

Resolution No. 6

Date: April 30, 2004

City: Washington, D.C.

NAHB Resolution

Title: Storm Water Enforcement
Original Sponsor: Environmental Issues Committee

WHEREAS, the Clean Water Act (CWA) prohibits the discharge of pollutants from a point source without a permit; and

WHEREAS, while the CWA was initially designed to address process wastewater and industrial discharges as point sources, in 1987 Section 402 was expanded to specifically prohibit the discharge of storm water from a point source without a permit; and

WHEREAS, the majority of construction sites are deemed to be point sources and their owners/operators are required to obtain National Pollutant Discharge Elimination System (NPDES) permits for the storm water that leaves the construction site, including finished lots in developments where one or more acres of land is disturbed at any one time in the development and regardless of the size of the finished lot or amount of land disturbed; and

WHEREAS, the Environmental Protection Agency (EPA) may authorize each state to administer its own NPDES program in lieu of the EPA, and 45 states to date have assumed this responsibility, while the remaining five remain under the EPA's authority;

WHEREAS each delegated state must develop and implement a permit program that is at least as stringent as the federal program and tailored to meet the state's legal, regulatory, political and environmental characteristics; and

WHEREAS, as a result of this delegation and the flexibility it provides, the NPDES program varies greatly among states and differs significantly from the federal program, including substantial differences between the EPA and the states regarding enforcement philosophies, priorities and actions; and

WHEREAS, while the EPA has recently announced that it has made storm water enforcement a priority and has since increased its visibility and workforce to seek out and address storm water violations, it has not concurrently focused on compliance; and

WHEREAS, as part of this increased enforcement effort, EPA has made expansive requests for historic documentation in the hope of finding actionable violations, and has conducted investigations in delegated states without coordinating with the state and has issued notices of violation against individual permit holders instead of allowing the state agencies in charge of enforcement of the storm water program to issue these notices; and

WHEREAS, these actions have created intense paperwork burdens, resulted in confusion among the regulated community as to who is the ultimate permitting authority and placed permittees in a "double jeopardy" situation in which they have to address duplicative and sometimes contradictory enforcement actions initiated by both the state and the EPA; and

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WHEREAS, in measuring compliance with the general permit, the EPA has placed primary emphasis on paperwork, giving little consideration to the environmental impact of alleged violations, yet fines for “paperwork” violations can be significant, exceeding over \$100,000 in some instances; and

WHEREAS, the determinations on which particular infractions constitute actionable violations and the assessments of subsequent fines are extremely inconsistent; and

WHEREAS, the EPA has no time frame in which it must act in enforcement actions, and the date of an inspection and subsequent notification of a violation can be months apart — a lag time that does nothing to further the goals of the CWA;

NOW, THEREFORE, BE IT RESOLVED that the National Association of Home Builders (NAHB) urge the Environmental Protection Agency (EPA) to:

1. Establish national enforcement and compliance policies to create uniformity across the country.
2. Limit its enforcement actions in delegated states to only those instances where there are significant environmental impacts resulting from the alleged violation; at a minimum, identifying what conditions or criteria must exist prior to the agency initiating any enforcement action within a delegated state.
3. Hold the delegated states responsible for any shortcomings in the enforcement of their programs and require the states to correct any perceived program defects instead of circumventing the state and its legally-binding requirements to reach individuals.
4. Establish a reasonable, predictable time frame between the date of inspection and final agency action and commit to train all inspectors and ensure that they complete an exit interview with documentation with the permittee at the conclusion of each inspection, with no penalties assessed if no exit interview is conducted.
5. Consider developing a mechanism to overcome the legal oversight needed to make violation determinations so that violation and penalty assessments can be issued in the field.
6. Tailor its finding of violation and penalty assessment structure to the severity of the environmental impact; limit penalties for paperwork violations; and recognize and give credit during enforcement proceedings to those who are genuinely seeking to comply, and to implement a 14-day right to cure policy to avoid penalties.
7. Expand the applicability of the Expedited Settlement Offer (ESO) by recruiting more EPA regions and states to use the ESO and widen the scope so that it applies to a broader range of enforcement scenarios.
8. Commit to implementing internal practices such as monitoring, self-auditing or developing policy guidance to ensure that like allegations and findings of violations are treated similarly and in proportion to the level of environmental impact.
9. Commit the staff and resources to work with NAHB and the state and local governments to develop compliance materials and conduct outreach activities to improve compliance with the storm water program.

Board of Directors Action:

Executive Board Action:

Resolutions Committee Action:

Land Development Committee Action:

Approved

Recommends Approval

Recommends Approval

Recommends Approval