to evaluate the circumstances surrounding individual sites and have some flexibility related to this provision for these very limited cases. In the vast majority of situations, however, vegetative or non-vegetative stabilization measures would be required. EPA solicits comment on these proposed changes.

7. Revision of 40 CFR 450.21(d)(2)

This provision, as currently written would require permittees to "Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater;"

EPA proposes to amend this requirement as follows:

Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater. Minimization of exposure is not required in cases where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination (such as final products and materials intended for outdoor use).

EPA is proposing to amend this requirement in order to acknowledge that there are certain circumstances where it may not be necessary or environmentally beneficial to minimize exposure of materials to precipitation and to stormwater. The first case would be those instances where a material is not a source of pollutant discharges. An example would be an inert material that does not leach, erode or otherwise add pollutants to precipitation or to stormwater. The second case would be where the material may contribute negligible quantities of pollutants. An example would be steel members that are part of an electric transmission tower. During construction of the tower, the material may be stored on the site in a staging area or adjacent to the tower pad. Although it may be feasible to provide cover for the material or otherwise minimize exposure of the material to precipitation and to stormwater, doing so may not be cost-effective or

beneficial if the material would be expected to contribute little or no pollutants to stormwater. EPA believes that permitting authorities should have discretion and permittees should have flexibility to address site-specific considerations with respect to this requirement. The proposed amendment should provide such flexibility. EPA solicits comment on these proposed changes.

8. Removal of Numeric Standard and Monitoring Provisions at 40 CFR 450.22(a) and 450.22(b)

The final proposed change would be to remove the numeric discharge standard and monitoring requirements found at 40 CFR 450.22(a) and 450.22(b). EPA would effectuate this change by deleting the current language at paragraphs (a) and (b), which are currently stayed, and reserving these paragraphs for potential revisions should EPA decide to propose additional effluent limitations guidelines and monitoring requirements in a future rulemaking. The stay has been in place since January 2011. In order to remove the stay or to implement a different numeric standard, EPA would need to undertake rulemaking. EPA 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. EPA believes that removing the current standard that is stayed, but still appears in the Code of Federal Regulations, would provide clarity to permitting authorities that this standard is not required to be incorporated into permits. EPA continues to be interested in data and information regarding numeric discharge standards for construction sites.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). The action does not impose an information collection burden because the proposed rule changes would affect the effluent limitations and standards applicable to regulated entities, but would not impose any data collection requirements.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration’s (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district

with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

The proposed rule would clarify applicability of the existing non-numeric effluent limitations at 40 CFR part 450 and provide exemptions to some requirements in limited cases. We have therefore concluded that today's proposed rule will either not change or relieve regulatory burden for all affected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the

aggregate, or the private sector in any one year. This proposed rule would clarify applicability of the existing non-numeric effluent limitations at 40 CFR part 450 and provide exemptions to some requirements in limited cases. The proposed rule would not impose new or more stringent requirements, and therefore this action would not subject regulated entities to any costs incremental to the existing rule. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This proposed rule would clarify applicability of the existing non-numeric effluent limitations at 40 CFR part 450 and provide exemptions to some requirements in limited cases. These requirements apply to all governmental entities that undertake construction activities regulated at 40 CFR 122.26, and therefore do not significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule would clarify applicability of the existing non-numeric effluent limitations at 40 CFR part 450 and provide exemptions to some requirements in limited cases. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with

EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed action from State and local officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule would clarify applicability of the existing non-numeric effluent limitations at 40 CFR part 450 and provide exemptions to some requirements in limited cases. The proposed rule would not impose new or more stringent requirements, and therefore this action would not subject regulated entities to any costs incremental to the existing rule. Thus, Executive Order 13175 does not apply to this action. EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This action is not subject to EO 13045 because it is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We have concluded that this rule is not likely to have any adverse energy effects because this action would clarify applicability of the existing non-numeric effluent limitations at 40 CFR part 450 and provide exemptions to some requirements in limited cases. These clarifications or exemptions are not expected to require additional energy usage by permittees.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

Executive Order (EO) 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income populations from this proposed rule. This proposed rule would clarify applicability of the existing non-numeric effluent limitations at 40 CFR part 450 and provide exemptions to some requirements in limited cases. While EPA considers it unlikely, it is possible that the changes to some of these requirements could result in greater pollution discharge to waters of the United States. However, EPA does not expect the quantity of pollution discharges to significantly increase as a result of this proposed rule at the national level. Furthermore, the primary pollutants discharged by this industry, which are sediment and turbidity, are present in background levels to varying quantities in waters of the United States. Therefore, the extent, if any, of changes in human health or environmental effects as a result of this action would depend upon waterbody-specific conditions and the locations and interaction of populations with those waterbodies. Due to the varying nature and location of construction site discharges, and due to the fact that there are often other sources of sediment and turbidity pollution in waterbodies, it is not practicable to quantify the extent to which this action would alter levels of pollution discharges or whether any change in pollution discharges as a result of this action would

contribute disproportionately high and adverse human health or environmental effects on minority and/or low income populations.

List of Subjects in 40 CFR Part 450

Environmental protection, Construction industry, Land development, Water pollution control.

Dated: March 20, 2013

Bob Perciasepe, Acting Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 450--CONSTRUCTION AND DEVELOPMENT POINT SOURCE CATEGORY

1. The authority citation for part 450 is revised to read as follows:

AUTHORITY: 33 U.S.C. 1311, 1312, 1314, 1316, 1341, 1342, 1361 and 1370.

Subpart A – General Provisions

2. Section 450.11 is amended by adding paragraph (b) to read as follows:

§450.11 General definitions.

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(b) *Infeasible*. Infeasible means not technologically possible, or not economically practicable and achievable in light of best industry practices.

Subpart B – Construction and Development Effluent Guidelines

3. Section 450.21 is amended by:

a. Revising paragraphs (a)(1), (a)(2), (a)(6) and (a)(7).

b. Adding paragraph (a)(8).

c. Revising paragraph (b).

d. Revising paragraph (d)(2).

§ 450.21 Effluent limitations reflecting the best practicable technology currently available (BPT).

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(a) ***

(1) Control stormwater volume and velocity to minimize soil erosion in order to minimize pollutant discharges;

(2) Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize channel and streambank erosion in the immediate vicinity of discharge points;

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(6) Provide and maintain natural buffers around waters of the United States, direct stormwater to vegetated areas and maximize stormwater infiltration to reduce pollutant discharges, unless infeasible;

(7) Minimize soil compaction. Minimizing soil compaction is not required where the intended function of a specific area of the site dictates that it be compacted; and

(8) Unless infeasible, preserve topsoil. Preserving topsoil is not required where the intended function of a specific area of the site dictates that the topsoil be disturbed or removed.

(b) Soil Stabilization. Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. In arid, semiarid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, alternative stabilization measures must be employed as specified by the permitting authority. Stabilization must be completed within a period of time determined by the permitting authority. In limited circumstances, stabilization may not be required if the intended function of a specific area of the site necessitates that it remain disturbed.

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(d) ***

(2) Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater. Minimization of exposure is not required in cases where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination (such as final products and materials intended for outdoor use); and

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4. Section 450.22 is amended by removing and reserving paragraphs (a) and (b).

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