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Position on Municipal Stormwater Management Program

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NAFSMA represents local agencies dedicated to the improvement of stormwater quality through the implementation of technically feasible and fiscally responsible stormwater management programs.

Section 402(p)(3) of the Federal Clean Water Act clearly establishes the standard of compliance for municipal stormwater discharges as the " . . .reduction of stormwater pollutants to the maximum extent practicable . . .". This reasonable standard of compliance is continuously being superceded in NPDES permits with the addition of unreasonable and impractical numeric permit limitations, water quality standards and total maximum daily loads (TMDLs). Such impractical and complex permit requirements are pushing stormwater programs throughout the country beyond the technically achievable and fiscally responsible standards set forth in the Clean Water Act.

Many municipalities throughout the country are making significant improvements in managing stormwater quality. Over time, these efforts will incrementally improve water quality. However, increasingly complex and impractical permits and the constant threat of litigation are serving to impede local governments efforts and are leading to the implementation of costly and unproven stormwater treatment systems. These reactive measures are being undertaken despite the fact that the science is usually insufficient to demonstrate a commensurate environmental benefit.

NAFSMA looks forward to working with Congress and the U.S. Environmental Protection Agency to clarify a regulatory framework for municipal stormwater programs that will assure progress toward the improvement of stormwater quality and the protection of our nation's waters.

NAFSMA has identified the following major areas of concern that need to be addressed:

- Maximum Extent Practicable
- Total Maximum Daily Loads (TMDLs)
- Permit Simplification
- Point vs. Non-Point
- Phase II Municipalities
- EPA/State Funding, Research and Technical Assistance
- Industrial Facilities
- Rate and Volume of Flow

Maximum Extent Practicable

Position Statement: Amend the Clean Water Act to recognize the MEP standard as the required standard of compliance for municipal stormwater discharges. Amend the Clean Water Act to reiterate the definition of MEP as the technically sound and financially responsible, non-numeric criteria applicable to all municipal stormwater discharges through the implementation of "best management practices" (BMPs).

Rationale: The 1987 Clean Water Act amendments established MEP as the standard for municipal stormwater discharges. As documented in the Congressional record, this new standard was included because Congress recognized that traditional end-of-pipe numeric standards that applied to wastewater treatment plants and industrial process wastewaters were not practical for municipal separate storm systems that collect urban runoff and stormwater runoff from diffuse, non-point sources. The MEP standard, which prescribes the use of best management practices that are technically and financially achievable, results in the practical implementation of municipal stormwater programs that will improve the quality of stormwater discharges.

The MEP standard, which has been upheld by the 9th Circuit Court of Appeals, is being routinely superceded in NPDES permits nationwide by impractical standards of compliance, notably numeric effluent limits and receiving water limitations. While the Court of Appeals acknowledged that EPA had the authority to use standards other than MEP, such as numeric permit limitations, it did not rule the EPA was mandated to do so and did not rule the EPA's discretion could be applied without regard to practicality. In many cases, permits are being issued that require compliance with standards for pollutants that are not causing significant environmental impacts and/or are beyond the authority of local governments to control.

NAFSMA represented agencies concur that aggressive stormwater management programs with a wide array of BMPs and strategic plans to reduce and prevent discharge of key pollutants are needed. In fact, we believe that the MEP standard will likely change over time, resulting in gradual, incremental improvement to the runoff that is discharged from urban areas. Using adaptive management principles, significant improvements will take time and will involve fundamental changes in personal behaviors, business practices and public perceptions, similar to the experiences of solid waste recycling programs. Issuing NPDES permits that require unrealistic compliance with numeric limitations will only serve to subject cities and counties to lawsuits and costly, unproven treatment systems that are not likely to achieve compliance and will not significantly improve the quality of our nation's waters.

Total Maximum Daily Loads (TMDL)

Position Statement: Amend the Clean Water Act or direct EPA to develop regulatory guidelines that clearly prescribe a BMP based approach, that is consistent with the MEP mandate for compliance with TMDL waste load allocations for municipal stormwater discharges.

Specifically, Congress should direct EPA to develop a strategic plan for implementing TMDLs consistent with the recommendations of the National Academy of Sciences by:

- Expediting use attainability analyses (UAA) using the existing flexibility within the Clean Water Act by focusing on the needs of the drainage basin, identifying "real" beneficial uses, recognizing community values, and finding practical, positive actions by using existing knowledge and data. NAFSMA position is to recommend that Congress make a UAA process the first step of a TMDL process if a waterbody-specific UAA has not been done, recognizing that while the use of existing data is intended to achieve financial responsibility, where significant new costs are incurred in expediting these UAA's, federal funds should be made available for these analyses.

- Developing an adaptive management process. Recognizing that not enough is known to make all decisions for all time regarding how to deal with all pollutants and, therefore to adjust water quality programs over time as new knowledge is gained. The TMDL implementation process should begin

with practical actions to achieve beneficial uses valued by the community and should proceed with modifications to those actions as we evaluate the results of our earlier efforts.

- Coordinating TMDL implementation with BMP based efforts of municipal stormwater Phase I & II NPDES permits to maximize effectiveness by avoiding duplication, conflicts and unnecessary reporting. Specifically, NAFSMA members recommend that "Congress clarify or amend (if necessary) the Clean Water Act to reiterate the definition of "maximum extent practicable" (MEP) as the technically sound and financially responsible, non-numeric criteria applicable to all municipal stormwater discharges through the implementation of "best management practices" (BMPs).

Rationale: The current USEPA TMDL policy does not recognize the BMP based nature of municipal stormwater programs nor does it clearly provide for allocated loading reductions to be measured by implementation of BMP programs. TMDL implementation plans need to reflect the fact that the NPDES municipal stormwater program is a BMP based program with a compliance standard of MEP.

Municipal stormwater programs will be allocated specific waste loads as part of the TMDL process. While stormwater agencies acknowledge the fact that waste load allocations are a mandate of the TMDL process, the standard for compliance with those allocations must be linked to the MEP standard established in the CWA. Short of this presumed compliance, stormwater agencies will be forced into cost prohibitive, unproven treatment technologies for pollutants that are generated by diffuse and uncontrollable sources.

An example of the practical limitations facing municipal stormwater discharges would be a TMDL for copper. Up to 75% of the copper found in urban runoff is from brake pad wear or other non-controllable sources which deposit a very fine, copper contaminated dust onto road surfaces. Once copper is mixed in with runoff, it is very difficult (if not impossible) to remove, even with large scale treatment facilities. Stormwater agencies can implement BMPs such as educational campaigns urging consumers to purchase non-metallic brakes, stepped up street sweeping programs, and controlling minor sources of copper from certain industrial sources. While these efforts will help reduce the amount of copper in stormwater discharges, the efforts of stormwater management programs alone will not result in achievement of numeric waste load allocations. Only efforts beyond the control and resources of local stormwater programs, such as elimination of metallic brake pads or the construction of unaffordable, unproven treatment systems, would result in compliance with numerical waste load allocations.

We must recognize that to move forward now in implementing TMDLs using current water quality standards could be a huge mistake. Current standards are not based on best available science, existing or historical beneficial uses or even, in most cases, any beneficial use attainment analysis. In addition, current standards are based on ambient stream conditions and do not even consider water conditions during a stormwater event.

Rather, EPA should strategically move forward with practical actions based on current knowledge focusing on achieving beneficial uses supported by the community, recognizing that future actions must be modified based on what we learn through an adaptive management strategy.

Presumed compliance, by successfully implementing specified BMPs, similar to the recently adopted CSO policy is the preferred and practical approach for complying with the waste load allocations in TMDL.

Permit Simplification

Position Statement: EPA should develop guidelines for NPDES permit writers that would simplify permits and clearly identify mandatory BMPs and performance standards.

Rationale: NPDES permits for municipal stormwater discharges are becoming so cumbersome and complex that they actually impede progress on water quality improvements. Simplification, especially during these early phases of the program, is critical for success. Many permits are being written to require compliance with water quality objectives within one permit term (5 years) or less without regard to the limitations of the drainage system or the ubiquitous sources of pollutants. Even if treatment plant construction were mandated (NAFSMA in no way supports such a concept), it would take decades and billions of dollars to re-plumb drainage systems and construct treatment plants.

Point vs. Non-Point

Position Statement: To alleviate some of the unworkable linkages to the NPDES program, consideration should be give to a Clean Water Act amendment that moves the municipal stormwater program from the NPDES program (Section 402 0f the CWA) to a new, non-point source municipal stormwater program.

Rationale: Prior to the 1987 CWA amendments, stormwater (despite its non-point source nature) was subject to the same regulations and standards of compliance as point source discharges, such as public sewage treatment plants and industrial wastewaters. These standards proved unreasonable and unworkable and, as part of the 1987 CWA amendments, Congress left the stormwater program in the NPDES program of the CWA, but created the "maximum extent practicable" (MEP) standard of compliance for municipal stormwater discharges.

It is NAFSMA's view that the MEP standard was developed to provide a reasonable standard of compliance and was clearly intended to replace the unreasonable and impractical standards that were in place prior to the amendments. However, apparently because the stormwater program remained in the NPDES program, there is a great deal of debate about the linkages to the NPDES requirements for true point source discharges. This uncertainty has resulted in several lawsuits and is pushing municipal stormwater agencies into costly, unreasonable programs that negate the intent of the 1987 amendments. An amendment to the CWA that moves the municipal stormwater out of the NPDES program and into a stand alone non-point source program would put the MEP standard of compliance into the appropriate context.

Phase II Municipalities

Position Statement: Permit requirements of Phase II municipalities must be limited to a number of simple, cost-effective and proven best management practices in order to be a success. Phase II program should be based on lessons learned in Phase I program.

Rationale: The municipal stormwater program is in effect a large demonstration project that is being funded by some 600 municipalities and counties in the Phase I program and will be joined by some 4,000 Phase II municipalities and counties by the year 2002. Until the Phase I and Phase II

stormwater programs can be fully evaluated and determined to be cost effective, it is crucial the limited resources of Phase II communities be focused on a select list of best management practices that are practical, effective and affordable. Otherwise, the same level of legal and regulatory battles that have impeded progress of the Phase I program will paralyze progress of the Phase II program.

EPA/State Funding, Research and Technical Assistance

Position Statement: Establish the capability at the State and/or Federal level to fund support activities including new studies, pilot grants to communities, direct technical assistance to communities, and research. If BMP retrofit projects or other structural BMPs become required permitted activities, funding should be made available.

Rationale: If the federal government is going to mandate far reaching programs as municipal NPDES stormwater permitting program requirements, it needs to provide funding and the technical and research capabilities necessary to support the effort. In general, state and Federal funding should be provided for mandated state and local costs associated with implementation of the federal NPDES stormwater program. It is unreasonable to force state and local governments to implement a program for which the science and effectiveness is unknown without providing adequate funding and technical support.

Industrial Facilities

Position Statement: Amend the Clean Water Act to allow local governments at their discretion to include their own industrial facilities in their municipal permit; and if requested by municipal permittees to allow, but under no circumstances require, the transfer of the regulatory responsibilities to municipal permittees for industrial facilities discharging directly into the municipal stormwater system.

Rationale: Under current law, local governments are required to submit individual stormwater permit applications for municipally owned industrial facilities they own in addition to their system wide permit. It would be more efficient to reduce the number of permits required by including those municipal facilities requiring permits in the system wide permit.

There is interest by some (but by no means all) municipalities and regulators in having local agencies to administer the regulation of industrial dischargers that discharge directly into the municipal system. Under current law, all industrial dischargers are regulated by EPA or the state. Flexibility should be provided if requested by municipal permittees to allow, but under no circumstances require, federal and state agencies to transfer administration of regulatory responsibilities to municipal permittees for industrial facilities discharging directly into the municipal stormwater system.

Rate and Volume of Flow

Position Statement: The rate and volume of flow is a direct function of constitutionally defined state and local land use authority and should not be regulated by the Federal Government.

Rationale: The scope of NPDES is to require permits for the discharge of "pollutants" from any source into waters of the United States. There is no reference to controlling flow rates and volumes. It is the "pollutants" in stormwater that are the subject of regulation, not the flow itself. The compo-

nents of flow are a local – not a federal – responsibility, and federal intrusion into this right of states and local governments would be a major policy shift that is outside the purview of the federal agencies without a clear Congressional mandate.

Unless the federal government intends to impose a "no growth policy," there will be impacts from growth and expansion and one of them is in flow peaks and volumes. Local governments have long recognized the impacts of urbanization in terms of runoff volume and peaks. Many local governments already have ordinances in place to mitigate these impacts. While these measures can reduce peak rates, flow volumes and mitigate damaging impacts, they can seldom completely eliminate increases.