

August 17, 2011

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson,

We are writing to express our concerns over EPA's stormwater regulations, specifically post construction limits from newly developed and redeveloped sites (developed sites). While the agency intends to propose systems under which the Clean Water Act (CWA) section 402 permit programs apply only to discharges from active construction, we believe EPA's authority to regulate developed sites and post-construction stormwater discharges exceeds the agency's statutory authority. We ask that you provide a clear, detailed explanation on the source of EPA's authority to promulgate these regulations.

To assist you in addressing our specific concerns we ask that you provide responses to the following questions and cite any statutory text, case law, or legislative history that you believe supports your interpretation of the CWA. We will then use your responses to these questions in our ongoing review of the agency's regulatory authority for stormwater discharges from developed sites.

Study and Report to Congress: "Limits of Regulations"

1. CWA sections 402(a)(1)(C) and 402(a)(2)(C) require EPA to conduct a study and then report to Congress on developing new stormwater permit regulations. We believe this is a condition that must be satisfied prior to EPA initiating regulatory development. Under the CWA, EPA is required to act in the favor of developing a new stormwater permit program for developed sites. We have heard that EPA plans to provide this study and report to Congress sometime in August. When can Congress expect the report from EPA?

2. It is critical that Congress receive this report before EPA issues any proposed rules in this area. The report recommendations should be a reminder to Congress first. Then Congress should direct EPA direction based on that report before the agency issues any proposed rules. EPA is taking a fair down the path of deciding whether it will enact final regulations – without sufficient opportunities for congressional oversight.
 - a. Will EPA give Congress enough time to review the report before new regulations are proposed?
 - b. How much time does EPA plan to give Congress to review the report before such a rule is proposed by the agency?
3. According to EPA's website the agency plans to issue proposed rules for developed sites in September 2011, and final rules by November 2012.
 - a. What is the basis for these dates?
 - b. To give Congress enough time to review the report before EPA study and then give feedback to EPA – will the agency agree to change this schedule and give more time before the proposed rule is published by the agency?

Landowner Questionnaires from 2010

1. Laying the foundation for any developed sites regulations, EPA and EPA gathered information from the real estate industry. In 2010, EPA sent over 3000 information questionnaires to obtain information from landowners on stormwater management practices, their operations and maintenance, and their expense.
 - a. What did EPA learn from these surveys?
 - b. Was the information from them useful? Please explain.....
 - c. Were the time and resources spent by EPA to gather this information worth the effort?
 - d. Is the information being gathered as the basis for any proposed rules we will see from EPA regarding developed sites? Why or why not?
 - e. Will EPA make the information gathered from these questionnaires available to Congress and the public as part of the docket?

Authority and Requirements for NPDES Construction Discharges

1. As stated above, EPA's regulations under the program are limited to requiring new construction that is currently developing new requirements that would require permits to control stormwater discharges after construction has ceased. These could result in new post-construction stormwater permits at already built-out sites.

¹ <http://cruip.epa.gov/nbdes/npdeswatermainakinfo.cfm>

- a. Does EPA think that the new regulatory approach to stormwater runoff in the construction process ends?
 - b. Does EPA need authorization from Congress to enact new post-construction stormwater regulation?
 - c. In CWA section 4072(p)(2)(D) Congress gave EPA authority to develop permit requirements for stormwater discharges "associated with industrial activity." What "industrial activity" will provide the basis for EPA to develop requirements for stormwater discharges from developed property?
2. In the context of the public comment impact review panel that EPA told participants that new regulatory post-construction requirements could mean that already-built properties might need to make changes to the site to have the "hydrology of the land before construction" and maintain a "forest, prairie, meadow."
- a. How would EPA propose that land with homes and buildings already on it have the characteristics of a forest, prairie, or meadow?
 - b. What kind of economic impact would such a requirement have on property owners?
 - c. How would EPA determine the appropriate "hydrology of the land before construction" in areas where development has been going on for centuries and in areas that were previously swamps like Washington, D.C. or New Orleans, LA?
3. As explained above, current permit requirements for stormwater apply to operators at active construction sites. For new regulations of stormwater following construction, regulations could be based on land ownership.
- a. Might new stormwater regulations require owners of already built properties, for example, homeowners, associations, business owners, and store owners, to get permits to manage stormwater?
 - b. Has EPA done any analysis of the costs to businesses of such a program?
4. Court decisions have determined that EPA has the authority to regulate the "actual" discharges of pollutants from sources, and not potential discharges. Yet, in the past EPA seems to be considering regulatory requirements for discharge surrogates like the amount of stormwater flows, or the extent of paved and impervious surfaces in a parking lot. In short, EPA might consider regulations that are not based on actual pollutant discharges, but on potential discharges.

- a. What authority, in the CWA or elsewhere, would EPA have on a basis to regulate "sump pumps" for pollutants as opposed to the actual "discharges" of pollutants themselves?

Property Retrofits

1. EPA has indicated that these new regulations could require that new or existing sites be "retrofitted" to control stormwater.
 - a. How would stormwater retrofits work?
 - b. Would EPA directly regulate vegetated areas?
 - c. Would parking lots need to be torn out and replaced with more porous surfaces?
2. If EPA does not impose stormwater retrofit requirements directly on land and building owners, it is at least considering imposing those requirements indirectly – through a program where state and local governments might be required to enact new regulations for retrofit requirements on landowners.
 - a. Is EPA indeed considering a "back door" regulatory approach for stormwater retrofits on landowners?
 - b. On what basis can EPA compel municipalities to impose retrofit requirements on landowners?
 - c. Is EPA considering a "situation where it might withhold funding to municipalities unless they develop stormwater retrofit requirements on landowners?

EPA's current haste in developing these regulations is unwarranted. Until Congress has received the completed report, it is truly surprising that the agency continues to devote limited resources pursuing regulatory development.

Thank you for your prompt attention to this matter.

Sincerely,



