



National Association of Flood & Stormwater Management Agencies
PO Box 56764, Washington, DC 20040
202-289-8625 www.nafsma.org

NAFSMA Position on Municipal Stormwater Management Issues

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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. We are stewards of the environment and we support the core mission of the EPA in its effort to reduce pollution in our receiving waters by stormwater management regulations and guidance. In the spirit of cooperation and collaboration, NAFSMA offers the following position.

NAFSMA supports the Clean Water Act (CWA) and the use of tools such as the National Pollutant Discharge Elimination System (NPDES) Permit Program, Total Maximum Daily Loads (TMDLs) Program and adaptive management to help local jurisdictions determine the appropriate level of participation in cleaning the nation's waters. We agree that healthy water bodies should be protected and impaired water bodies restored; 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 CWA 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 However, this reasonable standard of compliance is often superseded in NPDES permits, individual State permits, and TMDLs. Some local governments are being required to implement measures to achieve numeric water quality-based permit limitations that can be extreme. These permit requirements are pushing stormwater programs throughout the country beyond the reasonably achievable and fiscally responsible compliance standards set forth in the CWA 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 educating their residents, businesses and leaders to the importance of reducing this previously unidentified source of pollution. NAFSMA believes that these efforts will continue to improve water quality of the nation's waters.

NAFSMA desires and is fully prepared to work with Congress and the Environmental Protection Agency (EPA) 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. A Memorandum of Understanding (MOU) was developed in 2014 listing roles and responsibilities as well as a list of key activities advocating for Low Impact Development (LID) Best Management Practices (BMPs) and Green Infrastructure (GI).

NAFSMA believes that first and foremost, it must be recognized that municipal stormwater cannot be regulated the same way as traditional point sources of pollution, such as publicly owned treatment works (POTWs) and industrial facilities. Stormwater presents unique challenges. For example, unlike traditional point sources, stormwater is dominated by diffuse sources and characterized by extremely variable (unpredictable) flow and water quality conditions. It is impracticable and sometimes impossible for local jurisdictions to address all aspects of stormwater management individually. Recognition of

these challenges is paramount if stormwater programs are to be effective in improving water quality of the nation's waters.

Accordingly, we believe that the following issues require an amendment to the CWA:

- Clarification of the term "Maximum Extent Practicable"
- Total Maximum Daily Loads (TMDLs)

In addition, we recommend the following additional areas of concern be addressed.

- Integrated Approach
- Permit Simplification
- Phase II Communities
- EPA/State Funding, Research and Technical Assistance
- Monitoring

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 including the National League of Cities, National Association of Counties, National Association of Clean Water Agencies, U.S. Conference of Mayors, National Governors' Association, American Public Works Association, Water Environment Federation, Water Environment & Reuse Foundation, and others regarding stormwater quality and quantity management issues.

III. General Statement

NAFSMA encourages the recognition of regional diversity and local responsibility in the cooperative 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. Municipal Stormwater Runoff is not a Point Discharge

Prior to the 1987 CWA amendments, stormwater (despite its non-point source nature) was considered a point source that was generally exempted from permitting requirements except where discharges were identified as significant contributors to water pollution. 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 standard of compliance which was clearly intended to replace the standards that were in place prior to the amendments. However, 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 has resulted in several lawsuits and is pushing local government agencies into costly, unreasonable programs that negate the intent of the 1987 amendments.

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 aggregation of such unachievable requirements such as eliminating pollutants that emanate from legal, often times federally approved, use of common

products such as fertilizers, pesticides, and brake pads.

V. Maximum Extent Practicable Standard

NAFSMA concurs that interactive stormwater management programs with a wide array of LID BMPs and strategic plans to reduce and prevent discharge of key pollutants are needed. In fact, we believe that the MEP standard will, by definition, change over time as BMPs and strategies evolve, resulting in incremental improvements 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.

VI. Total Maximum Daily Loads (TMDLs)

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 Research Council of the National Academies by:

- Recommending states or EPA to consider use attainability analysis (UAA) as part of the development of a TMDL for a water body. The UAA should focus on identifying the needs and the legitimate beneficial uses of the watershed, recognizing community values, and finding practical, positive actions by using existing knowledge and data. NAFSMA recommends that the CWA be amended to require a UAA as the first step of a TMDL development process if a water body-specific UAA has not been done.
- Recommending states or EPA to consider expediting UAAs and/or TMDLs prepared by municipalities that choose to do so. When a municipality, at its own discretion, prepares a UAA and/or a TMDL, the appropriate regulatory agency should devote necessary resources to review and approve it. Where significant new costs are incurred in executing UAAs and TMDLs by local and state agencies, federal funds should be made available for these 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 CWA 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). This implementation could advocate for use of more LID or GI BMPs in the permits.
- Listing of water bodies: Pollutant samples to be used as evidence for listing water bodies as impaired should meet rigorous quality control procedures and only the pollutants of concern with historic, physical and sound scientific evidence should be considered.
- Delisting of water bodies: Delisting of water bodies due to improvement in water quality as the direct result of the implementation of management measures and BMPs should be required to have the same level and priority of effort as listing of water bodies.

The current EPA 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. Stormwater agencies acknowledge the fact that waste load allocations are a mandate of the

TMDL process. Otherwise, local governments may be forced into cost prohibitive, unproven treatment technologies for pollutants that are generated largely by diffuse 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. Stormwater agencies can implement BMPs such as low impact development features which capture and treat stormwater or educational campaigns urging consumers to purchase non-metallic brakes and controlling minor sources of copper from certain industrial sources.

We must recognize that basing stormwater-related TMDLs on current water quality standards will not adequately address the continued deterioration of water quality throughout the United States. 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 flow conditions and do not even consider flow conditions in urban water bodies during wet weather periods. Extreme variability and unpredictability of flow and water quality during wet weather creates unique challenges in applying water quality standards to stormwater.

EPA should move strategically 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 is learned through an adaptive management strategy. Presumed compliance, by successfully implementing specified LID BMPs, similar to the combined sewer overflow (CSO) policy, is the preferred and practical approach for complying with the waste load allocations in TMDL.

VIII. Integrated Approach

EPA should develop guidelines for permit writers to encourage the use of an integrated approach / integrated planning framework that encourages and incentivizes regional stormwater recharge and reuse as an alternative to the traditional approach to stormwater regulations. This integrated approach needs to be comprehensive with guidelines that eliminate barriers for communities to implement LID and GI including any permitting processes as well as operation and maintenance requirements.

We understand EPA is weighing a number of flexibilities for municipalities and others subject to the EPA's Integrated Planning and Permitting Policy (IP3) requirements, such as allowing states with equivalent stormwater programs to regulate in lieu of EPA, giving industry as many as 30 years to implement retrofits, creating separate planning or permitting processes for interstate roads and bypassing a national permitting program in favor of a national list of sites that must comply with the post-construction stormwater requirements.

One of the biggest obstacles to efficient and cost-effective stormwater quality management is the fact that MS4s were long ago designed to provide flood protection by conveying as much water away from urbanized, developed areas into receiving waters. The traditional design of the MS4 has created a situation where pollutants must be prevented at the source, treated at the "end of pipe" or must otherwise be diluted before reaching receiving waters. Under this system, pollutants that cannot or are not prevented at the source therefore become an immediate problem for those charged with managing water quality in the MS4. Once pollutants enter the system, municipalities may have no control over the journey the pollutants take and whether the pollutants may be addressed before reaching the receiving water. In addition, once pollutants enter the system, it may be impossible to determine their source. Monitoring, therefore, serves only to highlight the existence of a discharge and offers no guidance for preventing discharges in the future.

The current regulatory framework addresses numeric limits in receiving waters through a combination of a prohibition on discharges and an iterative process to assist permittees. NAFSMA supports a more incentive-, not punitive-based regulatory framework. We support NPDES permits that offer regionally-appropriate solutions to control the discharge of pollutants in addition to consequences for exceedances

of water quality standards. We believe that NPDES permits containing such alternatives can benefit stormwater management and increase reuse and thereby meet beneficial goals beyond improving water quality. Such an approach can increase water supply, protect resources downstream of the MS4, reduce treatment costs and encourage municipalities to address discharges both at the source and before they exit the MS4.

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 on the known field performance of applicable BMPs. Vague and nonspecific MS4 permits are actually impeding progress on water quality improvements. Permit simplification is critical for success of the overall Stormwater programs.

X. Phase II Communities

Permit requirements for Phase II communities have now become a major portion of the Stormwater NPDES program. Providing significant pollutant reduction measures on limited budgets will be an increasing problem for these communities. NAFSMA anticipates impacts on Phase II communities may be significant as the program progresses.

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 such as those from International Stormwater BMP Database. If BMP retrofit projects or other structural BMPs become required permitted activities, funding should be made available.

Federal funding, technical, and research capabilities are essential to support the MS4 permitting and TMDLs programs, and should be provided for state and local programs associated with the implementation of federally mandated MS4 and TMDL programs. Local governments do not have the resources necessary to advance the science and verify the effectiveness of federal mandates without adequate funding and technical support assistance by the federal government. Enhanced site and watershed scale models that analyze BMPs so MS4 Permittees can develop tactical BMP deployment strategies need to be funded and completed.

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

XII. Monitoring

EPA 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's administration of its stormwater pollution prevention plan (SWPPP; a.k.a. stormwater management plan or SWMP), and (v) provides the basis for the adaptive management of the SWPPP (or SWMP) and its field BMPs. Monitoring requirements for LID and GI BMP should be minimal and not duplicative for BMPs proven to be effective in eliminating stormwater contaminants.