

TAKE ACTION on the Proposed EPA Stormwater Discharge Limit!

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I. Summary of Effluent Limitation Guideline:

- On Nov. 28, 2008, EPA published proposed Effluent Limitation Guidelines (ELGs), a new storm water regulation that will have an estimated annual cost of \$1.9 billion. Comments are due by February 26, 2009.
- The proposed ELGs are part of a court order and EPA must finalize them by Dec. 1, 2009.
- Once finalized, the ELGs will be implemented through existing State- and EPA-issued National Pollutant Discharge Elimination System (NPDES) permits; and will have a direct and significant impact on virtually all aspects of the construction industry.
- EPA is considering three regulatory options:
 1. Prescriptive sediment and erosion controls (i.e., BMPs);
 2. Prescriptive sediment and erosion controls (i.e., BMPs) PLUS a numeric turbidity standard for construction on certain larger sites that meet rainfall and soil-type conditions;
 3. Prescriptive sediment and erosion controls (i.e., BMPs) PLUS a numeric turbidity standard for all sites that disturb at least 10 acres.
- For Options 2 & 3, EPA is considering a numeric turbidity limit of 13 NTU, which will require monitoring and the use of Active Treatment Systems (ATS) with an estimated compliance cost of approximately \$15,000 – 45,000 per acre, according to industry estimates. Due to inherent variability of conditions and ATS performance, EPA cannot guarantee that such systems always will achieve the 13 NTU mandate, exposing thousands of contractors to legal enforcement actions.

- Once finalized, the ELGs will apply to all land disturbing activities, including construction of highways, streets, bridges, tunnels, pipelines, transmission lines and residential, commercial, and industrial structures.
- The ELGs will also impact the construction activities conducted by state and local governments, as well as how they administer and enforce their existing erosion control & storm water management programs. EPA's proposed end-of-pipe NTU limits also could severely impact new construction and regional development.

II. NAHB Position

- *The building community supports a reasonable erosion and sediment control approach, and we believe EPA's Option 1 (with appropriate editing and clarification) could satisfy EPA's legal obligations. But we strongly oppose a numeric effluent limit that mandates the use of ATS, which is unproven on a national scale and will not guarantee compliance with the 13 NTU proposed legal limit.*
- The proposal is currently open to public comment through February 26, 2009. Affected parties, including state and local governments and HBAs, must act quickly and submit comments opposing any numeric treatment standard (Options 2 and 3).
- EPA has not proposed any "Post Construction" requirements as part of this ELG proposal. We agree with EPA that post construction issues are not appropriately addressed through an ELG rulemaking and support EPA in this aspect of its proposal.
- NAHB has developed a draft sample comment letter for your use, which is available at www.nahb.org/ELG.

III. Instructions for Participating in the ELG Rulemaking

1. Talk to your members, solicit and draft comments and submit them to EPA. Consider asking the chairman of your Environmental, Land Development or similar committee (or other qualified individual) to draft comments on behalf of the HBA. Ask each of your members to submit a letter. EPA especially needs to hear from practitioners on how the proposal will impact them, their construction practices, and their businesses.
2. Alert other affected parties of the potential impacts of the proposal and urge them to develop and submit comments. Potential allies include contractors, real estate agents, commercial builders, state and municipal government officials, state and local storm water program coordinators, road and transportation builders, other linear construction contractors, etc. Stress the impact of the proposal on the costs and ability to provide needed public services. Consider hosting a meeting or conference call to discuss the issues and develop a common set of concerns for submittal to EPA.

IV. Writing Comments: Customizable Template letter for HBAs and members to use to submit comments to EPA

NAHB developed the following sample comment letter (below) for your use. You may simply cut and paste it on your letterhead, paying attention to all of the highlighted areas, or you may modify it by adding additional information or data. The letter can also be accessed at NAHB.org/elg/. We encourage you to copy NAHB on any and all correspondence with EPA and to call NAHB staff with questions or concerns. It is important that our message to EPA is consistent, but also that EPA hear from a broad and numerous demographic populous.

Transmitting Comments:

EPA will accept comments via any of the following delivery mechanisms. All comments must be sent by Feb. 26, 2009. This means that comments are uploaded on regulations.gov on or before the 26th, emailed on or before the 26th, or postmarked on or before the 26th.

1. Go to www.regulations.gov web site:

Enter EPA-HQ-OW-2008-0465 in the “Search Documents” field
In banner on left, click on “Proposed Rules” link
Click on “Send a Comment or Submission”
Fill out form and add any attachments with your comments

2. Email comments to OW-Docket@epa.gov

3. Mail Comments to:

USEPA Docket Center
Environmental Protection Agency
Docket Number EPA-HQ-OW-2008-0465
Mailcode 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

YOUR LETTERHEAD HERE

February **X**, 2009

USEPA Docket Center
Environmental Protection Agency
Docket Number EPA-HQ-OW-2008-0465
Mailcode 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Comments regarding EPA's Proposed Effluent Limitation Guidelines for the Construction and Development Industry; Docket No. EPA-HQ-OW-2008-0465.

Dear Mr. Pritts:

The **XX HBA** and its regional affiliates, which represent over **X** member companies, appreciate the opportunity to comment on the EPA's Proposed Rule: Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category (C&D ELGs). Our members consist of individuals and firms that develop land and construct homes, apartment building, light commercial buildings and other industrial projects. Our members live and work in the communities in which they build, and regularly plan and design their projects to optimize environmental protection and resource conservation. In fact, their site designs and treatment technologies often provide environmental protections that exceed federal, state, or local regulatory mandates. Most projects necessitate National Pollutant Discharge Elimination System (NPDES) permits for the storm water discharges associated with their construction activities. EPA's proposed C&D ELGs will unnecessarily complicate these NPDES permits by mandating unreasonable and unjustified additional duties, practices, compliance costs, and liabilities, but which will result in little, if any, demonstrated environmental benefits beyond those associated with existing NPDES permits.

HBAX is extremely concerned about the deleterious impacts that EPA's current proposal would have on our members' businesses. Our builders and developers are already being crippled by the economic downturn, and the ability of the home-buying public to absorb significant new costs, like those contained certain options proposed by EPA. At a minimum, EPA's proposed C&D ELG Option 2 would add a minimum additional cost of \$15-45,000 per acre, according to industry estimates. EPA must consider the following before finalizing the C&D ELG rulemaking:

- C&D ELG Must Correlate with Scientifically Based Environmental Concern and Be Capable of Achieving Intended Result. Storm water discharges associated with construction activity are already heavily regulated and largely controlled. Hence, resulting construction site discharges, contribute a very small percentage of sediment, a conventional pollutant, to the Nation's receiving streams. Nevertheless, EPA has

proposed an extremely expensive and untested regulatory action that is disproportionate to construction activities and alleged environmental risks. Therefore, we request EPA to more thoroughly assess and recognize the significant benefits of the existing NPDES permit program, as well as additional environmental benefits resulting from other state and local regulations addressing sediment. Further, EPA must re-examine its data and recognize that the existing contribution of sediment from storm water discharges from construction sites is small relative to all other unregulated sources.

- A C&D ELG Must Be Adjustable to Site Conditions. The current NPDES program for construction site discharges recognizes and provides sufficient flexibility to address the stochastic nature of precipitation and the variability of other site attributes (such as soils type and topography) by allowing flexibility in the design and implementation of Best Management Practice (BMPs) and other pollutant control measures. This approach has fostered the implementation of appropriate controls on a state and regional basis, while guarding against inappropriate and/or overly excessive requirements. We continue to support that approach, and any new federal requirements must maintain sufficient flexibility to account for the variability of conditions encountered on construction sites across the country, as well as fit within the existing CGP framework that has proven to be effective.
- Enhancing the Existing BMP Approach is a Logical Progression. HBAX supports the use of erosion and sediment control BMPs. BMPs have been proven effective in practice, are known to the regulated community, and are cost effective, thus, they should continue to form the foundation for any future ELG requirements. EPA's Option 1 more-or-less builds on this framework and will help to ensure, on a national basis, that minimum BMPs are considered and, as appropriate, implemented. To finalize the Option 1 approach, EPA is urged to collaborate with the regulated community to ensure that its approach maintains appropriate flexibility but helps to further the significant progress made to date to further reduce sediment discharges from construction sites.
- Numeric Limits Are Not Suitable to Construction. EPA's Options 2 and 3 require dischargers to meet a stringent numeric turbidity limit. HBAX is vigorously opposed to these options for several reasons. First, the science of stormwater control, especially at construction sites, is still evolving and varies from site to site across the country. Technologies that work well at one site might not work at all at others, and absolute numeric limits that may work in one climate, topography, or region may be completely inapplicable and/or unachievable under other circumstances. Second, there is minimal data on the effectiveness of numeric limits to meet desired environmental outcomes. Third, meeting numeric end-of-pipe limits is resource intensive and difficult to implement nationally. Options 2 and 3 will impose costly and unpredictable monitoring and sampling requirements and result in many contractors facing unnecessary liability for natural conditions completely out of their control. Finally, EPA is not legally obligated to promulgate end-of-pipe numeric limits and, we assert, is hard-pressed to legally justify such an approach based on the information supporting this rulemaking.

- 13 NTU Limit is Unattainable and Required Use of Advanced Treatment is Inappropriate. EPA has proposed a set numeric limit of 13 NTU, which is unjustified. The naturally occurring turbidity in most streams and lakes nationwide is much higher than 13NTU. EPA can demonstrate only one way to consistently meet a 13NTU limit; through builders and developers installing Active Treatment Systems (ATS), requiring chemical treatment of the storm water before it is discharged. HBAX is troubled by the fact that chemical treatments for erosion control and pollutant removal from stormwater runoff have not been thoroughly evaluated or ever used in much of the country outside certain very isolated circumstances that are not “nationally applicable.” ATS technologies are not a cost effective or reasonable option for most construction sites, particularly when compared to properly implemented, conventional erosion and sediment control BMPs or even passive treatment systems. There are numerous reasons why ATS is not a viable option nationally, including the necessary costs associated with additional retention ponds and tanks on site, constant and ongoing monitored, and need for knowledgeable experts to provide constant staffing and oversight. We estimate the cost of ATS to range from \$15,000 to \$45,000 per acre, making it economically unachievable. EPA is urged to drop its consideration of a 13 NTU limit and not to select Options 2 or 3 for the final C&D ELG rulemaking.

HBAX appreciates the opportunity to provide comments on EPA’s proposed ELG rule. The proposal raises serious concerns regarding the requirements for numeric effluent limits and active treatment systems. Because it imposes unrealistic, significantly burdensome, and economically devastating impacts on construction site operators, HBAX strongly urges EPA to focus on a BMP-based and flexible approach (Option 1) to ensure a final ELG is economically achievable, effective in reducing pollution from storm water discharges, and workable on a national basis. In lieu of adopting numeric effluent limits, ATS mandates and the burdens that will accompany Options 2 and 3, EPA should focus on implementation of erosion and sediment control Best Management Practices (BMPs) that are practical and consistent with existing state and local permit requirements, and proven effective in protecting water quality.

Finally, we recognize that EPA is under a court-ordered deadline to complete action on this rulemaking by December 1, 2009. We encourage EPA to work closely with the home building industry and NAHB during the comment review process and as it works on a final C&D ELG regulation.

If you have any questions or would like to discuss our comment, please contact XXX at YYY

V. *Suggested Points for your State or local permitting authority to consider:*

1. Review and understand the ELG proposal. The first option is a prescriptive erosion and sediment control and sediment basin requirement. Most permitting authorities are familiar with this type of regulation. The second option is a numeric turbidity limit of 13 NTU for sites larger than 30 acres located in areas with high rainfall and high clay content. Site operators would have to use advanced treatment systems to chemically alter and filter their storm water discharges. Many states and localities have limited experience with this type of technology. For more details, review the proposed rule at <http://www.epa.gov/fedrgstr/EPA-WATER/2008/November/Day-28/w27848.pdf>. Pay particular attention to the regulatory language on pages **72612 – 72614**.
2. Assess the impact of the rule on current state and local stormwater programs and construction operations. The permitting authority should compare the list of BMPs under EPA's sediment and erosion control practices to current state and/or local requirements. Are the requirements in balance? What is the most significant difference between your permitting requirements and the ELG? Are the differences compatible with your program? How will the difference(s) impact implementation and enforcement? What is the states' or localities' experience with polymers? Does your state have guidance on the use of ATS? What are typical background NTU's in state waters? EPA has estimated the annual compliance costs for Option 1 to be \$4.4 million for all states and \$25.1 million for all local governments. Are these realistic? What do you predict the costs and benefits of implementing the ELG to be?
3. Submit comments to EPA. EPA will consider public comments before selecting a final option. Once your state/local government reviews the proposal and understands the new standard, it is important to assess the impact of the rule on the state/local programs that will be responsible for compliance and enforcement and submit reactions, concerns, and comments to EPA. Specific issues of import include technical feasibility, implementation, and the cost associated with implementing the rule.

Additional specific questions for permitting authorities to consider include:

1. How do the sediment basin requirements in the ELG compare to state/local sediment basin requirements (i.e., sizing, storage volume design, length/width ratio, outlet control/skimmer, etc.)?
2. What are the soil stabilization requirements in your state? How does the ELG requirement compare?
3. What are the silt fence and buffer requirements in your state? The ELG requires a 6 feet vegetated buffer requirement from the silt fence. Is this a reasonable idea?
4. In some cases the permitting authority will have to determine equivalent measures in lieu of the ELG requirements for sediment and erosion control? Is the state/local government prepared to make such a determination?
5. How will the state/local government have to change its construction processes to meet the new requirements?
6. How will the state/local government implement and enforce the new requirements, how much will it cost, and how will these new programs be funded?