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February 26, 2009

NAFSMA Comments on the
Effluent Limitations Guidelines and Standards
for the Construction and Development Point Source Category
November 28, 2008 Proposed Rule

Docket ID No. EPA-HQ-OW-2008-0465

Introduction

The National Association of Flood and Stormwater Management Agencies (NAFSMA) is a 30-year old national organization based in the nation's capital that represents local, regional, and state flood and stormwater management agencies, most of which are located in large urban areas. NAFSMA members serve more than 76 million citizens by providing flood and/or stormwater management.

Many of our member agencies are local jurisdictions directly responsible for not only following, but also regulating others affected by EPA rules. We are proud of our partnerships with EPA, the Corps of Engineers and FEMA.

NAFSMA recognizes the challenges of providing nationwide rules addressing sediment in our waterways, while integrating current NPDES regulations, state and local nuances, best available technology, environmental concerns, and compliance costs. NAFSMA wants to be an asset in developing the Guidelines and Standards in collaboration with our Federal partners.

The NAFSMA comments below are provided on the proposed Rule issued on November 28, 2008. General comments are followed by specific comments.

General Comments

1. Apply the Maximum Extent Practicable (MEP) standard Applicable to Municipal NPDES permit programs

The preamble to the proposed rules contains a discussion of the NPDES permit requirements applicable to municipal separate storm sewer systems (MS4s), including the requirement to develop stormwater management programs that include the regulation of discharges from construction sites. However, the preamble fails to recognize the fundamental statutory limitation which provides that MS4s must regulate such discharges to the "maximum extent practicable" ("MEP"). Although EPA proposes to establish numeric effluent limitations applicable to the construction and development industry in this permit, it should be made clear that MS4s are responsible for enforcing those limitations through their stormwater management programs only to the extent that it is "practicable" for municipalities to do so.

2. Develop a more comprehensive plan before setting nationwide standards

Our understanding is that a relatively small sampling of sites was used for data collection. We believe that not only should a much larger sampling be performed, but that it may take several years to determine action levels. We would propose that EPA consider a national approach to collecting data and allowing local and state jurisdictions a number of years (5 years or more may be appropriate) to participate in a plan for setting benchmarks/action levels for turbidity. This data should be studied to determine if numeric limits are even appropriate. It is also important to note that turbidity is only an indicator of the possible presence of pollutants. Its use should be limited to triggering the need for improving pollution prevention measures.

Consider this request/suggestion in light that this nation has immense diversity of physical and institutional conditions. Rainfalls vary from long-duration storms of low intensities to extreme intensity downpours, from areas that average well over 60 runoff producing storms to ones that produce less than 8 on an annual average, soils that range from flat terrains that are sandy to ones that have steep slopes and heavy clays, areas that have precipitation events that occur throughout the year to ones that have very short seasons of precipitation with long periods of virtually none, areas that are semi-tropic to ones that have deep frost penetrations and ones that have severe freeze-thaw cycles, and many other diversities of conditions that have to be dealt with. One set of technical regulations is not likely to be appropriate to protect the receiving waters and their ecologies. For example, there are parts of the country where ephemeral steams will carry under ambient conditions over 500,000 part per million of solids when runoff occurs and rivers and streams that have aquatic species that need high turbidity. The current proposal does not reflect these diversities and will create, in many cases, significant economic burden without commensurate environmental benefit. All of the aforementioned argues for much more technical evolution and study before final effluent guidelines are promulgated.

3. Consider a more rigorous study of the data to determine if Numeric Limits are an appropriate approach

There is much concern about the data and analysis used to develop the 13 NTU effluent limitation. We request that if the EPA incorporates an effluent limitation based on turbidity, that it allow the effluent limitation to be set relative to background levels, including ambient turbidity during rain events, or levels set by delegated states and tribes. As discussed earlier, it is most difficult to set a nation-wide standard for turbidity and careful consideration should be given to local soil conditions, rainfall patterns and sensitivity of receiving waters. This approach incorporates flexibility into the rulemaking.

4. Use a more scientifically-based approach to determining best available technology

Based on the documentation, it appears that much information used to determine availability of certain technology was gathered from vendors. Our experience is that vendors have not been a reliable source for identifying technologies, either from the availability or effectiveness perspective. As an example, Active Treatment Systems (ATS) are considered an “unknown” in the Texas Gulf Coast. This technology often places an unreasonable economic burden on the discharger and may involve the use of flocculants and/or coagulants which in turn may create new health and environmental concerns and require special handling and disposal. We request that the EPA re-examine the “Demonstration Status” of ATS using more objective sources, such as compliance officials in the construction and development industry and state and local government compliance inspectors.

Specific Comments on Options 1, 2 and 3.

5. **Option 1.** This option allows for use of what are considered the most common, widely-recognized, effective, proven practices for protecting streams from sediment and resulting turbidity inputs from land disturbing activities. Many of those practices, used in conjunction with additional measures such as double silt fences, higher strength fencing behind the silt fence and stone filters in conjunction with silt fencing, are also effective when protecting sensitive waters.

This option represents achievable measures and is the most reasonable of the three options considered, with the exception that the metric of the 2-year, 24-hour storm or 3,600 cubic feet per acre used to size the sedimentation basin is inappropriate as a national standard, and is particularly inappropriate in the semi-arid and arid southwestern states. Appropriate metrics for sediment basin sizing should be left to the state or local authority to develop based on regional hydrology.

6. **Option 2**. This option introduces the 30-acre site threshold, a 13 NTU limit that is considered to be impractical, if not impossible, to meet in many areas of the nation and a problematic Erosivity Factor (R Factor).

The site size of 30 or more acres, based on total size, not disturbed acreage is problematic. We should be encouraging operators of large sites to phase construction and development activities by basing the size limit on the disturbed area. The guideline should be based on disturbed area at a given time, not the total project size to provide incentive to minimize area of disturbance. As written, this rule is a disincentive to phasing of construction and development.

Many areas have background NTU readings that are far higher than the 13 NTU limit recommended, resulting in not being able to determine the impact of land-disturbing activities on the water. At a minimum, should EPA choose to use an NTU numeric limit, which we do not recommend, the limits should be selected based on a more regional basis, selected through science by local and/or state-level jurisdictions.

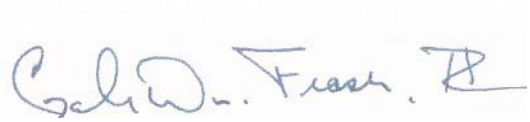
The use of the Erosivity Factor (R Factor) from the Revised Universal Soil Loss Equation is problematic as a compliance trigger. This factor is currently available in some areas of the country only on a county-wide basis. In many parts of the country erosivity can vary greatly from one site to another within the same county. Also, since erosivity is based in part on historic monthly precipitation trends it adds a layer of complexity in determining whether the site needs to meet a maximum turbidity limit based on the actual timing of construction. Additionally, it is not clear how the R Factor value of 50 was selected, but the published R Factors based on the 23 major soil classifications in the United States are already based on an extreme case of continuously fallow ground on a continuous 9% slope. Any R Factor value chosen as a regulatory threshold should be based on the optimization of cost vs. achievable benefit, and there is no evidence to us that such an analysis has been performed. We further recommend that this threshold also be developed by each state or local authority, not by the EPA.

The financial or compliance costs, have not been fully considered for this option. It appears that dated information has been used to determine costs. EPA has admitted that consideration of the total ability or cost to provide active treatment systems has not been determined and as such, the nation could expect costs to exceed EPA estimates.

7. **Option 3.** As mentioned in discussion of Option 2, we are concerned with the 13 NTU limit, the compliance costs and the science behind determining methods available for treatment. We highly recommend that some or all of the recommendations listed in the General Comments above be used to better set benchmark/action levels over a longer period of time.

NAFSMA very much appreciates the opportunity to submit these comments on behalf of local sponsors across the country. NASFMA is available to provide further insight, comments, and information that may be considered helpful to EPA during this decision-making process.

Sincerely,



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