May 31, 2013

Submitted Via Electronic Service to Ow-Docket@epa.gov

Water Docket
United States Environmental Protection Agency
4203M, 1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: AGA Comments on EPA Proposed Rulemaking for Effluent Limitation Guidelines and Standards for the Construction and Development Point Source Category, Docket No. EPA-HQ-OW-2010-0884

Dear Sir or Madam:

The American Gas Association (“AGA”) is pleased to submit these comments to the Environmental Protection Agency (“EPA”) on the above-referenced Proposed Rule1 that would withdraw the numeric discharge standards and revise several of the non-numeric provisions in the existing construction and development rule (“C&D Rule”).2

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 71 million residential, commercial and industrial natural gas customers in the U.S., of which 92 percent — more than 65 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets almost one-fourth of the United States' energy needs.

AGA members are directly affected by EPA’s stormwater program because they construct and maintain natural gas facilities that frequently require construction-related stormwater permitting. However, our members are not engaged in the type of construction that involves installing new buildings and acres of new impervious pavement. Instead, natural gas utilities typically obtain new NPDES permits for limited, temporary storm water discharges from digging short, narrow ditches to install gas lines, or for short-term (1-2 days) hydrostatic test water discharges.


AGA encourages EPA to pursue the use of best management practices ("BMPs") as an appropriate method for natural gas utilities to demonstrate compliance with NPDES requirements for their linear intrastate transmission (non-FERC regulated) and distribution pipeline construction projects. AGA members deploy site-specific BMPs on their project sites, through a combination of EPA-imposed requirements in the Construction and Development final rule, U.S. Corps of Engineers wetland site-specific permits or Nationwide Permits (NWPs), state and local permitting requirements where EPA is not the NPDES permitting authority, and voluntary measures as part of their site-specific erosion and sediment control plans. AGA has discussed these BMPs at length in comments filed on EPA’s 2012 draft Construction General Permit in July, 2011. These best practices address erosion and sedimentation, and in most cases are specified by state or local permitting authorities and implemented through BMPs. Stormwater discharge monitoring practices under these BMPs include visual monitoring of erosion and sediment controls, and are tailored to the size and scope of linear gas pipeline construction projects. These BMPs have proven to be highly effective erosion and sediment control tools for natural gas utility construction projects. AGA commends EPA’s recognition of the value of BMPs in its Proposal, and supports EPA’s decision to withdraw the numeric turbidity limits and related discharge monitoring and sampling requirements under the C&D Rule.

AGA also supports EPA’s proposal to add a definition of “infeasible” in the relevant regulations at 40 C.F.R. Part 450, to achieve consistency with how EPA characterizes the potential infeasibility of stormwater control requirements in the preamble to the C&D Rule, and in the 2012 CGP. However, AGA requests that EPA clarify this concept, as follows.

- **Site-Specific Infeasibility:** AGA respectfully requests that EPA clarify that an operator can demonstrate “infeasibility” on a site-specific basis, consistent with how EPA has discussed “infeasibility” in the preamble to the C&D Rule and in several examples in the 2012 CGP.

- **Unique Circumstances & Emergency Infeasibility:** AGA requests that EPA clarify that unique circumstances, such as emergency conditions or when projects are confined to limited rights-of-way or narrow corridors on larger multi-operator construction sites, could render pre-construction control requirements

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3 See AGA Comments on EPA’s Draft National Pollutant Discharge Elimination (NPDES) General Permit for Stormwater Discharges From Construction Activities, Docket ID No. EPA-HQ-OW-2010-0782, Construction General Permit (July 11, 2011).

4 See Final NPDES General Permit for Stormwater Discharges from Construction Activities, EPA Docket ID No. EPA-HQ-OW-2010-0782, ("Final CGP") (February 16, 2012), at Appendix A-6, pp. 13 (defining “infeasible” as follows: “for the purpose of this permit, infeasible means not technologically possible or not economically practicable and achievable in light of best industry practices. EPA notes that it does not intend for any permit requirement to conflict with state water rights law”).
“infeasible” even if they were otherwise achievable under other operating conditions.

- **Best Management Practices:** AGA believes the definition of “infeasible” should reference “best industry management practices” rather than “best industry practices” for consistency with industry terminology and to achieve consistency with the 2012 CGP’s reference to “BMPs” (best management practices).

AGA urges EPA to make these clarifications by modifying the definition of “infeasible” in the C&D Rule regulations and the 2012 CGP, or at least by including a clarifying explanation in a revised preamble to the final C&D Rule.

As currently proposed, the definition of “infeasible” does not give the permitting authority and permittee the flexibility to weigh the costs and benefits of pursuing a specific BMP plan or to assess the necessity of pursuing certain controls. There are many circumstances in which a specific stormwater control requirement may be technologically “possible”, economically “practicable”, or otherwise “achievable” in light of best practices utilized on other construction sites, but may not be an appropriate, effective, or even necessary mechanism on a natural gas project site, because site-specific constraints, emergency conditions, or unique circumstances do not warrant installation of a specific control.

Gas utilities' linear construction projects often take place under unique circumstances that should be explicitly recognized as a permissible basis for demonstrating the “infeasibility” of specific stormwater controls and the utilization of alternative BMPs. These unique circumstances include: gas utility work within larger construction sites with several other utilities and project operators; work in narrow, confined project corridors and rights-of-way such as highways; or, in limited easements on urban or rural private property. If gas utilities could not demonstrate that unique circumstances like a limited construction footprint render certain construction-phase stormwater controls “infeasible,” they could be held responsible for expanding their work outside project boundaries to place controls on adjoining areas to which they have neither access nor ownership rights. In the Proposed Rule, for example, EPA suggests eliminating the “within the site” language in 40 C.F.R. § 450.21(a)(1), a provision which requires permittees to control stormwater volume and velocity to minimize erosion.5 Without this “within the site language,” gas utilities may be held responsible for installing controls beyond the corridor of their limited, temporary earth-disturbing activities if they were not able to demonstrate “infeasibility” on the basis of site-specific, unique circumstances. Therefore, AGA urges EPA to clarify how “infeasibility” may be assessed in emergency conditions, on multi-operator construction sites, or in the many other unique circumstances where gas utilities have a limited, temporary and confined construction footprint.

The low-impact, minimally earth-disturbing and temporary nature of distribution pipeline repairs warrants an approach to NPDES permitting that allows permitting authorities and operators to make a real-time assessment of the necessity for stormwater controls. Even for intrastate transmission excavation projects that cross over a wide mix of landscape, the temporal and physical contours of the ongoing project do not have the same impacts as a

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traditional construction project. On any given day, only a fraction of the project route is disturbed and excavated, and back-filled or “buttoned up” at the end of each work day, leaving only laydown/storage areas for minimal potential erosion exposure.

The clarifications we request do not depart from EPA’s current approach to stormwater permit compliance. EPA has already recognized the need for a site-specific, cost-benefit determination of whether a stormwater control may even be necessary. In the 2012 CGP, there are several examples where EPA allows the permittee to document in its SWPPP the reasons why specific constraints, the availability of alternatives, and other circumstances outside the permittee’s control may warrant a stormwater control “infeasible”. For example, in guidance discussing how project operators should choose compliance alternatives with the 50-foot buffer requirement, EPA recognizes that “there will be a number of situations in which it will be infeasible to provide and maintain a buffer of any width” (emphasis added).\(^6\) On the topic of effluent limitations, the CGP states that the requirement may be “infeasible” because (i) the requirement was not part of a previous permit, (ii) compliance is prevented by the nature or location of earth disturbances that began prior to a certain date, subject to construction activity by a federal operator, or (iii) compliance is prevented by the manner in which stormwater controls have already been installed or were already designed prior to a specific date. These examples demonstrate that the 2012 CGP allows “infeasibility” to be assessed on the basis of available alternatives, project impact, prior impacts of other operators working in the same right of way, or a conflict between previous permitting requirements and control design, and new requirements.

AGA members have noted that permitting authorities implementing the NPDES program do not have a universal understanding of why a specific control may be infeasible for a given site or situation, and that the burden is on the permittees to constantly revisit what is “infeasible” because the current stormwater permitting regime does not provide sufficient guidance on what EPA might consider “infeasible”. AGA believes our requested clarifications to the definition of “infeasible” will bring needed direction to the exercise that permittees and permitting authorities undertake to determine “infeasibility”.

In prior comments, AGA urged EPA to exempt intrastate natural gas linear pipeline construction projects from numeric effluent discharge standards.\(^7\) AGA had noted that the turbidity limit assumed a “one-size-fits-all” approach that could result in unworkable and resource-draining monitoring requirements for linear natural gas projects without any improvement in environmental outcomes. It is appropriate and environmentally effective for natural gas linear excavation operators to devote their time and resources to the implementation

\(^6\) Id., at Appendix G, pp. 8 (referencing “whether it is feasible to provide a reduced buffer”).

of BMPs that have been proven to reduce the impact of stormwater flow from these activities. AGA commends the EPA for providing relief for linear natural gas projects in its 2012 Construction Stormwater General Permit, and for issuing this Proposal to withdraw the numeric turbidity limitation and monitoring requirements that would have applied to intrastate natural gas transmission and distribution projects.

AGA appreciates EPA’s recognition that the C&D rulemaking is an opportunity to provide needed regulatory relief for natural gas utilities’ linear pipeline excavation projects. These are minimally earth-disturbing, short-term projects for which extensive testing, monitoring or representative sampling would unduly prolong construction activity and increase costs for ratepayers without appreciable environmental benefits or results under EPA’s stormwater program. We commend EPA for its continued attention to these issues, support the changes suggested in the Proposed Rule, and respectfully request that EPA consider providing further clarity regarding what is “infeasible” either in the preamble to the final C&D rule or preferably in the definition itself. Please feel free to contact us with questions or for additional information.

Respectfully Submitted,

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