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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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Submitted via Electronic Mail

May 31, 2013

Water Docket
U.S. Environmental Protection Agency
ATTN: Docket ID No. EPA-HQ-OW-2010-0884
Mail Code: 4203M
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Comments on EPA's Proposed Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category; Docket ID No. EPA-HQ-OW-2010-0884

Dear Sir or Madam:

On April 1, 2013, the U.S. Environmental Protection Agency (EPA) published a **proposed rule** to revise the Effluent Guidelines and Standards for the Construction and Development Point Source Category (C&D ELG). 78 *Fed. Reg.* 19,434. EPA first promulgated the C&D ELG on Dec. 1, 2009. 74 *Fed. Reg.* 62,995. The current proposal would withdraw the nationwide numeric discharge limit, which is currently stayed, and change several of the non-numeric Best Management Practice (BMP) provisions of the C&D ELG. EPA is proposing these changes pursuant to a settlement agreement to resolve litigation. The Associated General Contractors of America (AGC) is pleased to submit the following comments in response to EPA's April 1 proposal.

Introduction

AGC is the leading trade association in the construction industry. It dates back to 1918, and today, it represents 30,000 firms in nearly 100 chapters across the United States. AGC's members include 6,000 of the nation's leading general contractors, nearly 13,000 specialty contractors, and more than 11,000 material suppliers and service providers to the construction industry.

These members engage in the construction of commercial buildings, hospital and laboratories, schools, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, levees, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development. These important construction projects are frequently in or near "waters of the United States." When hit by wet weather events, they generate "stormwater associated with construction activity," as defined by the relevant federal regulations. *See* 40 CFR § 122.26(b)(14)(x) and (15). Construction sites require National Pollutant Discharge Elimination System (NPDES) stormwater permits, which are impacted by EPA's C&D ELG. Specifically, EPA's C&D ELG provisions must be incorporated into all construction stormwater general permits and, therefore, the precise contours of those provisions have a direct and significant impact on all construction operations that disturb one acre or more of land.

The C&D ELG's numeric effluent limit (NEL) and monitoring requirements have been on hold, or stayed, since 2011; however, those provisions still appear in the *Code of Federal Regulations* at 40 CFR Part 450.[1] This has caused much confusion across the country as the Clean Water Act requires permitting authorities to add the C&D ELG provisions to all NPDES construction stormwater permits the next time the authorities reissue the their permits. EPA's April 1 proposal would finally withdraw the NEL and monitoring requirements and remove them from the federal regulations (currently found at 40 CFR Parts 450.22(a) and 450.22(b)) and clarify that these provisions do not need to be incorporated into state-issued construction stormwater permits.

In addition, the proposed rule would revise and clarify many of the non-numeric provisions currently included in the subsections of 40 CFR Part 450.21 that require permitees to —

- Control stormwater volume and velocity;
- Control stormwater discharges to minimize channel and streambank erosion in the immediate vicinity of discharge points;
- Provide and maintain natural buffers around waters of the United States;
- Minimize soil compaction and preserve topsoil;
- Stabilize disturbed areas; and
- Minimize the exposure of building materials, waste, etc., to precipitation and to stormwater.

EPA also proposes to add a brand new definition of "infeasible" at 40 CFR Part 450.11(b). Several of the provisions of the C&D ELG require permittees to implement controls, unless "infeasible." Nevertheless, the current C&D ELG does not provide a definition of that term.

EPA has proposed these changes to the C&D ELG pursuant to a **settlement agreement** with the National Association of Home Builders (and other parties) to resolve a lawsuit over the 2009 C&D ELG (*Wisconsin Builders Ass'n v. EPA,* 7th Cir., No. 09-4113, 12/21/12). While not a named party in the lawsuit, AGC has been heavily involved in EPA's efforts to develop appropriate controls for construction site stormwater runoff for more than 15 years.

Executive Summary

For the most part, the proposal tracks the settlement documents, summarizing the litigation, EPA's efforts to "stay" the NEL included in the final C&D ELG, and the proposed changes to that regulation set forth in the settlement itself. AGC carefully reviewed EPA's proposed rule and coordinated with the industry petitioners in the C&D ELG suit. Summarized below are AGC's more general responses to EPA's April 1 proposal. A more detailed section-by-section analysis follows.

[1] EPA admitted that it miscalculated the stormwater runoff limit in its 2009 C&D ELG rule. The agency took direct final action Nov. 5, 2010, to stay the numeric effluent limitation of 280 NTU and associated monitoring requirements. 75 *Fed. Reg.* 68,215 (effective Jan. 4, 2011).

- **AGC strongly supports EPA's proposal to delete the NEL from the C&D ELG.** Existing controls in federal, state and local programs combined with the BMP-based standards in the C&D ELG are efficient means to control turbidity levels in construction site discharges. AGC remains concerned, however, about EPA's ongoing effort to collect data and develop a new numeric effluent limit (middle column of p. 19436). AGC strongly believes that a NEL is not practical. EPA cannot justify a single compliance limit for all locations throughout the nation. If faced with a NEL, contractors would be required to monitor the turbidity levels in the stormwater running off their construction jobsites, implement *extremely costly* advanced treatment controls to try to meet EPA's *potentially unachievable* limit and publicly report any exceedances of the limit. AGC estimates it would have cost industry $10 billion a year to comply with a NEL for turbidity on construction sites nationwide.

- **By and large, AGC finds that the proposed amendments to the various non-numeric BMP provisions of the C&D ELG will provide additional clarity, efficiency, and improve the existing C&D ELG.** AGC supports EPA's recognition of the fundamental principle that it can regulate only the "discharge of pollutants through point sources to waters of the U.S." and agrees with the proposed amendments that are premised on these key facts. AGC supports EPA's efforts to revise current provisions that wrongly imply that EPA can control "on-site" activities or even down-stream environmental concerns, neither of which could be directly related to the discharge of pollutants from point sources (in this case originating from active construction operations subject to NPDES permitting) to waters of the U.S. AGC agrees, as described in the proposal, the non-numeric BMP requirements would apply only during the construction phase and end once construction has ceased and sites have been stabilized.

- In the preamble to its proposal, EPA set forth several "examples of appropriate controls" (or explanations) for the amended BMPs. **AGC recommends that EPA remove this text from the preamble to the final rule and work to develop a separate guidance document as appropriate.** In some cases, EPA's examples appear to contradict the rationale for amending the BMP in the first place, which may lead to confusion for permit writers and permitees. The states' permitting authorities have ample authority to provide guidance on the most effective ways to implement the non-numeric BMP provisions within their jurisdictions. EPA also should encourage permitting authorities (in implementing the C&D ELG) to develop state or locally-appropriate guidance.

  On the other hand, EPA's examples of "What EPA does not mean by the requirement?" would be extremely helpful for EPA to retain in the preamble to the final rule and to include in guidance.

- **AGC supports EPA's proposed definition of "infeasible": whether a control is (1) "technologically possible" OR (2) "economically practicable and achievable in light of best industry practices."** EPA's proposal appropriately recognizes that compliance may be "infeasible" in certain cases when site-specific conditions pose technically impossible or cost-prohibitive hurdles. AGC agrees with EPA's approach to allow a permittee to assert either/or as a reason why a certain control may be "infeasible." EPA said it proposed the definition to avoid inconsistency among permitting authorities; AGC maintains that this is of vital importance to the regulated community.

Specific Comments on Numeric Standard and Monitoring Provisions

- ✓ **REMOVAL OF NUMERIC STANDARD AND MONITORING PROVISIONS AT 40 CFR § 450.22(A) AND 450.22(B)**

AGC strongly supports EPA's proposal to withdraw the NEL and monitoring provisions. As AGC has stated in numerous comment letters and at many meeting with EPA staff, the nature of the construction site operations makes it extremely difficult to develop a single nationwide turbidity limit that can be consistently met through the use of a single technology, on all types of construction sites, under a variety of metrological conditions and construction site challenges presented across a myriad construction activities nationwide. As clearly evidenced by the administrative rulemaking record for the C&D ELG, a NEL will impose significant burdens on the construction industry as well as state and local governments – all of whom overwhelmingly opposed the imposition of any compliance limit and corresponding burdensome recordkeeping/reporting requirements, per their comment letter submitted during the proposal stage.

The benefits associated with a national NEL, in addition to existing federal, state, and local efforts to control stormwater discharge, is limited. EPA's benefit's assessment completed for the C&D ELG estimated that construction sediment discharges represent approximately 0.15 percent of total sediment to surface waters, and that removing all construction sediment discharge would lead to only a 0.25 percent reduction in baseline total suspended solids levels.[2] Thus, when considering the overall contribution of sediment from construction sites relative to other sources, it is clear that there is limited benefit achieved by developing and implementing a numeric effluent limit for the construction and development industry.

What is more, EPA admits (as stated in the C&D ELG technical supporting documents) that the estimated costs of compliance are more than twice the rule's estimated benefits. EPA also has failed to demonstrate that any particular "technology" will universally ensure compliance across the country with the numeric limit.

We remain vigorously opposed to any strict, one-size-fits-all, numeric compliance limit for the following reasons—

1. It is impossible to achieve the exact same result on all jobsites. The science of stormwater control, especially at construction sites, is still evolving and technologies that work well on one site might perform differently on others due to even the slightest change in conditions (e.g., climate, topography, geology, etc.).
2. EPA lacks the data to show that a numeric limit would achieve the desired environmental outcomes. EPA has no sampling data specific to construction to support its numbers. Much of EPA's data has been supplied by commercial vendors. That data may not be nationally representative or meet EPA's established standards for quality assurance or quality control

[2] U.S. Environmental Protection Agency, *Environmental Impact and Benefits Assessment for Final Effluent Guidelines and Standards for the Construction and Development Category*, November 2009, p. 6-26.

(QA/QC). As relevant and appropriate, AGC's prior comments are adopted and incorporated by reference into these comments.

3. EPA has yet to develop a set of "tried-and-tested" procedures for obtaining high-quality and representative samples of stormwater runoff from construction sites, making the use of numeric limits (for compliance purposes) impossible to apply with any consistency. Current techniques measure the variability of the storm event and not the effectiveness of the BMPs or other controls. As relevant and appropriate, AGC's prior comments are adopted and incorporated by reference into these comments.
4. In most cases, advanced treatment systems (ATS) will be the only "technology" capable of meeting with a numeric turbidity limit. However, ATS are neither cost effective nor practical options for most construction sites, particularly when compared to conventional erosion and sediment control BMPs. Industry conservatively estimates that the costs of ATS will range from $15,000 to $45,000 per acre, and even EPA estimates that the cost will be $7,000 per acre, making the nationwide use of such systems economically unachievable. ATS also require specialized operators and inspectors to be available at all times, particularly during and after rain events. Further, it takes considerable space to operate ATS, which require many holding tanks and additional retention ponds.

AGC restates its objections to a nationwide NEL and associated monitoring requirements under the C&D ELG rule and incorporates by reference the Association's prior comments on the issues related to such limits and testing.

Specific Comments on Non-numeric (BMP) Provisions

- ✓ **REVISION OF 40 CFR § 450.21(A)(1)**

This requirement, as currently written, requires permittees to: "Control stormwater volume and velocity within the site to minimize soil erosion."

EPA proposes to amend this requirement as follows: "Control stormwater volume and velocity to minimize soil erosion in order to minimize pollutant discharges."

AGC supports EPA's proposed change to the wording of 450.21(a)(1). This revision would more appropriately link the requirement to control soil erosion to the actual discharge of pollutants.

Industry petitioners have argued – and AGC supports the finding – that the current C&D ELG text at 450.21(a)(1) exceeds EPA's authority because the Agency only has authority over discharges of pollutants; it may not regulate the internal processes of a facility.[3] By requiring operators to control erosion within the site, EPA is *in effect* regulating the internal process of a construction site. The new regulatory language keeps the Agency from exceeding its authority by tying to the control of volume and velocity to actual discharges.

[3] *AISI v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997); NRDC v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988)).

However, AGC objects to some of the "examples of appropriate controls for this provision," that EPA has included in the preamble. Therein, EPA discusses controls of "overland flow" and "in channel" measures. Because the CWA provides EPA with authority over the addition of pollutants from point sources, AGC agrees that channel liners and check dams are appropriate controls pursuant to an ELG because they are placed in the point source. However, AGC does not believe that, in an ELG, the EPA has authority to require controls that influence "overland flow" until such flow is channelized. Overland flow that has not been channelized does not come from a single point; it is a widely dispersed source of stormwater runoff (sheet flow), and does not fall within EPA's CWA Section 301 authority. AGC recommends that EPA delete this language.

Similarly, sections II.B.2.(a) - (c) of EPA's preamble contain unnecessary and confusing discussions regarding Virginia's Erosion and Sediment Control Handbook, discussions about particle sizes (*i.e.* "above 40 microns"), and other generalizations that are not universally applicable, might cause state permitting authorities or courts (or other parties) to question what EPA is mandating, or otherwise are inappropriate for this rulemaking's preamble. AGC recommends that EPA delete this language.

- ✓ **REVISION OF 40 CFR § 450.21(A)(2)**

This requirement, as currently written, requires permittees to: "Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize erosion at outlets and to minimize downstream channel and streambank erosion."

EPA proposes to amend this requirement as follows: "Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize channel and streambank erosion in the immediate vicinity of discharge points."

AGC supports EPA's proposed change to the wording of 450.21(a)(2). It is critical for EPA to differentiate between increased erosion caused by the construction site discharges and erosion caused by other sources (e.g., upslope development). This revision would clarify that construction site operators are responsible for erosion control in the "immediate vicinity" of permitted outfalls, which is in the area where the contractor is performing work. This requirement does not require permittees to address streambank and channel erosion that is caused by other sources. AGC believes this is an important point of clarification.

- ✓ **REVISION OF 40 CFR § 450.21(A)(6)**

This requirement, as currently written, directs permittees to: "Provide and maintain natural buffers around surface waters, direct stormwater to vegetated areas to increase sediment removal and maximize stormwater infiltration, unless infeasible."

EPA proposes to amend this requirement as follows: "Provide and maintain natural buffers around waters of the United States, direct stormwater to vegetated areas and maximize stormwater infiltration to reduce pollutant discharges, unless infeasible."

AGC supports replacing "surface waters" with "waters of the United States" because the latter term is one that is defined by the Clean Water Act and generally recognized by state NPDES permit writers and permittees. In addition, the second proposed change to this provision would replace "increase sediment removal" with "to reduce pollutant discharges" – and AGC agrees with EPA that this revision would provide clarity that the goal of the requirement to direct stormwater to vegetated areas and to maximize stormwater infiltration is to reduce pollutant discharges. However, AGC once again cautions EPA to be mindful that the Agency may only require site operators to "direct" confined or channelized stormwater to vegetated buffers. EPA may not lawfully require operators to direct sheet flow to vegetated areas, as the Agency does not have regulatory authority over sheet flow until it is channelized and discharged (see related discussion above).

- ✓ **REVISION OF 40 CFR § 450.21(A)(7)**

This provision, as currently written, would require permittees to: "Minimize soil compaction and, unless infeasible, preserve topsoil."

EPA proposes to amend this requirement, as well as split the one provision (minimizing soil compaction and preserving topsoil) into two separate requirements as follows—

> Minimize soil compaction. Minimizing soil compaction is not required where the intended function of a specific area of the site dictates that it be compacted.
>
> Unless infeasible, preserve topsoil. Preserving topsoil is not required where the intended function of a specific area of the site dictates that the topsoil be disturbed or removed.

AGC supports the proposed changes and EPA's acknowledgment that it is not always practical to minimize soil compaction or preserve topsoil. Indeed, in some cases a project's design and specifications may require such practices on certain areas of the site. For example, soil compaction is necessary on areas of a construction site where driveways or wheelchair ramps will be built. Other areas of a site that require compaction, by design, for structure and stability include foundation pads for buildings or road subgrade materials. In addition, there are instances where it would it would be detrimental to the overall project – or conflict with other programs or regulations – to preserve topsoil; for example if the topsoil is of poor quality or contaminated. And there are instances where the intended function of a specific area of the site dictates that the topsoil be disturbed or removed.

In its explanatory preamble language, EPA suggests that one manner to preserve topsoil is by "limiting clearing . . . to accommodate the building footprint." AGC finds this statement to be problematic for two reasons. First, it suggests authority over the facility, not the discharge of pollutants from a point source. Second, it ignores the reality that to build a structure, the builder must clear an area larger than required for the "building footprint." AGC recommends that EPA delete this language (as well as the rest of the discussion of site conditions and site management in sections (a) and (2)), which is better suited for guidance documents.

- ✓ **REVISION OF 40 CFR § 450.21(B)**

This provision, as currently written, would require permittees to stabilize disturbed areas. The requirement reads: "Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. Stabilization must be completed within a period of time determined by the permitting authority. In arid, semiarid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, alternative stabilization measures must be employed as specified by the permitting authority."

EPA proposes to amend this requirement as follows—

> Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. In arid, semiarid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, alternative stabilization measures must be employed as specified by the permitting authority. Stabilization must be completed within a period of time determined by the permitting authority. In limited circumstances, stabilization may not be required if the intended function of a specific area of the site necessitates that it remain disturbed.

AGC supports the proposed changes which would provide much-needed clarity as well as a potential exemption from stabilization for certain areas of a site that the permitting authority has determined must remain disturbed.

- ✓ **REVISION OF 40 CFR § 450.21(D)(2)**

This provision, as currently written would require permittees to: "Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater."

EPA proposes to amend this requirement as follows—

> Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater. Minimization of exposure is not required in cases where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination (such as final products and materials intended for outdoor use).

AGC supports the changes proposed to this provision because it differentiates between materials that pose a risk of pollutants entering stormwater discharges and those that do not. For some materials, such as certain building materials, minimizing the exposure to stormwater and precipitation may be infeasible or even unnecessary. Indeed, some materials are designed to be exposed to stormwater after construction and minimization of exposure to stormwater during construction would be inappropriate.

Definition of 'Infeasible'

- ✓ **ADDITIONAL DEFINITION AT 40 CFR § 450.11**

EPA proposes to add a definition of "infeasible" at 40 CFR 450.11(b). Several of the provisions of the C&D ELG require permittees to implement controls, unless infeasible. However, EPA did not provide a definition of infeasible in the C&D rule. EPA proposes to add the following definition of infeasible—

> Infeasible means not technologically possible, or not economically practicable and achievable in light of best industry practices.

AGC supports the proposed definition for "infeasible" as it is consistent with EPA's recently issued 2012 federal Construction General Permit (CGP). AGC finds it important for EPA to provide a definition for "infeasible" within the text of the C&D ELG because several of the rule's non-numeric (BMP) requirements must be implemented "unless infeasible." AGC supports EPA's efforts to ensure that a permittee can reasonably assess whether a given BMP is technologically possible to implement, and if so, whether it makes reasonable economic sense in light of comparable industry practices to do so. Site-specific factors must be considered in such determinations and EPA should avoid making broad or universally-applicable feasibility pronouncement.

Preamble Contains Unnecessary & Confusing Text

EPA's preamble contains unnecessary and potentially confusing examples and excessive effort to explain the proposed changes, which ultimately compromises its efforts to clarify. AGC asserts that much of the extra "guidance-like" examples and descriptions should be eliminated from EPA's final C&D ELG amendments and, instead, EPA should work to develop separate guidance, as appropriate.

EPA's preamble serves not only to meet the Agency's obligations under the Administrative Procedure Act (APA), but also represents an obvious source of EPA's perspective and intent. If, in reviewing the statute, a court finds the specific regulatory language ambiguous, it will often look to the preamble accompanying an administrative rule for insight. *Fidelity Federal Savings & Loan Assoc. v. Cuesta*, 458 U.S. 141, 142 (1992). *See e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965) (noting that the preamble serves as a reference for the administrative construction of a regulation, to which "deference is…clearly in order"); *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77 (Temp.Emer.Ct. of App.1981), cert. denied, 456 U.S. 905 (1982) (acknowledging that the preamble to a final rule should be considered in construing a regulation to determine its meaning); *see also, Las Vegas v. FAA*, 570 F.3d 1109, 1117 (9th

Cir. 2009) (The 9th Circuit recognizing that if a regulation is ambiguous, "we consult the preamble of the final rule as evidence of context or intent of the agency promulgating the regulations").

Hence, preambles that are filled with extraneous details not required by the rule will increase the opportunities for misunderstanding an agency's intent and may unknowingly misdirect the court in its attempt to decipher the agencies true intent. *See e.g., Seneca Oil v. Dept. of Energy*, 712 F.2d 1384, 1398 (Temp.Emer.Ct. of App.1983) (concluding that plaintiff's arguments give "undue predominance and effect to minor disconnected and imprecise language of the preamble, selected out of context"); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 690 (1996) (Preambles drafted in anticipation of substantive challenges or future rulemakings "may well distract agencies from using the statement of basis and purpose as a device for coherent explanation of regulatory meaning"). Therefore, EPA should strip away much of the extraneous discussion in the proposed rule's preamble and ensure that the final rule remains specifically focused on the revisions and appropriate corrections to the original 40 CFR Part 450.

Conclusion

In sum, the proposed modifications to the C&D ELG will provide additional clarity, efficiency, and improve the existing C&D ELG. It is a major step forward and welcome outcome to the litigation.

A BMP-based, control-measure approach is known and understood by the regulated community; it is cost-effective; and it promotes the use of innovative technologies on construction sites. We urge EPA to strengthen educational programs and materials on BMP-based stormwater permitting programs and not to burden state regulators, construction firms, and the public with rigid and inflexible numeric standards and monitoring requirements.

AGC appreciates the opportunity to participate in EPA's C&D ELG rulemaking. Please call or email if you have questions or need additional clarifications regarding issues raised in these comments.

Sincerely,

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