

National Association of Home Builders

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June 10, 2010

The Honorable Lisa P. Jackson
Office of the Administrator
Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460

**RE: Petition To Reconsider the Construction and Development (C&D)
Effluent Limitation Guideline (ELG) Final Rule;
74 Federal Register 62996, December 1, 2009**

Dear Administrator Jackson:

On behalf of the National Association of Home Builders (NAHB), I respectfully petition the U.S. Environmental Protection Agency (EPA) to use the Agency's authority under the Administrative Procedure Act (APA) to reconsider its final effluent limitation guidelines for the construction and development industry (C&D ELG) and propose a new standard that is more appropriate for this category of dischargers.

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Founded in 1942, NAHB represents more than 175,000 members who are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Even though NAHB's builder members collectively construct about 80 percent of the new homes constructed each year in the United States, nearly all of them are classified as "small businesses" by the U.S. Small Business Administration (SBA).

NAHB's builder and developer members already take numerous steps to reduce or eliminate the introduction of pollutants into the nation's waters to comply with the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting requirements and the myriad of duplicative and overlapping state and local requirements designed to minimize erosion and sedimentation and reduce and manage stormwater discharges. The December 2009 C&D ELG places additional mandates on these small businesses and imposes a very stringent, and potentially impossible-to-meet numeric turbidity limit for those construction activities that disturb 10 acres or more. Even though EPA had recognized the efficacy of the existing federal, state, and local effort when, in 2004, it stated that "construction site stormwater discharges are already being adequately addressed through the existing program,"¹ it nonetheless finalized a rule that will cost billions annually while providing limited environmental benefit.

Given the potential severity of the impacts resulting from the ELG, NAHB consistently raised concerns throughout the development of the rule regarding the data and modeling methodology used to derive the numeric standard; effectiveness and feasibility of the intended control methodologies; and the impacts that will accrue to small businesses who must attempt to meet the overly stringent and under-tested standard. Now that the rule has been finalized, a number of factual errors in EPA's record analyses have been exposed that further support NAHB's concerns and point to the need for serious revisions prior to the rule's implementation. Most notable is the U.S. Small Business Administration Office of Advocacy's April 20, 2010 petition to EPA requesting that it reconsider the C&D ELG (attached). Citing flaws in data collection and manipulation, misinterpretation of technology, implementation difficulties, and unreasonable costs, the petition recognizes the significant negative impacts that will stem from the December 2009 rule and thus, warrants a serious and timely analysis and response. NAHB strongly agrees, fully supports SBA's petition and its supporting documents, and hereby petitions EPA to use its authority under 5 U.S.C. §553(e) to revisit the C&D ELG.

The APA Allows This Action and It Is Not Without Precedent

The Administrative Procedure Act (APA) sets out the general rulemaking obligations that apply to all federal agencies. In short, it allows interested parties to petition for the issuance, amendment, or repeal of a rule.² Today's petition meets the APA requirements. First, NAHB clearly qualifies as an "interested person" in

¹ 69 *Federal Register* 22,477 (April 26, 2004).

² See 5 U.S.C. §553.

this undertaking.³ On behalf of its members, NAHB has participated in the Agency's efforts to regulate discharges from construction activities nearly two decades. Likewise, NAHB's members are directly and materially affected by the C&D ELG.

Second, such action is not without precedent. A similar review was conducted and subsequent rule modifications made in the early 2000's after the Centralized Waste Treatment (CWT) ELG was finalized in December 2000. After obtaining information from the industry that the expected treatment technologies would not result in the desired pollutant reductions, EPA proposed regulatory changes and completed a final rule modification in 2003. Like the response to the CWT ELG, today's request demonstrates that the reductions expected cannot be achieved using the passive treatment system envisioned by the agency and that more complicated, and costly measures would be needed. The Agency is urged to follow the example established by the CWT ELG and takes the steps necessary to reevaluate and modify the final C&D ELG to correct the flaws and reflect the additional information presented by SBA's petition.

Significant Flaws Must Be Corrected

The SBA petition lays out a series of issues that must be addressed and modifications that must be made to ensure that the C&D ELG is properly justified, cost-effective, and can be implemented efficiently. SBA's petition is not based on new data, but rather corrected analyses of data and information contained in EPA's rulemaking record. NAHB herein incorporates the SBA petition and its attachments in their entirety, as well as the following information, as evidence sufficient to compel EPA to reassess and modify the C&D ELG.

I. The Final Standard is Extremely Costly

As demonstrated by the SBA petition, due to the inaccuracies in EPA's data analyses and lack of industry-specific data), the final ELG will cost businesses in excess of \$9.7 billion per year, not the \$953 million estimated by EPA. Using this figure, costs for operators/dischargers will be nearly \$11,000/acre instead of EPA's estimated \$1,518. NAHB contends that the costs more than outweigh

³ The term "interested person," while not defined in the APA, has been interpreted broadly. *See, e.g.*, Attorney General's Manual on the Administrative Procedure Act 39, *reprinted in* William F. Funk, Jeffrey S. Lubbers & Charles Pou, Jr., *Federal Administrative Sourcebook* 75 (4th ed. 2008) ("The right to petition under [section 553e] must be accorded to any 'interested person.' It will be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment or repeal of a rule.").

the benefits and are unreasonable – especially given that they will result in a reduction in baseline total suspended solids of less than 0.25 percent!

As a practical matter, any rule that adds significantly to the cost of each new home while providing minimal environmental benefit must be immediately suspect. These are costs that can be borne by neither home builders nor home buyers. These costs are even more problematic when considered in light of the present economy. NAHB submits that EPA has significantly underestimated the full costs of implementing Advanced treatment Systems (ATS) and, once corrected, the use of ATS and meeting the 280 NTU limit will be shown to be too costly.

II. EPA Incorrectly Set a Passive Treatment Turbidity Standard Based on Data Almost Exclusively from Advanced Treatment Systems

Although EPA cited a series of papers in the record that examined various forms of passive chemical flocculation, such as self-feeding poly-aluminum chloride (PAC) and poly-acrylamide (PAM) logs, the overall conclusion reached through these papers is that numeric compliance limits cannot be consistently met by the examined technologies or by any other conventional technology in common usage at this time unless the numeric limit were to be set extremely high. Despite this finding, EPA nevertheless inappropriately manipulated the data that it had to show that meeting the 280 NTU was possible using passive treatment.

Contrary to this assertion, and as demonstrated by SBA, EPA did so by mischaracterizing the use of modified advanced treatment systems (ATS) as “passive treatment,” even though the treatment required an onsite operator, mechanical pumps, computer monitoring, and other components of active treatment. Had the Agency set a turbidity limit based solely on the data it had for passive treatment, a much higher limit would have been selected. Indeed, SBA concludes that a properly calculated limit based on the data in the record would be 793 NTU.

EPA must revise the final standard to reflect the passive technology it has selected for the final ELG. To do so, it must exclude the data from ATS and re-evaluate the data for true passive systems to derive a limit that can consistently be met by the majority of dischargers using passive treatment technology.

III. Correction of Errors Would Result in a Turbidity Standard in Excess of 500 NTU

As above, EPA has the authority to correct the identified errors and re-promulgate a modified final rule. According to the SBA analyses of EPA data and depending on which error(s) were corrected, the new calculations would yield a numeric limit roughly between 500 and 800 NTU. Recognizing the challenges associated with consistently meeting a set turbidity limit on all construction projects in all areas of the country, regardless of rainfall patterns, soils types, or geography, NAHB put forth a proposed turbidity action level of 1000 NTU. The 1000 NTU level accounts for variability in conditions across the nation and represents the level of turbidity that BMPs and appropriately designed settlement basins should achieve (as a broad generalization) for most sites on a national basis for most 2-year, 24-hour storm events.

IV. An Action-Level Approach is the Most Appropriate Solution

The final ELG establishes a numeric limit of 280 NTU which, if exceeded, could constitute a violation of the Clean Water Act. Because of the wide variability in soils, geography, rainfall, etc. associated with storm water discharges, an approach that provides sufficient flexibility, such as an action-level, is imperative for widespread compliance. Recognizing this need, EPA based its multi-sector general permit, which addresses storm water discharges from a variety of industrial activities, on an action-level or benchmark approach.⁴ The Agency should do the same here.

⁴ See United States Environmental Protection Agency (EPA), National Pollutant Discharge Elimination System (NPDES), Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP), as modified effective May 27, 2009, accessed at http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf on June 7, 2010.

Unlike a limit, which is an enforceable effluent standard that requires significant monitoring and oversight, an action level would represent one or more indicators that, if exceeded, suggest some inadequacy in the installed BMPs and a need for additional action to improve the site's performance. NAHB believes that such a system would directly address the largest remaining source of sediment discharge from construction sites by encouraging operators to maintain BMPs that are most effective at reducing the number of significant discharges that occur over the life of the project. EPA should not unjustly put construction stormwater permittees in the untenable position of being threatened with CWA enforcement and lawsuits because EPA miscalculated the effectiveness and efficiency of its final BAT standard.

V. Other Improvements Should Be Considered

a. EPA Should Reinstate the 30 Acre Threshold

From reading the preamble to the final rule, it is not apparent how or why EPA derived the 20- and 10-acre thresholds. Presumably, because the Agency revised its approach to now rely on passive treatment, it was expected that more dischargers could afford to implement the techniques necessary to meet the numeric limit. Thus EPA arbitrarily selected lower thresholds. As above, however, because the technology selected is not truly "passive treatment" and is much more costly than EPA's estimates, recalculations of the costs will demonstrate that applying the numeric limit to projects disturbing less than 30 acres is not feasible.

b. EPA Should Reinstate the R-Factor Waiver

The R-Factor estimates rainfall erosivity or the potential for soil to wash off disturbed areas at any given location. While initially included in the proposed ELG as a way to reduce storm water management burdens on projects located in areas that traditionally have minimal rainfall and few, if any, storm water runoff problems, EPA deleted the R-Factor criteria after citing concerns over complexity. While this may be so, EPA already uses the R-Factor for "low erosivity waivers" for small

construction sites and has even developed a web site to help project operators determine the R-Factor for their sites.⁵

Use of the R-Factor also allows the Agency to take a risk-based approach to construction stormwater discharge regulations. NAHB believes that applying the R-Factor will better ensure that only those sites and activities that may have a higher probability of significant stormwater pollutant discharges are subject to the ELGs mandates. Removing those projects that are less likely to result in significant discharges can also significantly reduce the costs associated with the rule.

The SBA Petition Has Meaning

When Congress created the Office of Advocacy in 1976 within the U.S. Small Business Administration, it directed the Office to measure the direct costs and other effects of government regulation on small businesses; and make legislative and nonlegislative proposals for eliminating excessive or unnecessary regulations of small businesses.⁶ As per this directive, the SBA Office of Advocacy (Advocacy) exists to protect, strengthen and effectively represent the nation's small businesses within the federal government's legislative and rule-making processes. As such, Advocacy regularly works with federal agencies both formally and informally to improve regulations. While Advocacy staff regularly interact with agency staff throughout the development of rules and regulations, Advocacy files only about 30 – 50 formal comment letters per year.⁷ Considering there are over a thousand rulemakings each year, it is clear that Advocacy must carefully screen and prioritize its activities, focusing on those actions that are likely to have the most significant impact on small businesses and those in which it believes its participation can make a difference.

Advocacy participated informally throughout the ELG rulemaking process and formally by attending EPA's mock Small Business Regulatory Enforcement Fairness panel meetings and submitting comments during the public comment period. In its comments and participation, Advocacy staff consistently raised concerns about underestimated costs and overestimated benefits, lack of support for

⁵ U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System Rainfall Erosivity Factor Calculator, accessed at <http://cfpub.epa.gov/npdes/stormwater/lew/lewcalculator.cfm> on June 7, 2010.

⁶ 15 U.S.C. § 634b(3).

⁷ U.S. Small Business Administration, Office of Advocacy, Background Paper on the Office of Advocacy 2001-2008, October 2008, accessed at <http://www.sba.gov/advo/backgr08.pdf> on June 6, 2010.

the then-proposed 13NTU numeric limit, and the significant impacts that would be faced by thousands of small firms if Option 2 was adopted, among others.⁸ Despite these efforts, the final rule retained many of the infirmities identified by SBA and others, so in an extremely rare undertaking, on April 20, 2010, Advocacy submitted the petition requesting that EPA reconsider the C&D ELG.

Because this is only the second time Advocacy has ever asked an agency to revise a rule after it had been promulgated,⁹ EPA should not dismiss SBA's (and now NAHB's) concerns without careful review and honest reassessment of its prior C&D ELG conclusions. Further, Advocacy's responsibility for looking out for the interests of small businesses deems it uniquely qualified to provide advice on issues such as the impacts and hardships created by the ELG. The impacts of the final ELG are egregious and problematic – particularly for small businesses. NAHB strongly urges EPA to respond positively to SBA's petition by addressing earlier errors and modifying the regulatory approach so that the desired environmental benefits may be achieved at a reasonable cost.

NAHB's members understand the importance of their roles and have demonstrated throughout the years their willingness to take the steps necessary (and oftentimes go beyond the requirements) to protect and improve the quality of our nation's waters. The data, cost, and compliance challenges stemming from the December 2009 rule, however, demonstrate that the final ELG is unworkable, impractical, and cost prohibitive. NAHB looks forward to your leadership in alleviating these difficulties and facilitating compliance and environmental stewardship by revisiting the C&D ELG and making necessary modifications per the SBA petition.

⁸ U.S. Small Business Administration, Office of Advocacy, Comments on the Effluent Guidelines and Standards for the Construction and Development Point Sources Category, February 26, 2009, accessed at http://www.sba.gov/advo/laws/comments/epa09_0226.html on June 7, 2010.

⁹The only other occasion identified in which Advocacy submitted a formal petition was in 1991, when Advocacy filed a rulemaking petition asking EPA to exempt from reporting under the Superfund Amendments and Reauthorization Act (SARA), Section 313 (toxic chemical release reporting), those facilities--most of which are small businesses--having minimal or "de minimis" releases of toxic chemicals. In response, the EPA promulgated a streamlined reporting option for such facilities in November 1994. *See* U.S. Small Business Administration Office of Advocacy Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Calendar Year 1995 U.S. Government Printing Office Washington, D.C.: 1996, accessed at <http://www.sba.gov/advo/laws/flex/95regflx.html> on June 6, 2010.

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If you have any questions regarding NAHB's petition or require additional information, please do not hesitate to contact me at (202) 266-8538 or sasmus@nahb.com.

Sincerely,



Susan Asmus
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