



Before the
Environmental Protection Agency

Notice of Proposed Rulemaking
Effluent Limitation Guidelines and Standards for the Construction and
Development Points Source Category
40 CFR Part 450

Docket No. EPA-HQ-OW-2008-0465; FRL-8744-1
RIN 2040-AE91

Comments of
Associated Builders and Contractors, Inc.

Associated Builders and Contractors, Inc. (ABC) submits the following comments in response to the above-referenced notice of proposed rulemaking (NPRM) published on page 72562 of the *Federal Register* of November 28, 2008 (73 Fed. Reg. 72562).

COMMENTS

A. **About ABC**: Associated Builders and Contractors, Inc. (ABC) is a national construction industry trade association representing 25,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC's diverse membership is comprised of merit shop companies, bound by a commitment to the construction industry's

merit shop philosophy. The merit shop philosophy is grounded on the principal of full and open competition, without regard to labor affiliation, where construction contracts are awarded to the lowest responsible bidder through competitive bidding. This philosophy helps to ensure that taxpayers and consumers alike receive the most for their tax and construction dollar.

Merit shop construction firms comprise more than 80 percent of the private commercial construction industry as a whole, the majority of which are small businesses. As such, ABC's members have a considerable interest in this rulemaking and its ultimate outcome.

B. ABC's comments and concerns regarding the proposed rule: It is important to state at the outset of these comments that ABC and its contractor members are proponents of clean water. ABC also recognizes that a principal impetus for this rulemaking was the lawsuit brought by several environmental groups and by a United States court of appeals decision in *NRDC v. EPA*, 526 F.3d 591(9th Cir. 2007), which affirmed the district court decision. The court has directed the Environmental Protection Agency (EPA) to promulgate effluent limitation guidelines (ELGs) and new source performance standards (NSPS) by no later than December 1, 2009. 73 Fed. Reg. at 72568. Therefore, it is clear that, as a result of the court's decision, EPA has an obligation to promulgate a guideline and standards. However, it is also clear from the court's decision that EPA is not limited in its options, and that it has not been restricted to a specific regulatory outcome.

Having reviewed the NPRM and, in particular, the preamble's discussion of the record upon which the proposed rule relies, ABC has a number of concerns regarding the scientific justification for some of the substantive requirements that have been proposed.

In addition, ABC is concerned about the significant costs that the proposed rule would impose on construction contractors—costs that contractors would have to incur as a result of having to take remedial actions that the proposed has failed to justify.

It should be noted that the National Association of Home Builders (NAHB) and Associated General Contractors (AGC) both submitted comprehensive comments to this docket. These employer representatives have provided detailed discussion of EPA's scientific justification for the NPRM and its projected compliance cost analysis. ABC shares their concerns regarding that analysis; however, rather than fully restate the concerns stated in their respective comments, we expresses our general support and agreement with NAHB and AGC, and incorporate their concerns into these comments by reference.

1. Based on the NPRM's preamble and record, the furthest regulatory action that EPA can justify taking is the adoption of proposed Option 1, with one qualification. ABC is concerned that Option 1's additional mandate that, for certain construction sites, contractors would also be required to install and maintain sediment basins or sediment equivalent controls, solely due to the size of the site. 73 Fed. Reg. at 72575. ("Specifically, for portions of sites that drain to one location and will have 10 or more acres disturbed at one time, dischargers would be required to install a sediment basin to control and treat the stormwater discharges.") While we agree that the size of a construction site, or the amount of acreage being "disturbed at one time," *id.*, can be one causative factor affecting the amount of sediment that can be discharged from that construction site, it is certainly not the only factor that should be considered. It is illogical to contend that, every time the specified site size is exceeded, a sufficient

scientific justification exists—based solely on the size factor—to warrant, let alone mandate, the installation of sediment basins or sediment equivalent controls. The preamble provides neither evidentiary discussion, nor does it point to any scientific evidence contained elsewhere in the record, that would support the requirement under Option 1 for the installation of sediment basins or sediment equivalent controls every time a site meets or exceeds a specified size threshold. Moreover, even allowing that size can be one causative factor, the NPRM nonetheless fails to provide any scientific justification to why the minimum threshold was set at 10 acres, rather than at a higher amount of acreage. While ABC commends EPA for what appears to have been an effort to impose a “reasonable” threshold, the record remains void of any scientific basis to explain why the 10 acre minimum threshold was proposed, or why it could not be a higher threshold—for example, 50, 100 or even 500 acres.

In addition, the preamble does not provide any scientific justification for EPA’s adoption of either Option 2 or Option 3. If anything, the adoption of either of these two options would be even more arbitrary than the adoption of the sediment basin requirement proposed under Option 1.

2. Aside from the NPRM’s lack of scientific evidence to support the adoption of anything other than the qualified Option 1, ABC has a number of concerns regarding the proposed rule’s costing analysis.

The NPRM failed to demonstrate that the best management practices (BMPs) currently in use are insufficient to address the effluent problem without need for imposing additional regulatory obligations and costs imposed by Option 2 and Option 3. As such, the NPRM’s regulatory analysis focused solely on how much it would cost to

comply with either option, and entirely ignored whether there is even a need for such costs to be incurred in the first place.

In addition, while the NPRM correctly recognizes that even under normal business conditions construction contractors can only “pass through” a portion of their costs, 73 Fed. Reg. 72579 [“Under normal business conditions with cost pass-through (85% residential and 71% non-residential)...”], ABC believes that the NPRM has nonetheless significantly underestimated the costs that contractors will have to bear if either Option 2 or Option 3 were adopted.

In calculating the projected compliance costs, the NPRM has failed to take into account the complexity of construction procurement in both the public and private sectors. In preparation of a bid, general contractors, but especially subcontractors, routinely have a significant burden identifying in advance of construction, every foreseeable problem, issue and variable that will arise during construction so that their costs can be calculated as precisely as possible. Although EPA may believe it to be quite reasonable to assume that any costs that could not have been reasonably foreseen during the calculation of a bid can later be passed through by the contractor under a “change order,” that will not always be the case. It is quite common for construction bids to be solicited and awarded on a fixed-price basis, thereby disallowing any opportunity for additional costs not included in the contractor’s bid to be recouped later.

The exorbitant cost of advanced treatment systems—systems that are not mandated by the proposals, but nonetheless would be required in many parts of the country in order to remain in compliance—cannot be passed through to the degree to which EPA estimates. Furthermore, these systems would often require the hiring of

engineers and specialists to contractor payrolls, and the amount of time these specialized consultants work on a given jobsite would vary greatly due to the changing environmental conditions of that site. Owners and developers simply will not allow cost pass through of the magnitude necessitated by Option 2 and Option 3 to occur. Project owners will often not allow for contingency factors, as they will not place themselves at risk for an unknown amount of money. Financing of projects will become extremely difficult, due to the increased level of contingent liabilities contractors stand to inherit, and contractors' potential inability to secure bonding also becomes a significant concern.

For example, in the case of fixed-price federal construction projects, the federal government routinely refuses to reimburse contractors for costs they are required to incur as a result of having to comply with federal regulations that weren't required that went into affect after the government accepted the contractor's bid. What compounds this problem further is the fact that contractors have no control over whether construction projects are built on a fixed-price, cost-plus, or some other basis, which is determined by the project owner.

There are a multitude of variables that contractors would have to confront in complying with either Option 2 or Option 3 that would make it difficult for a contractor to identify what degree of compliance under Option 2 or Option 3 may be required, let alone for a contractor to anticipate and calculate its compliance costs for bid purposes. The NPRM has overlooked this problem entirely and for this reason (in addition to the other reasons discussed in both the NAHB and AGC comments) ABC submits that the NPRM's compliance cost calculations for options 2 and 3 are significantly understated.

As stated previously, EPA is compelled to promulgate a guideline and standards as a result of a court decision, but it is clear from the court's ruling that EPA is not limited in its options, and it has not been restricted to a specific regulatory outcome. For the reasons outlined above, ABC maintains that the furthest regulatory action that EPA can justify taking is the adoption of proposed Option 1, with the caveat that the final rule must identify causative factors in addition to size to determine when the installation of sediment basins or sediment equivalent controls is warranted. In addition, ABC urges EPA to work with the construction industry to reconsider the potential costs that contractors would incur as a result of actions that the proposed rule has not yet taken into account.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Hirsch", written in a cursive style.

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