

February 26, 2008

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

Re: Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category; Proposed Rule

To Whom It May Concern:

On behalf of the 5,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer the following comments on the United States Environmental Protection Agency's (EPA's) November 28, 2008, proposed rule concerning effluent limitations guidelines and standards for the construction and development point source category.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs. ARTBA members routinely deal with stormwater issues as part of the existing environmental review and approval process required for all transportation improvement projects.

ARTBA is concerned with elements of EPA's proposed rule implementing a numeric standard for stormwater runoff on "certain large projects." EPA's proposal does not adequately define what a "certain large project" might be. Without a more specific definition, numeric standards could be unnecessarily over-applied to a variety of different situations resembling a "certain large project" depending on individual interpretations of EPA's proposed rule.

Furthermore, ARTBA would ask EPA to exempt transportation projects for the purposes of this rule from any definition of "certain large projects." Transportation projects, by their nature, are often linear projects (roads) and cover a large number of acres. However, the actual impacts of a transportation project on any given acre of land are often small, as only the area of land around



the road project (as opposed to the rest of the land in any acre) is involved. Thus, transportation projects spread impacts over a large area of land, as opposed to concentrated development projects (malls, for example) where impacts are greater and fixed on a smaller portion of land.

As part of every project with which they are engaged, ARTBA members must participate in a clearly-established transportation planning process. According to a recent report by the U.S. Government Accountability Office (GAO)¹, as many as 200 major steps are involved in developing a transportation project from the identification of the project need to the start of construction. According to the same report, it typically takes between nine and 19 years to plan, gain approval of, and construct a new major federally funded highway project.² This process involves dozens of overlapping state and federal laws—including dealing with stormwater issues.

A recent study by the U.S. Federal Highway Administration (FHWA) found the time required to process environmental documents for transportation projects has doubled over the past two decades.³ In the 1970s, the average time for completion of an environmental impact statement (EIS) was 2.2 years. Former United States Department of Transportation (U.S. DOT) Assistant Secretary for Policy Emil Frankel reported that from 1999-2001 the median time for completing an EIS was 4.4 years.⁴ However, delays in the transportation project environmental review and approval process are not only limited to large projects requiring an EIS. While according to FHWA three percent of federally funded transportation improvement projects require an EIS, the remaining 97 percent require an environmental assessment (EA), (6.5 percent) or categorical exclusion (CE) (90.6 percent).⁵ A recent report conducted by the National Cooperative Highway Research Program (“NCHRP”) stated:

“[D]elays in completing [EA and CE] reviews are encountered frequently despite the minimal environmental impacts associated with such projects. Even if such project-level delays are individually small, their cumulative impact may be significant because most transportation projects are processed as CEs or EAs.⁶”

Water quality issues, including stormwater, are dealt with during the NEPA process. According to the report, 63 percent of all state DOTs responding to the survey reported environmental process delays with preparation of CEs and 81 percent reported similar delays involving EAs.⁷

¹ GAO Testimony Before the Committee on Environment and Public Works, U.S. Senate, GAO-02-1067T (Sept. 19, 2002).

² *Id.*

³ United States Federal Highway Administration, *Evaluating the Performance of Environmental Streamlining Development of a NEPA Baseline for Measuring Continuous Performance*. (available at <http://www.environment.fhwa.dot.gov/strmlng/baseline/section2.asp>).

⁴ Statement of Emil H. Frankel, Assistant Secretary for Transportation Policy, United States Department of Transportation, before the United States Senate Committee on Environment and Public Works, Hearing on Project Delivery and Environmental Stewardship. (September 19, 2002).

⁵ United States Federal Highway Administration Report to Congress on Federal Highway Administration Streamlining Activities in 2003. (June 2004) (available at <http://www.environment.fhwa.dot.gov/strmlng/rtc0604rpt.asp>).

⁶ *Environmental Streamlining: A Report on Delays Associated with the Categorical Exclusion & Environmental Assessment Process*, Prepared for the AASHTO Standing Committee on Highways by TransTech Management under NCHRP contract number HR 20-7(129) (Washington, D.C. Oct. 2000).

⁷ *Id.*

These delays triple average environmental review times for CEs—from about eight months to just under two years—and have more than doubled review times for EAs, from under 1.5 years to about 3.5 years.⁸

Prior to the publication of EPA's proposed stormwater rule, ARTBA members participated in a variety of work group meetings with EPA staff during August and September of 2008. Currently, many projects effectively use Best Management Practices (BMPs) to address stormwater concerns in a manner that effectively balances environmental protection without exacerbating already arduous delays. In discussing how to approach the regulation of stormwater runoff from construction sites, ARTBA expressed a strong preference for the use of BMPs as opposed to the numeric standards contained in EPA's proposed rule. BMPs allow the flexibility necessary for projects to be able to select stormwater control techniques best suited to a projects particular circumstances. Every transportation project faces unique challenges based on a number of factors, including where actual construction is taking place, the size of the project and climate issues such as rainfall amounts during the time construction is being performed. A numeric standard applied to all projects, however, would not be able to take such differences into account. Transportation projects in areas with heavy rainfall would be held to the same effluent limitation standards as projects in dry, arid regions. Such a "one-size-fits-all" approach to stormwater permitting will constrain and delay transportation projects because it does not account for the individual circumstances of each project.

In one specific instance, an ARTBA member company had a project on a fairly large site (70 to 100 acres). It started out as a \$4,000,000 project. During the project, there was an "El Niño" weather cycle bringing a great deal of rain every day. The project's customer could not afford to wait until all of the BMPs treated the water and needed the contractor to dry out the site as fast as possible so construction could continue. Since the contract granted weather days but the water needed to be processed faster, the contractor developed an Alternative Treatment System (ATS, which would be required on all projects to meet the EPA's numeric standards) using settlement ponds, flocking, filtering, pumping, handling, etc. The contractor agreed to do this work on an audited Time and Material basis. The final cost and change order resulted in over \$1,000,000 in additional charges to the project.

The ARTBA contractor involved in this job noted that just about every job in that area had the same problem that summer but none of them had the ATS expense that this contractor incurred. In considering ATSS, ARTBA is concerned the implementation of numeric stormwater discharge standards will add substantial additional costs which could put many contractors out of business due to the high cost of purchasing ATS equipment necessary for compliance. Further, contractors who pay these additional costs are most assuredly going to pass them along resulting in all owners, particularly public ones, paying more for their projects. This is especially troublesome for transportation projects where needs vastly outweigh available resources.

Another problem with numeric stormwater standards is the lack of availability of treatment equipment necessary to meet the standards. According to ARTBA contractor members, it could take years until there is enough equipment to fully implement numeric discharge standards. Meanwhile, many projects will be in limbo while waiting for this equipment to become available. Currently, there are only a relatively small number of vendors who sell the necessary

⁸ *Id.*

equipment. Implementing a numeric discharge standard would essentially place transportation planners as well as the states and localities overseeing transportation projects at the economic mercy of this small group of treatment equipment vendors, at least in the short term.

Also, there are liability issues arising from the imposition of a numeric standard. If a project temporarily violates the proposed numeric standard, it would open the door for litigation. EPA's proposed rule does not specify who would bear the brunt of any such litigation. Would the project planner be responsible, the contractor in charge of the job, or the sub-contractor (if there is one) assigned to deal with stormwater run-off? Ultimately, the proposed rule provides another avenue for project opponents to use litigation as a means to delay and disrupt transportation improvements. As soon as there is a violation of the numeric standard, a "rush to the courthouse door" would likely be triggered, potentially resulting in additional years of delay to affected projects.

Building on what ARTBA stated in its multiple meetings with EPA prior to the issuance of the proposed rule, BMPs are a far more preferable approach to dealing with stormwater issues than numeric standards. BMPs allow for the level of flexibility needed to make sure stormwater issues can be addressed in a manner suited to the individual nature of the project in question. Further, BMPs have an established track record of being able to mitigate stormwater runoff and are familiar to both project sponsors and state and local governments. BMPs acknowledge that each transportation project has different factors in geography and scope which must be taken into account while an inflexible, uniform numeric standard does not. As such, ARTBA urges EPA to abandon the idea of a numeric standard for stormwater runoff and focus its efforts on the proactive and aggressive promotion of BMPs.

ARTBA looks forward to continuing to work with EPA on stormwater issues in a manner providing the necessary flexibility in order to allow the nation to balance environmental protections with necessary transportation infrastructure improvements.

Sincerely,



T. Peter Ruane
President & C.E.O