

Executive Order No. 12866 Meeting Record

Date: 1/28/11

Rule Title: C&D Effluent Guidelines RIN: 2040

Stage: NPRM Lead Agency: EPA

PLEASE PRINT CLEARLY

Name	Affiliation	Client (if applicable)
Jim Lasky	OMB	
Mary Ellen Levine	EPA	
Pete Ford	EPA	
Jesse Pruitts	EPA	
Jan Goodwin	EPA	
Kevin Bromberg	SBA/Advocacy	
Jeff Peterson	URS	
Jeff Longman	Business & Community	National Assn of Home Builders
Ty Asfaw	NAHB	
Susan Asmus	NAHB	
Dom Mancini	OMB/OIRA	
Jennifer Krajewski	CEQ	
Pete Ciarleglio	URS	NAHB
Andy Bollman	SBA/Advocacy ^{Pedant Assoc}	SBA/Advocacy

*If agency does not attend, check box if invited by OIRA:

EPA Incorrectly Based Passive Treatment System (PTS) NEL of 280 NTU on Mostly Data from Sophisticated/Automated/Expensive Advanced Treatment Systems (ATS)

- Bases of 280 NTU
 - 22 ATS!! (15 from one site, SeaTac Airport)
 - 3 PTS
- PTS is simple (i.e. polymer logs in drainage ditch, runoff flows through them based on gravity and rain intensity, no operator present)
- ATS is highly controlled by sophisticated automation, instrumentation, many pumps and piping, large pond volumes, polymer feed systems
 - Very costly (not used by EPA in Cost Model)
 - Operator attended
 - Constant real time intervention to lower turbidity by multiple instruments, automated pumps and valves, etc.
 - Large detention and treatment ponds
- See details in March 2010 URS report (48 pages and Appendices)

SeaTac Airport ATS Data Should Not Be Used to Calculate a PTS NEL

- The only data used by EPA was Dec. 2007 and Jan. 2008 when very little soil disturbance occurring
 - Most construction complete
 - No samples from when 20' to 30'+ (2006 and 2007) massive fill was being constructed
 - Fill and runway already installed, grass growing on the slopes and on much of the site
 - Very large detention ponds
- EPA used as 15 sites/systems (out of 25 sites/systems)
 - Bias low NEL of 280 NTU
 - Actually only four systems
 - At most EPA should only use as one (280 NTU increases to 652 NTU)
- System on sensitive Salmon stream, very low 5 NTU was target
- Fill was glacial till w/negligible clay; much of the USA soil has significant clay content.

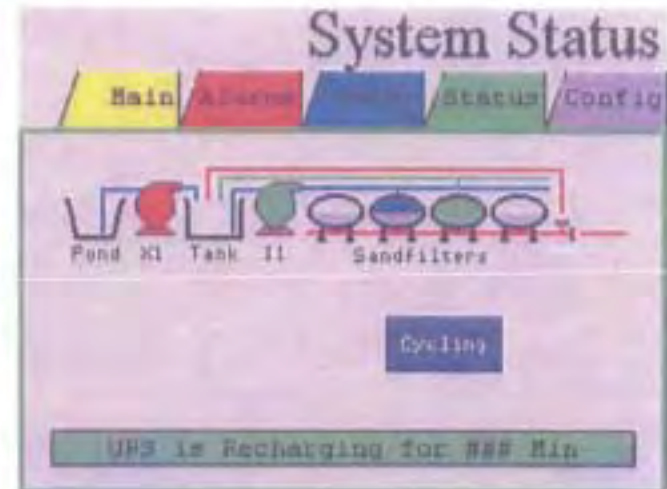
One of 3 ATS Sites at the Sea Tac Airport
Used by EPA to Calculate the 280 NTU

Five (5) pumps (500 gal/min. each) are conveying Chitosan treated and settled water from the same pond (Pond #3) at the same time. The discharge from each pump is conveyed to the Control System where the turbidity is recorded.

In essence the same sample of the pretreated water is being measured 5 times. Incorrectly, EPA used this data like it was 5 different sets of data. Since there were 3 sites like this one at the Sea Tac Airport, EPA used all the data like they had 15 individual sets of data which makes-up 15 of the 25 sets of data EPA has in the docket to calculate the 280 NTU limit.



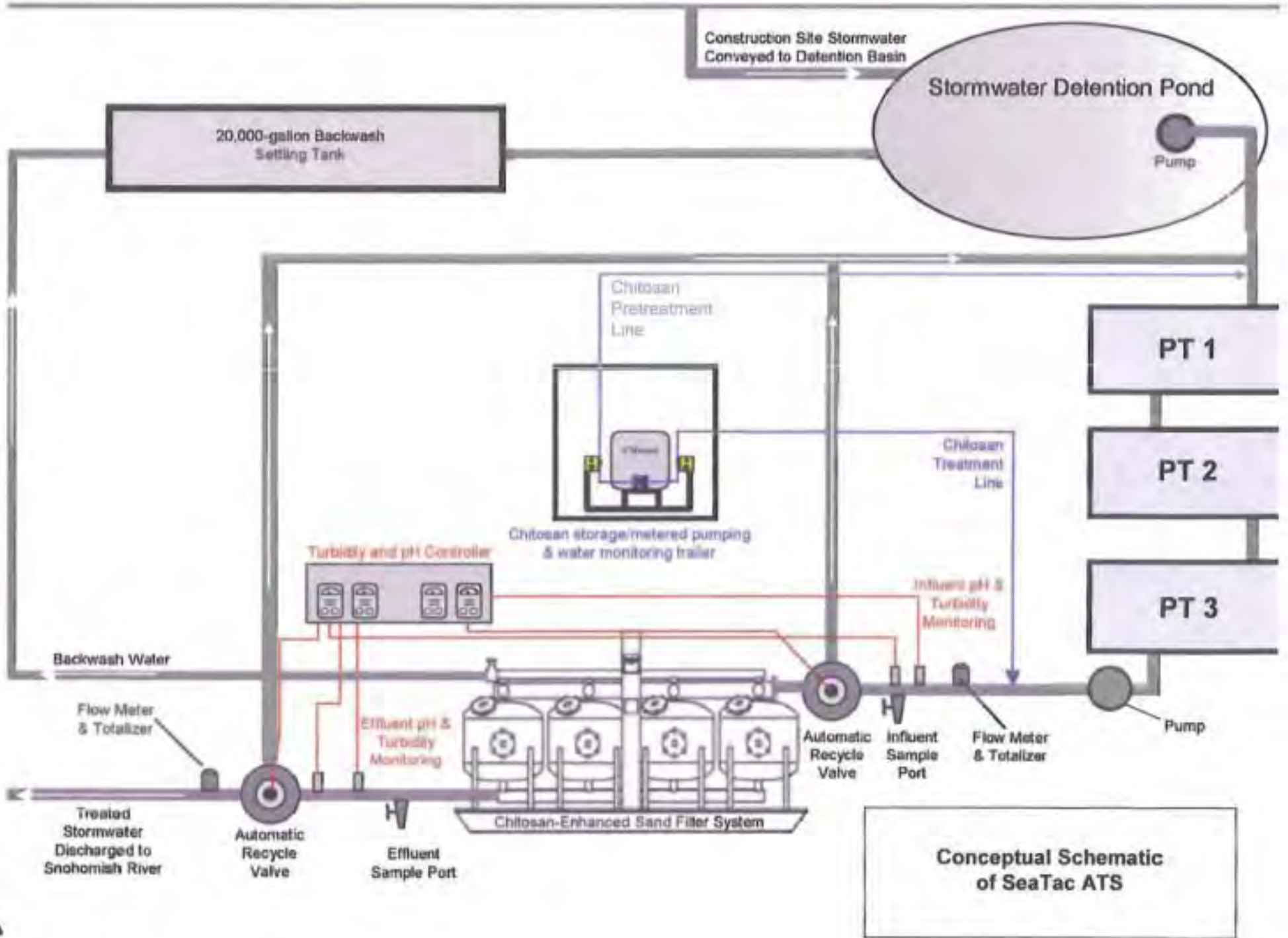
ATS Control System Data Management – QA/QC



Water Properties

Main Alarm **Off** Status Config

Record	Incoming	Discharge
Turb	###.#	###.#
pH	##.##	##.##
GPR	####	####
Pres	####	####



5

Figure 5
 Overview of Sea Tac 3rd Runway Construction Drainage



Figure 5
 2006 3rd Runway
 Embankment (10724)
 and RW 16L Safety
 Area Expansion (101958)
 General Work Area





December 31, 2007
South End
Sea Tac, 3rd Runway



December 31, 2007
North End
SeaTac, 3rd Runway



February 3, 2008
North End
SeaTac, 3rd Runway

Demonstration of Significant Recycling of Treated Water Occurs Every Day Through Automated and Manual Interventions; Example from SeaTac Airport ATS

Date	Influent Flow (from last pre-treatment Pond 3 (PT3) to Sand Filter, gal)	Daily Avg Tur in (Used by EPA as PTS Effluent) (NTU)	Discharge Flow (successfully treated effluent from sand filter, limit was 5.5 NTU) (gal)	Recycle Flow Post-Sandfilter (gal)	Calculated Total Recycle (combined pre- and post-sand filter recycle)	Total Recycled as percent of Influent	Significant Rain Events >0.10 inches
The CDG drainage at SeaTac was sampled in Dec 2007 and Jan 2008. This sheet summarizes all data for that drainage, from all five systems (pumps) at site, rainfall data for Seattle from Weather Underground.							
Post-sand filter recycle is water recycled after sand filter treatment primarily because it is not <5.0 NTU. This flow comes from daily ATS operation sheets, and is a subset of the total recycle. At SeaTac, all recycle flow goes back to PT1.							
Another recycle valve is located before the sand filter, that can send water back to PT 1 when influent turbidity and/or sand filter pressure gets too high. This flow was not directly available from operations sheets.							
Total Recycle is calculated as the difference between influent flow and the discharge flow.							
Days with no treatment are indicated. There are many days where treatment is not necessary.							
Note that even during rain events, there are many days of no treatment.							
Note that substantial recycling occurs every day of treatment, to a greater or lesser degree.							
12/01/07	No treatment						0.34
12/02/07	2555337	72.4	2057038	99421	298811	11.69%	1.47
12/03/07	3100391	141.4	2488882	195228	612709	19.75%	3.98
12/04/07	3272340	113.1	2763324	54288	509016	15.56%	0.2
12/05/07	3308139	93.0	2825450	20441	68289	2.06%	
12/06/07	3113122	88.1	2986757	196293	616365	19.80%	
12/07/07	2752992	87.8	2185217	330917	567775	20.62%	
12/08/07	2034019	75.0	1714281	186475	319735	15.72%	
12/09/07	1228915	78.7	989108	116537	317815	25.86%	
12/10/07	879826	82.6	770154	37876	209382	23.80%	
12/11/07	No treatment						
12/12/07	No treatment						
12/13/07	No treatment						0.14
12/14/07	No treatment						
12/15/07	457441	59.6	421481	21579	35960	7.86%	0.28
12/17/07	1054859	57.8	978008	25318	79851	7.57%	
12/18/07	1081185	92.6	831329	207508	249857	22.92%	0.11
12/19/07	2163988	123.2	1784783	200174	379205	17.48%	0.48
12/20/07	2294248	101.9	1910487	224132	383759	16.74%	0.89
12/21/07	1358720	71.8	1218413	87594	140307	10.32%	
12/22/07	1342018	88.8	1113858	148796	228167	16.97%	0.35
12/23/07	909602	84.8	792259	36867	117343	12.87%	0.34
12/24/07	152132	64.4	137847	5396	14285	9.38%	
12/25/07	No treatment						0.15
12/26/07	465806	65.0	387391	43078	78115	16.77%	
12/27/07	823775	78.03	530582	37881	92193	11.19%	0.6
12/28/07	1621361	49.87	1468882	42064	155279	9.58%	
12/29/07	990788	44.17	953017	35178	57769	5.73%	
12/30/07	No treatment						
12/31/07	No treatment						
01/01/08	No treatment						
01/02/08	1548331	57.4	1482729	48813	137627	8.89%	0.52
01/03/08	1743294	63.0	1123328	27943	125912	7.22%	0.44
01/04/08	No treatment						0.1
01/05/08	1618548	47.6	1412336	43448	186220	11.51%	0.14
01/06/08	2113486	46.3	1969948	35299	212518	10.05%	0.18
01/07/08	No treatment						
01/08/08	No treatment						0.47
01/09/08	1990128	48.8	1792388	44118	206742	10.39%	0.29
01/10/08	1618915	59.8	1412946	48918	194272	11.99%	0.51
01/11/08	2288346	60.9	1931237	39159	258009	11.28%	
01/12/08	1436296	81.9	1288233	73889	206673	14.39%	
01/13/08	No treatment						
01/14/08	1263338	49.8	1087237	18837	176098	13.94%	0.15
01/15/08	1144216	48.8	974838	36383	169378	14.81%	
01/16/08	No treatment						
01/17/08	No treatment						
01/18/08	No treatment						
01/19/08	No treatment						0.12
01/20/08	No treatment						
01/21/08	No treatment						
01/22/08	No treatment						
01/23/08	No treatment						
01/24/08	694897	60.1	548898	27737	152907	21.87%	
01/25/08	374567	49.8	321034	15488	51033	13.62%	
01/26/08	No treatment						0.18
01/27/08	No treatment						
01/28/08	319884	60.9	234226	20348	85658	26.80%	
01/29/08	1273064	61.1	1029919	27709	249146	19.57%	0.12
01/30/08	922998	36.3	886394	22908	188514	20.42%	0.15
01/31/08	No treatment						0.17
avg % recycle for site						10.13%	

Demonstration that Recycle Interventions Coincide with High Influent Turbidity Readings; Recycle Often Reaches 100% for Extended Periods

Date (month)	Time (hr:mm)	Flow In (Pumped from FT Panel & to Sand Filter) (gal)	Tur In (Used by EPA as representative of RTB effluent) (NTU)	MSR Comments	Discharge Flow Out (gal)	Flow Recycled Post-sandfilter (gal)	Turbidity of Recycle post-sandfilter (NTU)	Total Treated Flow	Total Recycled One and post sand filter	Percent Recycled
This data segment from December 7, 2007. COG drainage, site 2, system 2										
High influent turbidity triggers either automated or manual operator recycle intervention or sometimes shutdown.										
Periods of major intervention are highlighted in pink, recycle intervention often initiated at turbidities less than 150 NTU.										
Note: highest turbidity data not used by EPA when effluent (flow out) = zero, but pretreatment (flow in) continues during 100% recycle										
Influent turbidity nearly always drops significantly either during or shortly after recycle interventions										
Averages and totals at bottom are for entire day of 12/07/07, avg % recycle indicates several more interventions occurred later in the day										
Avg day's recycle indicates that 34.64% of the water contributing to the "Tur in" has already been "passively" treated once, and is on "second pass"										
12/07	8:15	7142	104.6		7182	0	0.0	7182	-40	-0.56%
12/07	8:00	7410	122.1		6501	680	7.7	7181	909	12.67%
12/07	8:45	6671	118.0		3546	2637	11.9	6385	5323	83.39%
12/07	8:30	7780	108.9		852	5517	18.0	6369	6028	94.65%
12/07	8:15	6829	191.0	intervention initiated at 191 NTU	465	6468	6.6	6923	6374	92.06%
12/07	8:00	7026	103.3		6948	117	5.1	7065	80	1.14%
12/07	7:45	7186	113.3	intervention ends temporarily at 113 NTU	7193	0	0.0	7193	-7	-0.10%
12/07	7:30	8172	142.8		4237	2471	14.6	6708	3935	58.66%
12/07	7:15	8519	178.0		103	6016	30.9	6119	8418	137.56%
12/07	7:00	4119	215.8	data point not used by EPA for flow rec	0	4123	37.2	4123	4119	100.00%
12/07	6:45	6907	256.3	data point not used by EPA for flow out	0	6975	26.8	6975	6907	100.33%
12/07	6:30	7638	262.9	data point not used by EPA, 260 flow	0	6385	40.2	6385	7038	100.50%
12/07	6:15	6948	217.6	intervention initiated at 217 NTU	5844	1133	10.1	6977	1102	15.81%
12/07	6:00	7066	96.2		7106	0	0.0	7106	-40	-0.57%
12/07	5:45	7159	57.9	intervention ends temporarily at 57 NTU	7186	0	0.0	7186	-27	-0.38%
12/07	5:30	7837	66.3		1273	5210	23.9	6483	6564	101.26%
12/07	5:15	6850	171.6	data point not used by EPA for flow rec	0	6902	16.7	6902	6850	100.53%
12/07	5:00	7009	152.9		1795	5293	7.7	7088	5214	73.58%
12/07	4:45	7173	138.7		6494	719	14.6	7213	679	9.47%
12/07	4:30	7778	142.9	data point not used by EPA for flow out	0	6426	26.2	6426	7778	121.03%
12/07	4:15	6921	140.7	data point not used by EPA for flow out	0	6953	14.0	6953	6921	100.00%
12/07	4:00	7101	144.7		3731	3397	6.8	7128	3370	47.41%
12/07	3:45	7866	162.4		2918	3768	27.9	6686	4948	74.03%
12/07	3:30	6891	103.0	data point not used by EPA for flow out	0	6617	26.1	6617	6891	104.14%
12/07	3:15	6937	157.9	data point not used by EPA for flow out	0	6965	13.2	6965	6937	100.00%
12/07	3:00	7155	157.6	peak 157 NTU	4716	2471	6.4	7187	2439	34.07%
12/07	2:45	7804	104.3	data point not used by EPA for flow out	0	6459	26.4	6459	7804	120.97%
12/07	2:30	6860	164.0	data point not used by EPA for flow out	0	6957	13.5	6957	6860	100.62%
12/07	2:15	7069	130.6	intervention initiated at 137 NTU	4850	2579	6.1	7129	2519	35.33%
12/07	2:00	7301	120.1		6704	486	12.0	7190	597	8.31%
12/07	1:45	7651	83.3		1980	4844	15.1	6434	6061	79.22%
12/07	1:30	6929	56.4		6966	0	0.0	6966	-37	-0.53%
12/07	1:15	2786	89.0		1751	944	7.0	2695	1035	37.15%
12/07	:15	576	96.4		468	121	3.3	589	107	18.01%
12/07		7012	97.6		6994	0	0.0	6994	16	0.23%
12/07	daily sums/avg	679349	114.8		443693	190194		634187	236366	34.64%

Total Pond Volumes at KC-SeaTac Greatly Exceeded EPA CGP Requirements; EPA did not Include Ponds as Essential Passive Treatment Technology

Comparison of Pond Sizes in the Four Drainage Areas at the KC-SeaTac Runway Site During the Time Period Dec 2007-Jan 2008

Drainage Area Designation	Total Acreage of Drainage Area	Detention Ponds Located Within Drainage		Pretreatment Ponds Located Within Drainage		Total Pond Capacity in Drainage (Cu Ft)	Total Pond Capacity in Drainage (gallons)	Capacity as cu ft/acre of drainage	Capacity as Multiple of CGP standard 3600 cu ft/acre
		Number of Detention Ponds	Total Live Detention Pond Capacity (Cu. Ft)	Number of Pretreatment Ponds	Approximate Total Pretreatment Capacity (Cu Ft)				(here, unlike CGP, pond capacity/acre is based on total, not disturbed acreage)
Pond F	70	1	640,332	3, 50x50x4'	30,000	670,332	5,014,083	9576	at least 2.7x times larger than CGP standard
Ponds C/D/G	190	4	2,321,748	3, 50x50x4' 1 larger pretreatment pond	30,000	2,351,748	17,591,075	12165	at least 3.4 times larger than CGP standard
Pond M	17.5	1	159,429		20,000	179,429	1,342,129	10253	at least 2.8 times larger than CGP standard
SDS6 (South Pond)	96	1	261,360	3, 50x50x4'	30,000	291,360	2,179,373	3035	Final stabilization on this part of the site was mostly complete, see note on SDS6 below.

Notes:
 The technology basis for the rule did not require any ponds, but these 15 KC-SeaTac sites that were used as the basis for the limit all have ponds in use for treatment that far exceed EPA and most State CGP capacity requirements of 3600 cu ft pond retention per acre of disturbed area.
 The CDG drainage contained four detention ponds; there were a G1 and G2 as well as a C and D detention ponds.
 The drainage designations, pond volumes, condition of construction activity, and acreage for each drainage were supplied by representatives of the the Seattle Port Authority.
 EPA and many state CGPs recommend detention ponds that are at least 3600 cu. Ft. per acre of disturbed area at a construction site >10 acres.
 The capacity calculated above for all drainages is based on the total area of the drainage, not just the disturbed area.
 The first three drainages at the top of the chart had very little actively disturbed area, so actual multiple over CGP standard is much higher than shown. The runway was all paved at the time of the sampling and no active excavation is believed to be present. The addition of topsoil to the areas around the runway was the last planned soil activity.
 Essentially all of the SDS6 drainage was paved, stabilized and/or complete. The pond likely was larger previously when active construction was taking place on this portion of the site. This area would not have still maintained stormwater treatment if not for the strict 5 NTU water quality limit.

Demonstration of Significantly Higher LTA for the SeaTac CDG Drainage in December than for any Other SeaTac Drainage; Coincides with the Only Construction Activity Performed at SeaTac During Sampling Period

Drainage Area and Data Date Range at SeaTac	Long Term Average (LTA) of Influent Turbidity
Note: For simplicity, only the basic LTAs are compared here, not the unbiased calculations	
CDG Drainage, Dec Data Only, all five pumps	73.63
CDG Drainage, Combined Dec-Jan Data, all 5 pumps	67.35
CDG Drainage, Jan Data Only, all five pumps	49.65
Pond M (Only Jan Data from one pump exists, EPA original calculations)	43.30
Pond F Dec Data for 2 pumps (only data available)	56.29
SDS6 Drainage 4 pumps, Dec-Jan combined	47.24
SDS6 Drainage 4 pumps, Dec data only	41.49
SDS6 Drainage 4 pumps, Jan data only	52.75



March 30, 2006



May 3, 2005



March 30, 2006



8-15-07

SKY-PIK
00125 4242

How the Proposed Effluent Limitation Guidelines Conflicts with Executive Orders and
Presidential Memorandums

Issue / Concern within ELG	Text from Executive Orders and Presidential Memorandums
<p>Overall quality of data upon which federal agency decisions rely.</p> <ul style="list-style-type: none"> • EPA is attempting to establish a national technology standard with limited data from actual construction activities. • EPA set the numeric limit using data from advanced treatment systems rather than passive treatment systems. However the chosen technology for the final ELG was Passive Treatment Systems. 	<p><i>"The public must be able to trust the science and scientific process informing public policy decisions."</i></p> <p>Presidential Memorandum for the Heads of Executive Departments and Agencies March 9, 2009</p> <p><i>"Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."</i></p> <p>E.O. 13563, Improving Regulation and Regulatory Review. January 18, 2011</p>
<p>Ensuring the accuracy of data relied upon by federal agencies during the rulemaking process.</p> <ul style="list-style-type: none"> • EPA significantly underestimated the overall costs associated with its final rule, as it set a standard based on "passive treatment" as the model technology, yet almost exclusively relied on data from modified advanced treatment systems in establishing the standard. EPA's cost estimates are therefore too low by approximately a factor of ten. • EPA grossly overestimated the sediment removal that would be achieved by the ELGs because it gave no credit to the measures that are already required to reduce pollutant loads from active construction sites, which can be significant. 	<p><i>"Agencies should communicate scientific and technological findings by including a clear explication of underlying assumptions; accurate contextualization of uncertainties; and a description of the probabilities associated with both optimistic and pessimistic projections including best-case and worst-case scenarios where appropriate."</i></p> <p>Memorandum for the Heads of Executive Departments and Agencies December 17, 2010, issued by John P. Holdren, Assistant to the President for Science and Technology and Director of the Office of Science and Technology Policy.</p>

How the Proposed Effluent Limitation Guidelines Conflicts with Executive Orders and Presidential Memorandums

<p>Disproportionate and cumulative effects of regulations on small businesses.</p> <ul style="list-style-type: none"> • The 10 acre threshold that triggers a Numeric Effluent Limit will disproportionately impact small business entities. EPA should reinstate a 30 or 50 acre threshold to avoid cumulative impact on small businesses. • EPA has not yet determined how the numeric limit will apply to small sites that are part of a larger common plan of development. 	<p><i>"My (President Obama's) Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects including cumulative effects, on small businesses."</i></p> <p>Presidential Memorandum – Regulatory, Flexibility, Small Business, and Job Creation. January 18, 2011</p>
<p>Ensuring the public and regulated entities have access to data relied upon by an agency for a rulemaking decision.</p> <ul style="list-style-type: none"> • In its rush to meet the court-ordered December 1 2009, deadline, EPA promulgated a standard without providing the public with an opportunity to review the data or methodology upon which it was based. • After NAHB's challenge of the rule, EPA's motion to the court asks for 18 months (until February 2012) to correct the final rule. But EPA is rushing to finalize a rule by May 30, 2011. 	<p><i>"To the extent feasible and permitted by law, each agency shall provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings."</i></p> <p>E.O. 13563 Improving Regulation and Regulatory Review. January 18, 2011</p>

How the Proposed Effluent Limitation Guidelines Conflicts with Executive Orders and Presidential Memorandums

<p>Completing a comprehensive cost-benefit analysis</p> <ul style="list-style-type: none"> EPA estimates that compliance with the ELG and its 280 NTU numeric limit will cost \$953 million per year. NAHB has shown that the cost will be closer to \$9.7 billion because EPA failed to recognize the need to use active treatment technology. EPA also failed to fully consider the financial impact of a numeric limit on state and local governments. NAHB's analysis suggests that the implementation of a numeric limit will require an additional 614 full time employees nationwide – an increase of 30 percent over current staffing levels and \$4 million/yr beyond current program resources. Because the total sediment discharges from construction activities currently account for less than 0.1 percent of all sediment discharges to receiving waters nationally, and EPA admits that the ELG will control less than 0.25 percent of sediment runoff, it is difficult to believe that these minimal benefits justify the excessive cost. 	<p>"In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." E.O. 12866, Regulatory Planning and Review September 30, 1993</p> <p>"As stated in that Executive Order [12866] and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs." New E.O. Improving Regulation and Regulatory Review January 18, 2011</p>
<p>Ensuring flexible approaches for regulatory requirements are both considered, and to the extent possible, chosen by the federal agency.</p> <ul style="list-style-type: none"> EPA has chosen a one size fits all numeric limit for turbidity that does not take into consideration the flexibility that is needed to address the variety of soil types, rainfall patterns, and other site specific conditions on construction sites. 	<p><i>"Where relevant, feasible, and consistent with regulatory objectives, and to extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public."</i></p> <p>E.O. 13563 Improving Regulation and Regulatory Review. January 18, 2011</p>

NAHB's Concerns with a Numeric Effluent Limit

Summary: On December 1, 2009, EPA finalized the Effluent Limitation Guidelines (ELGs) for the Construction and Development Industry. After a close analysis of the data used to develop the numeric effluent limit of 280 NTU, the Small Business Administration's (SBA) Office of Advocacy and the National Association of Homebuilders (NAHB) filed a petition asking the agency to revise its new ELGs for the construction and development industry because of problems with the data and modeling. NAHB also filed a lawsuit challenging the rule in the U.S. Court of Appeals for the 7th Circuit. Only after NAHB filed its opening brief in July 2010 would the Department of Justice (DOJ), with EPA's concurrence, discuss possible errors in EPA's 280 NTU numeric limit. As a result, DOJ/EPA filed a motion asking the 7th Circuit to vacate the numeric effluent limit portion of the ELGs to address flaws in the final rule. These flaws include EPA's admission that it "improperly interpreted the data" such that it can no longer support the 280 NTU limit. EPA stated in the motion that the technical nature of the issue and number of steps required to resolve the flaws would require an 18-month abeyance in the case, or until February 15, 2012. Now, EPA has indicated it intends to finalize a new rulemaking by May 30, 2011.

NAHB is concerned with EPA's expedited rule proposal, lack of any new data to justify a new limit, and the costly implications associated with a nationwide 'one size fits' all numeric limit approach to managing construction site stormwater discharge.

EPA's ELG rule will be imposed upon NAHB members at the worst economic time for the industry. The U.S. Commerce Department reported the worst annual construction rate for new single family housing units on record; just 329,000 housing units nationwide. The lowest annual level since the Commerce Department began collecting new housing starts back in 1963.

Overall Cost Benefit Analysis

- According to NAHB's estimates, EPA's final rule will cost approximately \$9.7 billion. This contrasts with EPA's estimated cost of \$953 million per year because it reflects the fact that facilities would have to use modified Active Treatment System technology instead of Passive Treatment to comply with the ELG. Given the conservative nature of the \$9.7 billion cost estimate, and the inherent variability in the effectiveness of Passive Treatment Systems, we believe that this is the best available estimate of the costs of achieving a 280 NTU limit.
- According to EPA, the ELG will control less than 0.25% of all total sediment runoff, at a cost of approximately \$953 million annually. This is in contrast to EPA's determination in 2004 that the existing measures already provide substantial control of sediment erosion.
- EPA's final regulation will cost up to \$10 billion annually, hurting small businesses and housing affordability, while providing little additional environmental benefit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WISCONSIN BUILDERS
ASSOCIATION, NATIONAL
ASSOCIATION OF HOME
BUILDERS and UTILITY WATER
ACT GROUP,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL
PROTECTION AGENCY; LISA
P. JACKSON, in her official
capacity as Administrator of the
United States Environmental
Protection Agency,

Respondents.

No. 09-4113 (consolidated with
Nos. 10-1247 and 10-1876)

**EPA'S UNOPPOSED MOTION FOR PARTIAL VACATURE OF THE
FINAL RULE, REMAND OF THE RECORD, TO VACATE BRIEFING
SCHEDULE, AND TO HOLD CASE IN ABEYANCE**

Respondents United States Environmental Protection Agency, *et al.* (EPA), respectfully move this Court for entry of an order vacating and remanding to the Agency limited portions of the final rule under review in this case, vacating all pending procedural deadlines including

due dates for remaining briefs, and holding this case in abeyance for 18 months, until February 15, 2012, to allow EPA to address a flaw in the final rule that was first brought to the Agency's attention by way of petitions for administrative reconsideration. In addition, EPA moves for a remand of the record for the same time period to allow the Agency an opportunity to reconsider portions of the final rule based on petitioners' assertions that EPA failed to consider certain comments submitted during the rulemaking process.

All parties agree that the requested relief is appropriate.¹

BACKGROUND

This case involves multiple challenges to EPA's final rule entitled "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category," 74 Fed. Reg. 62,996 (Dec. 1, 2009). The rule, promulgated pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, establishes the first enforceable numeric effluent limit on the amount of pollutants in stormwater that may be

¹ On May 5, 2010, this Court entered an order denying the Natural Resources Defense Council's (NRDC) intervention motion "without prejudice to renewal if the EPA ceases to defend its regulations." *Id.* at 2. NRDC has authorized the undersigned to represent that it does not oppose the requested relief because EPA will take final action by February 15, 2012.

discharged from certain construction and development sites. In its current incarnation, the rule requires that discharges to our Nation's waters associated with construction activity at certain sites not exceed an average turbidity for any day of 280 nephelometric turbidity units ("NTU").² 74 Fed. Reg. 63,058. The rule also requires monitoring to ensure compliance with that numeric limit and implementation of various other controls. *Id.*

In December 2009, Wisconsin Builders Association and National Association of Home Builders (collectively, NAHB), filed petitions for review of the final rule and, in April 2010, the Utility Water Act Group (UWAG) filed its petition for review. This Court later consolidated the three petitions. NAHB and UWAG filed separate opening briefs on July 9, 2010. Among the arguments that NAHB raised, it reiterated the argument that it presented to the Agency a month earlier in its administrative reconsideration petition regarding deficiencies in the data EPA used to support its decision to adopt a 280-NTU effluent limit. NAHB also alleged that EPA had failed to consider certain site-specific characteristics, and in particular the impact of the numeric

² A nephelometric turbidity unit is a unit that measures clarity of water.

effluent limit on cold weather sites and small sites. For its part, UWAG alleged that, notwithstanding written comments it submitted to the Agency during the rulemaking process, EPA failed to consider certain impacts of the final rule specific to linear gas and electric utility projects.

In April 2010, the Small Business Administration (SBA)³ filed with EPA a petition for administrative reconsideration of several technical aspects of EPA's final rule and, in that petition, identified potential deficiencies with the dataset that EPA used to support its decision to adopt the 280-NTU limit. In June 2010, less than a month before it filed its opening brief in this Court, the National Association of Home Builders also filed a petition for administrative reconsideration with EPA incorporating by reference SBA's argument regarding the deficiencies in the data underlying the 280-NTU limit.

Based on EPA's examination of the dataset underlying the 280-NTU limit it adopted, the Agency has concluded that it improperly interpreted the data and, as a result, the calculations in the existing administrative record are no longer adequate to support the 280-NTU

³ The SBA is not a party to this case.

effluent limit. EPA therefore wishes to re-examine that number through a narrowly-tailored notice-and-comment rulemaking and, if necessary, revise that portion of the limit before proceeding with its defense of the rule. EPA also believes that a remand of the record to consider and respond to UWAG's comments would aid both the parties and the Court and would potentially narrow or eliminate the issues ultimately remaining for review by this Court. An order vacating and remanding the 280-NTU limit and remanding the record to allow EPA an opportunity to consider and respond to UWAG's comments, with the remainder of the case being held in abeyance pending EPA's completion of these actions, would be in the interests of justice, judicial economy, and the parties.

EPA's opening brief is currently due October 4, 2010.

ARGUMENT

A. Abeyance And Partial Vacature And Remand Are Appropriate So That EPA May Consider The Potential Data Error Identified In The Administrative Reconsideration Petitions.

EPA has determined that it will begin proceedings on the two pending administrative petitions so that the Agency may reconsider the 280-NTU limit in light of an error identified in those petitions. Given

this, EPA requests that the Court vacate and remand the numeric effluent limitation to the Agency and hold this case in abeyance until EPA completes the administrative reconsideration process.

The process of administrative reconsideration of a rule of this magnitude involves a number of administrative tasks, including: review of technical material in the rulemaking record, gathering and reviewing additional material and documents (as appropriate), drafting a proposed action for publication in the Federal Register, taking public comment on any proposed action, considering and responding to public comments, preparing a notice of EPA's final action for publication in the Federal Register, and taking that final action. In addition, the process will require interagency review of any proposed and final rulemaking notices pursuant to Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

Given the technical nature of the issue that EPA will reconsider and the number of steps EPA is required to take as part of this administrative determination, EPA requests that the Court hold the case in abeyance for 18 months, until February 15, 2012, to allow EPA sufficient time to complete the reconsideration process. *See, e.g., Anchor*

Line Ltd. v. Federal Maritime Comm'n, 299 F.2d 124, 125 (D.C. Cir. 1962) (“when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency”). EPA also proposes to submit a status report to the Court every 180 days while the case is held in abeyance to keep the Court informed of EPA’s progress.⁴ Within 30 days after the abeyance period ends, EPA proposes that the parties submit a report advising the Court on how the parties wish to proceed with the litigation in light of the action on remand.

Good cause exists to hold the case in abeyance while EPA reconsiders the issues regarding the numeric limit identified in the administrative reconsideration petitions. First, petitioners have already represented that the administrative reconsideration process may resolve at least some of their principal concerns with the final rule, thus potentially making it unnecessary for this Court to address these highly technical issues. See NAHB Br. at 14 (“If EPA grants either Petition for Reconsideration by changing the current rule or promulgating a new

⁴ Petitioners have indicated that they wish to reserve their right to file separate status reports in case they disagree with EPA’s characterization in its reports of the status of the Agency’s administrative reconsideration process.

rule, EPA could potentially moot certain issues raised in this appeal.”); UWAG Br. at 6 (same). Second, the petitioners and others may elect to seek judicial review of EPA’s final action on remand. Given the nature of reconsideration that EPA proposes to grant here, such challenges would likely overlap substantially with the issues presented here and, therefore, would be appropriate for consolidation with this action. Thus, granting abeyance while EPA reconsiders the numeric limit will promote judicial efficiency and conserve the Court’s and the parties’ resources by allowing all of the issues raised in this case and by any challenges to EPA’s actions on remand (if any) to be briefed and decided in a single, consolidated lawsuit.

B. This Court Should Remand The Record To EPA To Allow The Agency To More Fully Explain Its Rationale Regarding Certain Issues Identified By Petitioners.

EPA also asks that the Court remand the record to the Agency so that, in conjunction with its review of the issues raised in the petitions for administrative reconsideration concerning the numeric limit, the Agency may address (and, if necessary, take further regulatory action on) certain impacts of the final rule specific to linear gas and electric utility projects. EPA also agrees to solicit site-specific information

regarding the applicability of a numeric effluent limit to cold weather sites, as well as on the applicability of a numeric limit to small sites that are part of a larger project subject to the numeric limit. The Agency will also address any other issues that reveal themselves to the Agency on remand.

This additional analysis will provide the Court with a more complete rationale for the Agency's decision on important regulatory issues and may ultimately resolve (or substantially narrow) the issues for judicial review. Although EPA is confident that there is sufficient information in the record such that its decisionmaking path "may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), it nevertheless believes that the public and this Court will benefit from a full explanation by the Agency of these issues and other related issues that may arise on remand. EPA acknowledges that it could have provided a more direct response to UWAG's comments during the regulatory process, but believes that it would be a disservice to the Court, the parties to this lawsuit and to the public for that explanation to be excluded from the record on review. Accordingly, EPA seeks a remand of the record

running concurrently with the reconsideration period, to articulate more fully its rationale for these issues. *See, e.g., Public Service Comm'n of Kentucky v. FERC*, Case No. 03-1092, 2004 WL 222900 (D.C. Cir. Jan. 21, 2004) (granting motion to remand the record and to hold case in abeyance so that FERC could provide further explanation of the basis for its decision).

Courts of appeals “commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.” *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). Here, the Court must weigh the value of proceeding now (when EPA concedes that its administrative record would benefit from further development) and possibly remanding the rule back to the Agency for further explanation after full merits briefing and oral argument, against the value of providing EPA with an opportunity to fully articulate its position so that the Court can make an informed decision on the merits in the first instance.

Finally, as noted above, all parties agree that the requested relief is appropriate.

CONCLUSION

WHEREFORE, EPA respectfully requests that the Court:

- (1) vacate the deadlines set in its June 22, 2010 order (Doc. 22) for EPA to file its opening brief and for petitioners to file their reply briefs;
- (2) vacate and remand the 280-NTU numeric limit to EPA for further proceedings as outlined in this motion; (3) remand the administrative record to EPA for further explanation; (4) order the case held in abeyance for 18 months (*i.e.*, until February 15, 2012), by which date EPA will take final action to address the issues identified in this motion; (5) order EPA to file a report on the status of the administrative proceedings every 180 days during the abeyance period; and (6) order the parties to file a report advising the Court of their views on how the litigation should proceed, including proposed briefing deadlines, within 30 days after the abeyance period expires.

August 12, 2010

Respectfully Submitted,
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CERTIFICATE OF SERVICE

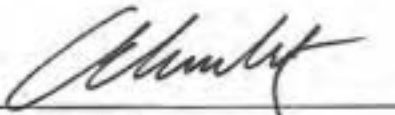
I hereby certify that on this 12th day of August, 2010, a copy of **EPA'S UNOPPOSED MOTION FOR PARTIAL VACATURE OF THE FINAL RULE, REMAND OF THE RECORD, TO VACATE BRIEFING SCHEDULE, AND TO HOLD CASE IN ABEYANCE**, was sent, via first class U.S. mail, to the following parties and proposed intervenors:

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