

Coastal and Marine Spatial Planning for Offshore Renewable Energy Development on the West Coast

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As developers continue to build renewable energy projects on land under relatively well-defined siting and permitting schemes, the regulatory regime for offshore wind and hydrokinetic projects (i.e., wave, tidal, and ocean current)¹ is a work in progress as agencies strive to promote certainty for investors and developers. Recent memoranda of understanding signed between the Federal Energy Regulatory Commission and the Department of the Interior (“DOI”),² the State of Washington,³ and the State of Oregon⁴ demonstrate federal and state commitments to develop offshore renewable energy resources. Successfully navigating the offshore regulatory environment requires close attention to regulatory authorities governing uses of the ocean space and impacts one use may have others.

One reason special care is required is that the ocean and adjacent coastal areas generally are not zoned to allow (or restrict) particular uses in particular locations *to the exclusion of others*. Consider these interests and uses, for example: commercial and sport fishing, aquaculture, recreation, shipping, mining, oil and gas exploration and development, renewable energy development, undersea fiber optic cables, national defense, coastal private property, tribal treaty rights, cultural heritage sites, national parks, national marine sanctuaries, and protected and endangered species.

While individual sectors of the marine economy are subject to regulations such as limits on take, designated shipping lanes, and lease requirements, those regulations generally do not affect other uses. For example, the existence of a shipping lane in Puget Sound does not prevent a recreational sailor from crossing that lane. Likewise, a renewable energy lease on the Outer Continental Shelf (the “OCS”) will not prevent commercial fishing or other uses in the lease area. Although this may not seem like a big deal (after all, the energy industry has been dealing with conflicting uses on the nation’s public lands for a long time), the number of regulations and regulatory entities governing the use of *marine waters* that require consultation and cooperation between state and federal agencies is greater than that confronting most land-based renewable energy projects. As existing and new user groups seek to make use of the states’ territorial seas⁵ and the OCS,⁶ some argue that a more comprehensive, integrated, ecosystem-based management framework is needed to deal with the statutory and regulatory complexity inherent in balancing so many interests.

The Interagency Ocean Policy Task Force

To address the potentially competing uses of the nation’s oceans and coastal areas, President Obama established an Interagency Ocean Policy Task Force (the “Task Force”) in June 2009 and directed it to develop “a recommended framework for effective coastal and marine spatial planning” (“CMSP”).⁷ Following the release of its Interim Report in September 2009,⁸ the Task Force convened 14 expert roundtables focused on interests specifically affected by CMSP⁹ and, on December 9, 2009, the Task Force released its Interim Framework for Effective Coastal and Marine Spatial Planning (the “Interim Framework”).¹⁰ The Interim Framework proposes nine regional planning areas (the West Coast Region includes Washington, Oregon, and California) and sets out a process to develop and implement CMSP in each region. According to the Interim Framework, each region is expected to develop its own CMS Plan within the next five years.¹¹ If implemented effectively, the CMS Plans contemplated by the Task Force can be a powerful tool for long-term ocean resource management and can play a key role in streamlining the regulatory process for offshore renewable energy developers.

This article focuses on the Interim Framework as it concerns offshore renewable energy development and posits that the CMS Plan for the West Coast Region (the “West Coast Plan”) should endeavor to achieve three goals: (1) clarify the role that each state and federal agency will play in implementing the West Coast Plan in order to minimize duplicative efforts and speed up the siting and permitting phase; (2) streamline the state and federal authorization processes for offshore wind and hydrokinetic projects¹² to align the West Coast Plan with the President’s goal of mitigating climate change through renewable energy development;¹³ and (3) establish a mechanism for funding ongoing research and development aimed at designing and implementing baseline environmental studies and monitoring for offshore renewable energy technologies. If the West Coast Plan accomplishes these things, the industry will quickly reap the benefits.

What Is Coastal and Marine Spatial Planning?

The Interim Framework defines CMSP as “a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal and Great Lakes areas. CMSP identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives. In practical terms, CMSP provides a public policy process for society to better determine how the ocean, coasts, and Great Lakes are sustainably used and protected now and for future generations.”¹⁴

The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) defines CMSP similarly,¹⁵ with

two important qualifications: for UNESCO, CMSP is not an end in itself and it does not replace single-sector planning.¹⁶ Thus, for UNESCO, CMSP functions as a national policy overlay that relies on existing statutory and regulatory schemes to achieve its purpose. In UNESCO's eyes, CMSP "is *not* ocean zoning."¹⁷

Importantly, the Interim Framework was vague on this point.¹⁸ States in a particular region may choose to implement that region's CMS Plan by (1) carving out and regulating exclusive-use zones according to specific, uniform guidelines, (2) allowing state agencies to interpret general guidelines according to their existing statutory authority, or (3) something in between. For the West Coast Region, the choice for implementation will lie with a regional planning body consisting of federal, state, tribal, and local agencies, as well as representatives from the West Coast Governors Agreement on Ocean Health¹⁹ (collectively, the "Western Regional Planning Body" or the "Planners").²⁰

Identifying Roles for State and Federal Agencies

According to the Interim Framework, the National Ocean Council (the "NOC")—a new Cabinet-level committee proposed by the Task Force—will help create the Western Regional Planning Body. Co-chaired by the chair of the Council on Environmental Quality (the "CEQ") and the Director of the Office of Science Technology Policy,²¹ the NOC will have "a stronger mandate and direction [than the former Committee on Ocean Policy], and renewed and sustained high-level engagement . . . [that will provide] a framework for more successful policy coordination."²² However, the NOC has not yet been formed. If President Obama takes the Task Force's recommendation, then he will likely form the NOC by executive order.²³

While both the federal government and the western coastal states have been active in ocean resource management since the 1970s,²⁴ the number and variety of ocean uses continues to grow. Admittedly, without a unifying policy goal to guide the preservation and development of ocean resources, stakeholders risk a tragedy of the commons²⁵ that puts both individual interests and ocean health at risk. However, the courageous efforts of the states and federal agencies like the National Oceanic and Atmospheric Association ("NOAA") and the DOI have not yet provided a clear framework for developing renewable energy projects on the west coast. Washington's passage of Substitute Senate Bill 6350 on March 19, 2010 ("SSB 6350"), represents the most direct legislative action to implement CMSP and coordinate offshore renewable energy development.

SSB 6350, effective June 10, 2010, establishes a marine interagency team tasked with assessing and recommending a framework for conducting marine spatial planning and integrating the planning into existing state management plans. The assessment must be completed by December 15, 2010. However, until federal, private, or other non-state funding is secured specifically for these activities, the team may not (1) assist state agencies with the review

and coordination of marine spatial data and marine spatial planning with existing plans and ongoing planning or (2) coordinate the development of a comprehensive marine management plan for the state's marine waters. Once funding has been secured and the interagency team sets itself to the task of designing a comprehensive marine management plan, it will have twenty-four months to do so. And once approved, the plan will be submitted to the appropriate federal agency for incorporation into the Washington's coastal zone management plan. The state's Department of Ecology is tasked with developing guidance to achieve a unified state position on the siting and operation of offshore renewable energy facilities in the state. However, that activity, too, is contingent on federal or other non-state funding.²⁶

The West Coast Plan presents an opportunity not only to develop a unifying policy for the region, but to use that policy as a basis for cleaning out the cupboards—i.e., for revisiting the nexus between federal and state authorization processes in order to streamline environmental reviews. Because the Western Regional Planning Body will have responsibility for choosing how CMSP is implemented in Washington, Oregon, and California, developers in the region should consider carefully how each participating agency's existing regulatory responsibilities will be affected (e.g., will the West Coast Plan consolidate or expand existing consultations?), and determine how to proactively engage them in streamlining the system.

The degree to which the Western Regional Planning Body envisions CMSP as a method of ocean zoning will be critical to analyzing how agencies' roles may change. If, on one hand, CMSP is implemented by defining exclusive use zones on the West Coast, then stakeholders must agree on a method for proceeding with project development as those zones are negotiated. Such zones would undoubtedly be hotly contested and subject to protracted state and federal notice and comment processes (if not new statutory drafting). A similar method for proceeding in the meantime will be necessary if the Planners choose to designate preferred use areas where other uses are not excluded, but potentially competing uses are allowed according to a predetermined hierarchy of "best uses." On the other hand, if the West Coast Plan permits state and federal agencies to interpret a general set of guidelines, then the proponents of renewable energy projects may have to deal with inconsistencies between state processes and potentially more regulatory hurdles.

No matter how the scope of CMSP is defined, however, the West Coast Plan must address how state and federal agencies can work together to accelerate the responsible development of offshore renewable energy resources and avoid duplicative efforts during the siting and permitting phases.²⁷

Implementing the West Coast Plan

The Interim Framework calls for each region to develop a CMS Plan within five years, based on a draft development agreement that will be provided by the NOC.²⁸ While other regions may find that goal difficult to meet, the West Coast Region should not. Not only do the western states benefit from an array of ocean resource management statutes and policies developed over the past 40 years,²⁹ the Interim Framework provides for the phased implementation of CMSP.³⁰ Phased implementation will allow the Western Regional Planning Body to focus early on those areas where the states have already accomplished the most and push less-developed or very contentious issues back for later consideration and negotiation. Thus, the Planners will not launch a comprehensive West Coast Plan *in* five years; rather, the West Coast Plan will be developed and implemented progressively *over the course of* five years.

Two areas deserve the Planners' early attention. First, dispute resolution procedures must be set out clearly and communicated to all stakeholders in the region. Distinct dispute resolution mechanisms must be established for (1) disputes that arise during the development of the West Coast Plan concerning the implementation of CMSP in the region generally and (2) disputes that arise after the West Coast Plan (or a portion thereof) has been implemented concerning the impacts a particular project could have on the environment, local culture, or local economy.

Neither the Interim Report nor the Interim Framework proposed a dispute resolution process to govern the development of regional CMS Plans. Rather, dispute resolution will be outlined by the NOC, in cooperation with the Governance Advisory Committee,³¹ a committee consisting of 13 members from regional governance structures, tribes, and both coastal and inland states.³² At a glance, the three levels of review set out in the Interim Report to resolve stakeholder disputes seem promising. If the regional planning body is unable to negotiate a solution, then the issue will be elevated to the NOC, and if the NOC members cannot resolve the conflict, it will be referred to the President for final decision.

However, a process that, in certain instances, could end only by executive order is not necessarily a streamlined one. Given the diversity of parties and the differing jurisdictional authorities and regimes between and among the state and federal agencies, devising a dispute resolution process that works for everyone will be challenging, but not impossible. Although implementing a process that is easy to facilitate and resolves conflicts quickly will require parties to compromise where they may not otherwise do so, the stakeholders involved in developing the West Coast Plan have a shared goal of responsible development.

Assuming the NOC establishes an efficient dispute resolution process for the regional planning bodies, the West Coast Plan itself should present a preferred method for resolving disputes that arise during individual project development. Ultimately, all stakeholders have an interest

in avoiding litigation, and a development plan that includes a strategy for assessing impacts throughout a project's life will be far superior to one that does not.

Thus, the second area that deserves early attention is mitigation. The Interim Framework recommends that CMSP should be guided by "the precautionary approach as defined in Principle 15 of the Rio Declaration, 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'"³³ However, others have argued that pure adaptive management would be better for accelerating the offshore renewable energy industry.³⁴

Ultimately, the West Coast Planning Body will determine what mitigation standard should predominate in the region, and it is possible that different mitigation strategies could be used to assess different technologies or sectors of the marine economy. After all, the West Coast Plan must address all ocean uses, not only renewable energy development. However, such a discussion is beyond the scope of this article.

Whichever method the Planners choose, the goal is clear. The West Coast Plan must give the industry a signal about the level of mitigation that developers will be required to undertake prior to placing their first device in the water. To be aligned with the President's goal of mitigating climate change through renewable energy development, projects must be able to move forward even though the environmental impacts (whether good or bad) are not completely understood at the outset. State and federal agencies must be able to define their specific roles in a comprehensive process for resolving disputes that arise in individual project development. Accelerating the industry, therefore, may be less about which mitigation philosophy should govern and more about how quickly the Planners can give the industry the signal it needs to assess the financial viability of proposed projects.

Using CMSP to Advance Offshore Renewable Energy

CMSP is to be "based on sound science."³⁵ However, relatively little is known about how offshore renewable energy projects will impact the ocean environment, and some of what is known is proprietary. Because the offshore renewable energy industry is still in its nascent stages of development, and because companies are not incentivized to share data gathered through their own R&D efforts, the West Coast Plan should establish a mechanism for funding ongoing R&D in the region.³⁶

One idea is for the western states to fund research projects focused on regional issues through the Northwest National Marine Renewable Energy Center. Another possibility is for the West Coast Planning Body to work with legislators to propose R&D programs that can be carried out by other public universities and colleges. At the federal level, the Ocean Renewable Energy Coalition has negotiated Senate Bill 1462, a bill "that would establish an Adaptive

Management Fund which developers can use to underwrite environmental studies and ongoing post-deployment monitoring requested by state and federal resource agencies, including NOAA, for demonstration and early-stage commercial projects.”³⁷ The concept articulated in Senate Bill 1462 is sound and the Planners can use it as a model for state legislation in the region.

Ultimately, increasing access to baseline data on the surface and subsurface environments will be critical to rapid growth in the industry. Better information will lead to more concise and efficient mitigation strategies, and better mitigation will lead to fewer disputes.

Conclusion

CMSP can be a powerful tool for ocean resource management on the West Coast. However, unless the West Coast Planning Body uses it to carefully streamline existing state and federal authorization processes, the West Coast Plan could slow offshore renewable energy development in the region. Once President Obama forms the NOC and the West Coast Planning Body convenes, the Planners should act quickly to leverage the states’ existing statutes, policies, and memoranda of understanding to identify areas for early action. The Planners should also look beyond the four corners of the Interim Framework and devise a funding mechanism for research on the surface and subsurface environments that will help to inform decisions by developers, resource agencies, and legislators. Finally, to the extent that CMSP is designed to determine the best uses for the marine environment, interested parties should engage in the process early, not only to reinforce the President’s goal of prioritizing renewable energy to mitigate climate change, but also to learn more about the competing uses and stakeholder groups.

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Hydroelectric Regulation Committee. Ms. Oram is a frequent speaker on ocean and tidal energy project permitting.

- 1 For an excellent summary and “roadmap” of relevant state and federal permits currently required for developing hydrokinetic projects in Washington’s territorial waters, see the “Washington” chapter of “Siting Methodologies for Hydrokinetics: Navigating the Regulatory Framework,” prepared by Pacific Energy Ventures, LLC on behalf of the U.S. Department of Energy and published in December 2009. A full-text PDF can be downloaded at <http://www.advancedh2opower.com>.
- 2 Memorandum of Understanding Between the U.S. Department of the Interior and Federal Energy Regulatory Commission (Apr. 9, 2009), available at <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf>.
- 3 Memorandum of Understanding Between the Federal Energy Regulatory Commission and the State of Washington (June 4, 2009), available at <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-wa.pdf>.
- 4 Memorandum of Understanding Between the Federal Energy Regulatory Commission and the State of Oregon (Mar. 26, 2008), available at <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-or-final.pdf>.
- 5 For Washington, Oregon, and California, the states’ territorial seas extend three nautical miles (3.452 statute miles) seaward of the baseline from which the territorial sea is measured (e.g., the mean lower low-water mark in Oregon). See U.S. Department of the Interior, Minerals Management Service, What is the Outer Continental Shelf? <http://www.gomr.mms.gov/homepg/whoismms/whatsocs.html> (last visited Apr. 12, 2010).
- 6 The OCS consists of “all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in [43 U.S.C. § 1301(a)], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.” Submerged Lands Act, 43 U.S.C. § 1331(a).
- 7 Memorandum from President Barack Obama to Heads of Executive Departments and Agencies, National Policy for the Oceans, Our Coasts, and the Great Lakes at 2 (June 12, 2009) (“Obama Memo”), available at http://www.whitehouse.gov/assets/documents/2009ocean_mem_rel.pdf.
- 8 White House Council on Environmental Quality, Interim Report of the Interagency Ocean Policy Task Force (Sept. 10, 2009), available at http://www.whitehouse.gov/assets/documents/09_17_09_Interim_Report_of_Task_Force_FINAL2.pdf.
- 9 White House Council on Environmental Quality, Interagency Ocean Policy Task Force: Expert Briefings, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans/expertbriefings> (last visited Apr. 12, 2010).
- 10 White House Council on Environmental Quality, Interim Framework for Effective Coastal and Marine Spatial Planning (Dec. 9, 2009), available at <http://www.whitehouse.gov/sites/default/files/microsites/091209-Interim-CMSP-Framework-Task-Force.pdf>.
- 11 See Interim Framework at 25-31.
- 12 See *id.* at 3 (“CMSP is intended to build upon and significantly improve existing Federal, State, tribal, local, and regional decision-making and planning processes.”).
- 13 Obama Memo at 1.
- 14 Interim Framework at 1.
- 15 “Marine spatial planning is a public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that usually have been specified through a political process.” UNESCO, Marine Spatial Planning, http://www.unesco-ioc-marinesp.be/marine_spatial_planning_msp (last visited Apr. 12, 2010).
- 16 *Id.* (“Marine spatial planning is *not* an end in itself, but a practical way to create and establish a more rational use of marine space and the interactions between its uses, to balance demands for development with the need to protect the environment, and to achieve social and economic objectives in an open and planned way.” (emphasis added)).
- 17 *Id.* (emphasis added).
- 18 This framework for CMSP is to provide all agencies with agreed upon principles and goals to guide their actions under these authorities, and to develop mechanisms so that Federal, State, tribal, and local authorities, and regional governance structures can proactively and cooperatively work together to exercise their respective authorities.
- 19 An agency or department’s capacity to internalize the elements of any particular CMS Plan would vary depending on the nature of the applicable statutes.
- 20 Interim Framework at 6.
- 21 See West Coast Governors Agreement on Ocean Health, <http://westcoastcoceans.gov/leads/> (last visited Apr. 12, 2010).
- 22 Interim Framework at 11-12.
- 23 Interim Report at 19.
- 24 Interim Report at 6.

- 23 The NOC will replace the former Committee on Ocean Policy within the CEQ. The Committee on Ocean Policy was formed by President George W. Bush in Executive Order 13366, 69 Fed. Reg. 76,591 (Dec. 17, 2004), available at <http://edocket.access.gpo.gov/2004/pdf/04-28079.pdf>.
- 24 For example, Congress enacted the Coastal Zone Management Act (16 U.S.C. §§ 1451-1464) and the Marine Mammal Protection Act (16 U.S.C. §§ 1361-1423) in 1972, the Endangered Species Act (7 U.S.C. § 136, 16 U.S.C. § 1531, et seq.) in 1973, and the Magnuson-Stevens Fisheries Conservation and Management Act (16 U.S.C. §§ 1801-1891) in 1976, and the State of Washington passed its Shoreline Management Act (RCW 90.58) in 1972.
- 25 Garrett Hardin, "The Tragedy of the Commons," *Science* (Dec. 13, 1968), at 1243-48.
- 26 Section 8 of SSB 6350 states explicitly that the statute will not affect "in any way any project, use, or activity in the state's marine waters existing prior to or during the development and review of the marine management plan."
- 27 The Ocean Renewable Energy Coalition ("OREC") expressed this sentiment in its comments to the Task Force: "Federal, state and local regulatory agencies should be encouraged to work together to ensure their approvals are consistent and to streamline their approval processes and timing." Comments of the Ocean Renewable Energy Coalition to the Interagency Ocean Policy Task Force at 2-3 (Sept. 10, 2009), available at <http://www.whitehouse.gov/assets/forms/submissions/54/fa1fe587be3f4b75af4ccd11c21de4ff.pdf> ("OREC Comments").
- 28 Interim Framework at 25-31.
- 29 Washington passed its Shoreline Management Act in 1972 (RCW 90.58) and then, amid increasing concern about offshore drilling, passed the Ocean Resources Management Act in 1989 (RCW 43.143). Oregon passed the Oregon Ocean Resources Management Act in 1991 (the "ORMA") (ORS 196.405-.515). The Oregon legislature also amended ORS chapter 163 in 1991 to create the Ocean Policy Advisory Council, tasking it with developing a Territorial Sea Plan by July 1, 1994. See Oregon Department of Land Conservation and Development, Oregon Coastal Management Program, Oregon Territorial Sea Plan, Part One, http://www.oregon.gov/LCD/OCMP/docs/Ocean/otsp_1-a.pdf (last visited Apr. 12, 2010). The ORMA is presented in Appendix E to the Territorial Sea Plan. Wave energy was brought to the forefront of the ocean-use conflict on March 26, 2008 when Governor Kulongoski signed Executive Order 08-07, directing state agencies to protect coastal communities when siting marine reserves and wave energy projects. Pursuant to the executive order, on November 5, 2009, Oregon's Land Conservation and Development Commission adopted an administrative rule for Part Five of the Oregon Territorial Sea Plan, "Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities." OAR 660-036-0005; Oregon Department of Land Conservation and Development, Oregon Coastal Management Program, Oregon Territorial Sea Plan, Part Five, http://www.oregon.gov/LCD/OCMP/docs/Ocean/otsp_5.pdf (last visited Apr. 12, 2010). California passed its Ocean Resources Management Act in 1990 (Public Resources Code § 36000, et seq.), and amended it in 1991 to transfer responsibility for all marine and coastal resource management to the Secretary for Resources. California Ocean Resources Management Program, http://www.resources.ca.gov/ocean/program_info.html (last visited Apr. 12, 2010). Finally, in 1999, California passed the Marine Life Protection Act. Cal Fish & Game Code § 2850, et seq. "This action required the state to undertake a marine spatial planning effort to evaluate and possibly redesign all existing state marine protected areas and to potentially create new protected areas that could, to the greatest degree possible, act as a networked system." U.S. Department of Commerce, NOAA, California Marine Life Protection Act Initiative, <http://www.msp.noaa.gov/practice/california.html> (last visited Apr. 12, 2010).
- 30 Interim Report at 26.
- 31 Interim Framework at 13.
- 32 Interim Report at 24.
- 33 Interim Framework at 8.
- 34 OREC Comments at 2 ("The Task Force should refrain from endorsing a precautionary principle that would discourage development in the face of uncertainty, and instead should endorse the testing and phased development of projects through robust monitoring and adaptive management.").
- 35 Interim Framework at 1.
- 36 Cf. OREC Comments at 2 ("Sound ocean management policy decisions and marine spatial planning must be based on adequate baseline data rather than speculation. Data collection is an integral part of any successful ocean management program and must receive adequate funding for comprehensive ocean planning to succeed.").
- 37 Testimony of Carolyn Elefant, Legislative and Regulatory Counsel, Ocean Renewable Energy Coalition, before the U.S. Senate Committee on Commerce, Science, & Transportation, Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard (Nov. 4, 2009), available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=9aca122c-7617-40ff-a232-386c1d842edd.

EPA Issues Construction Stormwater Rule

By Meline MacCurdy and Russell Prugh

The Environmental Protection Agency (EPA) issued a long-awaited final stormwater rule in the Federal Register on December 1, 2009, that for the first time imposes an enforceable numeric limit on stormwater discharges from large construction sites and requires monitoring to ensure compliance with the numeric limit. The rule also requires nearly all construction sites disturbing one acre or more to implement a range of erosion and sediment controls and pollution prevention measures. While the non-numeric effluent limitations are applicable to every Clean Water Act¹ (CWA) construction stormwater permit for sites over one acre issued after the rule took effect on February 1, 2010, the numeric limit and associated monitoring requirements applicable to large sites will be phased in over four years.

According to EPA, the rule will impact approximately 82,000 firms within the construction and development (C&D) category, including residential and commercial construction and heavy and civil engineering firms,² and will cost the industry nearly \$1 billion in new compliance costs.³ While massive, the cost of the new requirements are less than were estimated under the proposed rule, as a result of changes made during the rulemaking process.

The Clean Water Act

The CWA prohibits discharges of pollutants by any person from point sources into waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit.⁴ NPDES permits "place limits on the type and quantity of pollutants that can be released into the Nation's waters, and must set forth effluent limitations,"⁵ which are specific restrictions on the quantities, rates, and concentrations of chemical, physical, biological or other constituents, such as sediment or turbidity, discharged into navigable waters from point sources.⁶ EPA's effluent limitations are incorporated into NPDES permits when the permits are issued. NPDES permits are generally issued by state agencies, because most states have sought and received NPDES permitting authority from EPA.⁷ EPA's national regulations set a floor for state as well as EPA NPDES permits, but states can include requirements in state NPDES permits that are more stringent than the national standards.

The specific effluent limitations incorporated into NPDES permits are established using more general effluent limitations guidelines (ELGs) and new source performance standards (NSPSs).⁸ ELGs impose technology-based requirements for categories of point source dischargers. ELGs apply to existing sources of pollution and NSPSs only apply to "new sources." A "new source" is any source that was