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NAFSMA Position On Municipal Stormwater Management Issues

(Modified and Approved April 2008)

I. Introduction

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

NAFSMA supports the Clean Water Act and the use of tools such as the NPDES Permit Program, TMDLs and adaptive management to help local jurisdictions determine the appropriate level of participation in cleaning the nation's waters. We agree that clean streams should be protected and impaired streams cleaned; however, in order to facilitate the work, it is important that the rules and guidelines are clear and feasible.

Section 402(p) (3) of the Federal Clean Water Act clearly intends to establish the standard of compliance for municipal stormwater discharges as the “. . . reduction of stormwater pollutants to the maximum extent practicable . . .”. However, this reasonable standard of compliance is often superseded in NPDES and individual State permits. This then results in local governments being required to implement unreasonable measures to achieve impractical numeric water quality criteria and/or permit limitations, runoff volume controls, and Total Maximum Daily Loads (TMDLs). These permit requirements are pushing stormwater programs throughout the country beyond the technically achievable and fiscally responsible compliance standards set forth in the Clean Water Act and in many cases with no commensurate water quality benefit.

Many municipalities throughout the country, at their own expense and without Federal funding, are making significant improvements in managing stormwater quality and have been largely successful in awakening their residents, businesses and leaders to the importance of reducing this previously unidentified source of pollution. Over time, these efforts will improve water quality of the nation's waters. However, increasingly complex and impractical permits, constant threat of litigation and audits and enforcement activities are serving to impede local government's efforts and often lead to the implementation of costly and unproven stormwater treatment systems at the expense of real progress. These reactive measures appear to be undertaken just to show that something is being done and despite the fact that the science is usually insufficient to demonstrate a commensurate environmental benefit for the systems and practices being implemented.

NAFSMA desires and is fully prepared to work with Congress and the U.S. Environmental Protection Agency to define a regulatory framework for municipal stormwater programs that will assure the improvement of stormwater quality and the protection of our nation's waters.

NAFSMA believes that first and foremost, it must be recognized that point and non-point sources of pollution cannot be regulated the same way. It is impracticable and sometimes impossible for local jurisdictions to significantly reduce many non-point sources on their own. It often requires State and Federal rules to make this happen. For example, many pollutants are naturally deposited via air and wildlife. The point vs. non-point issue is the first of five that we believe will require amendment to the Clean Water Act.

In addition we recommend four additional areas of concern be addressed.

- Point vs. Non-Point *
- Clarification of the term “Maximum Extent Practicable”*
- Total Maximum Daily Loads (TMDLs)*
- Industrial Facilities*
- Construction Activities Management*
- Permit Simplification
- Phase II Municipalities
- EPA/State Funding, Research and Technical Assistance
- Rate and Volume of Flow
- Monitoring

*requires amendment to the Clean Water Act

II. Stormwater Committee Mission Statement

The Stormwater Committee identifies and addresses stormwater quality and quantity issues affecting local governments including tracking, evaluating and making recommendations regarding federal legislation and regulations. The committee coordinates with other associations such as the National League of Cities, National Association of Counties, U.S. Conference of Mayors, National Governors' Association and American Public Works Association regarding stormwater quality and quantity management issues.

III. General Statement

NAFSMA strongly encourages the recognition of regional diversity and local responsibility in the development of new, and implementation of existing, policies and programs; and to include local, regional, and state entities in the development of policies, programs, regulations, and guidance.

NAFSMA understands the need for national policies and programs. However, NAFSMA also encourages recognition of the regional diversity in the United States, the difficulty of a “one size fits all” approach, and that local and regional entities have a role and responsibility in local land use decision making.

IV. Point vs. Non-Point

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 Of the CWA) to a new, non-point source municipal stormwater program.

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 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 which was clearly intended to replace the standards that were in place prior to the amendments. However, be-

cause 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 has resulted in several lawsuits and is pushing local government 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.

NAFSMA believes that many significant improvements to stormwater quality can be achieved by cooperative efforts at all levels of government and business. However, Municipal Separate Storm Sewer System (MS4) permits should not become an aggeration of such unachievable requirements such as eliminating pollutants that emanate from legal, often times federally approved, use of common products.

NAFSMA does not support stormwater treatment plants, but if for some reason such requirements are mandated, then the Federal Government must provide funding for those efforts similar to Waste Water Treatment plants in the 1980's and 1990's.

V. Maximum Extent Practicable

Amend the Clean Water Act to recognize the “Maximum Extent Practicable” (MEP) standard as the required standard of compliance for municipal stormwater discharges; and, define MEP as a technically sound and financially responsible program that is not based on numeric criteria, but which is based on the implementation of effective best management practices (BMPs).

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, as confirmed by EPA in the 1999 Phase II rules, and also upheld by the 9th Circuit Court of Appeals, is being routinely superseded in NPDES permits nationwide by impractical standards of compliance, notably numeric effluent limits and receiving water limitations.¹ 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 local governments comply with standards for pollutants that do not provide evidence of meeting beneficial water quality objectives and/or are beyond the authority of local governments to control.² This approach leads to little improvement to water quality and serves to de-energize real, global solutions to ubiquitous water quality problems caused by legal, everyday sources such as pesticides and brake pad wear.

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 should change over time as BMPs and strategies evolve, resulting in 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, while placing major fiscal burdens on local governments and the citizens they serve.

VI. Total Maximum Daily Loads (TMDL)

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 Sciences³ by:

- **Encouraging and accepting use attainability analyses (UAA), using the existing flexibility within the Clean Water Act, which focus 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 recommends that Congress require that a UAA become the first step of a TMDL process if a water body-specific UAA has not been done. Where significant new costs are incurred in expediting UAAs, 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 in 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 the results of earlier efforts are evaluated.**
- **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 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).**
- **Listing of streams: The pollutant samples need to go through quality control procedures and only the pollutants of concern with historic, physical and sound scientific evidence should be considered. (In other words, grab samples with a limited number of frequencies should not qualify as evidence for listing)**
- **Delisting of streams: Delisting of streams due to improvement in the water quality based on the implementation of management measures and BMPs need to have the same level and priority of effort as listing of pollutants.**

The current USEPA TMDL policy does not recognize the BMP based nature of municipal stormwater programs nor does it clearly provide for load 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 management 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. Otherwise, local governments will be forced into cost prohibitive, unproven treatment technologies for pollutants that are generated by diffuse and uncontrollable sources.

Examples of the practical limitations facing municipal stormwater discharges would be TMDLs for heavy metals including copper, mercury and zinc. For example, 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 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, often unproven treatment systems, would result in compliance with numerical waste load allocations.

We must recognize that to base stormwater related TMDLs on water quality standards will be seriously problematic. 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 dry weather stream conditions and do not even consider water conditions in urban water bodies during wet weather periods.

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 are likely to be modified on the basis of what we learn through an adaptive management strategy. Presumed compliance, by successfully implementing specified BMPs, similar to the CSO policy is the preferred and practical approach for complying with the waste load allocations in TMDL.

VII. Industrial Facilities

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.

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 industrial 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. Current law also mandates that local governments also exercise controls on the dischargers into the municipal system. 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

stormwater runoff directly into the municipal stormwater system, thereby eliminating duplicated regulation of industrial permittees.

VII. Construction Activities Management

Eliminate the duplicated construction activities permitting and turn it over to local governments to administer, or eliminate the provisions in municipal permits to administer the program. Modify the CWA to clearly define who will administer the construction activities program and affirm that duplication in its administration is not in the interest of United States.

Under the current separate stormwater discharge permits, municipalities are required to have construction activities management programs, even though the permits for these activities are issued by the federal government or the states. This creates much confusion as to who is actually responsible for administration of these activities and much uncertainty regarding which level of government will enforce the construction permit conditions. In addition, the municipality is also subjected to enforcement actions if the federal government or the state determines that it is not pursuing construction management activities in sufficiently aggressive manner or the documentation is lacking on how it is being administered. The end effect is a waste of fiscal resources at all levels of government.

IX. Permit Simplification

EPA should develop guidelines for permit writers that would simplify permits and clearly identify performance standards based on the types of waters being protected and field performance of applicable BMPs.

NPDES permits for municipal stormwater discharges are becoming so cumbersome, prescriptive and complex that they actually impede progress on water quality improvements. Simplification is critical for success. Many permits are being written to require compliance with prescriptive water quality objectives without regard to the limitations of the drainage system, the ubiquitous sources of pollutants or the physical and fiscal realities of achieving the stated requirements. Even if treatment plant construction were mandated (NAFSMA in no way supports such a concept), it would take decades and many multiples of billions of dollars to re-plumb drainage systems and construct treatment plants and, will in fact, create other unforeseen environmental damages.

X. Phase II Municipalities

Permit requirements for Phase II municipalities have now become a major portion of permitted local jurisdictions. The difficulties of providing significant pollutant reduction measures on limited budgets will be an increasing problem for these communities. We continue to believe that the permits should be limited to a number of simple, cost-effective and field-proven best management practices in order to be a success. NAFSMA recommends that we work with Federal and State agencies to provide expertise on what works and what doesn't in order to limit unnecessary spending.

The municipal stormwater program is in effect a large demonstration project. 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 field-proven best management practices that are practical, effective and affordable. Otherwise, the legal and regulatory battles that have impeded progress of the Phase I program will paralyze the Phase II program.

XI. EPA/State Funding, Research and Technical Assistance

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 that includes the gathering and maintenance of BMP field performance data. If BMP retrofit projects or other structural BMPs become required permitted activities, funding should be made available.

If the federal government is going to mandate such far reaching programs as the municipal NPDES stormwater permitting program, 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 state and local costs associated with the pursuit of federal NPDES stormwater program objectives. It is unreasonable to force state and local governments to implement a federal program for which the science and effectiveness is unknown without providing adequate funding and technical support by the federal government.

Monitoring requirements also fall under this category. Federal and/or state funding should be available to support specific monitoring objectives.

XII. Rate and Volume of Flow

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.

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. At issue are the “pollutants” in stormwater that are the subject of regulation by the federal act, not the flow itself. The drivers of flow are a local, not a federal responsibility, and federal intrusion into this land use authority right of states and local governments would be a major policy shift that is outside the purview of the federal agencies.

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 their increases. Federal intrusion into these practices can, in fact, be counterproductive to local needs of already successful local practices already in place.

XIII. Monitoring

U.S.E.P.A. should develop stormwater permit monitoring guidance for EPA regions and the states issuing NPDES permits which (i) eliminates duplicative monitoring requirements for permitted stormwater systems, (ii) eliminates redundant stormwater characterization monitoring, (iii) focuses attention on evaluating effectiveness of the field-applied BMPs, (iv) evaluates the long term effectiveness of the permittee stormwater pollution prevention plan’s (SWPPP) administration, and (v) provides the basis for the adaptive management of the SWPPP and its field BMPs.

Many municipal stormwater permittees are being overwhelmed with monitoring requirements which simply duplicate monitoring findings already in hand, duplicate current monitoring being done by others, or focus monitoring efforts at in-stream locations which cannot demonstrate the effectiveness of the municipalities stormwater permit activities. Often the required monitoring does not result in information useful in adaptive management because the data is gathered in either a method or location that precludes being able to assess the effectiveness of BMPs. In addition, federal or state-required monitoring often supercedes the MEP standard, detection limits and BMP capabilities.

As a result, the effectiveness of BMP's cannot be accurately determined; the benefits of adaptive management cannot be secured for the advancement of the SWPPP; and the value of the fiscal resources applied to such mis-directed monitoring is lost to the stormwater quality objective.