

May 16, 2011

Mr. Kevin Weiss
Water Permits Division
U.S. Environmental Protection Agency
Room 7334 EPA East
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Comments on EPA's November 2010 Stormwater Memorandum

Dear Mr. Weiss:

On November 12, 2010, the Environmental Protection Agency (EPA) issued a memorandum entitled *Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on Those WLAs"* (Memorandum). On March 17, 2011, EPA announced that it would accept comments on the Memorandum through May 16, 2011 because a number of stakeholders had "expressed concern that they did not have the opportunity to provide input" before EPA finalized the Memorandum. The Federal StormWater Association (FSWA) is providing the following comments on EPA's Memorandum, and requests that the Agency withdraw the Memorandum.

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state permitting authorities under the Clean Water Act (CWA or the Act). FSWA member entities or their members own and operate facilities located on or near waters of the United States. Many conduct operations that generate "stormwater associated with industrial activity" as defined at 40 CFR § 122.26(b)

Jeffrey S. Longworth, Coordinator
Barnes & Thornburg LLP
1717 Pennsylvania Ave. NW, Suite 500
Washington, DC 20006
(202) 408 -6918
jlongworth@btlaw.com

I. SUMMARY OF KEY ISSUES

FSWA has identified and commented on the following key issues raised by EPA's decision to distribute the Memorandum as final Agency policy with regard to NPDES permitting of stormwater discharges to waters subject to TMDLs, and to the extent EPA expanded its new policy beyond only those waters subject to TMDLs.

EPA has provided no basis upon which permitting authorities can rely in establishing numeric effluent limitations in most stormwater permitting decisions, or even a rational explanation for how it develops stormwater-specific WQBELs.

EPA has provided no basis or justification for how it would establish a monitoring protocol that accounts for rain-event variability, pollutant fate and transport, background levels of pollutants, or a myriad of other issues that must be addressed in advance to ensure that any stormwater numeric effluent limit program is fair and appropriate.

EPA does not have the authority to regulate volume, flow or impervious surface under the NPDES permit program, as the NPDES permit program was designed solely to regulate discharges of pollutants. Even if EPA has the authority to regulate flow as a surrogate for pollutants, EPA would be forced to make site-by-site specific calculations and determinations, as every site's flow characteristics are unique.

If EPA now interprets "point source" to include impervious surfaces, it renders that term meaningless and clearly contradicts ConLMEN

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II. DETAILED COMMENTS

A. Overview

There are several fundamental problems with the Memorandum. First, the Memorandum represents a dramatic change in the way that EPA historically has implemented the NPDES stormwater program. As a result, we believe the agency must engage in appropriate rulemaking procedures set forth in the Administrative Procedure Act (APA). EPA's failure to adhere to APA requirements is in itself grounds for the Agency to withdraw the Memorandum. The FSWA has provided a summary of the procedural and related legal issues at the end of these comments.

Next, EPA has not provided appropriate technical or factual justifications for its dramatic change in approach. Although EPA cites to "more experience," "increased technical capacity," "more sophisticated and widespread monitoring," "better information," and "changed expectations," EPA has provided nothing factual or technical to bear out these conclusions. Absent a record to support the Memorandum, interested stakeholders, like FSWA members, have been denied the opportunity to independently assess the basis for EPA's conclusions. In short, EPA has provided no basis upon which permitting authorities can rely in establishing numeric effluent limitations in most stormwater permitting decisions. Further, EPA fails to justify the use of "surrogates" like flow volume or impervious cover, neither of which is a pollutant under the Clean Water Act. In addition, EPA improperly sets forth the Clean Water Act procedure for expanding its stormwater permitting program for "designating additional stormwater sources." EPA must address these critical deficiencies before proceeding further with revisions to the Agency's long-standing approach.

Finally, the issues raised in the Memorandum parallel many controversial issues raised in expansive stormwater rulemaking that EPA is planning on proposing by September 30, 2011 and then finalizing by November 2012. That stormwater rulemaking has been called different names in different situations, but EPA's stated intent is to expand the existing stormwater permitting program to include many new private and municipal sources, regulate post-construction stormwater discharges, require MS4 retrofits, and, perhaps, create/carve out a new transportation-related permitting program. Because of the significant overlap between issues raised in the Memorandum and EPA's ongoing new stormwater rulemaking, perhaps the most efficient forum for a public debate on all of these issues is through that rulemaking. Hence, EPA should withdraw the Memorandum.

B. EPA's Revisions Are Premature and Unfounded.

In its Memorandum, EPA specifically identified four reasons for updating the 2002 Memorandum, as follows:

Providing numeric water quality-based effluent limitations in NPDES permits for stormwater discharges;

Disaggregating stormwater sources in a WLA;²
Using surrogates for pollutant parameters when establishing targets for TMDL loading capacity; and
Designating additional stormwater sources to regulate and treating load allocations as waste load allocations for newly regulated stormwater sources.

These reasons, without individual justification and appropriate analyses, are not a sufficient basis to modify EPA's stormwater/TMDL permitting policies. EPA has not provided such justifications or analyses and, therefore, it should withdraw the Memorandum pending a more rigorous evaluation of all of the issues raised by the Memorandum, many of which are set forth below.

1. EPA's Past and Current Approaches Are Still Appropriate.

Since the beginning of its stormwater permitting program, EPA has relied heavily upon non-numeric effluent limitations for meeting the Clean Water Act requirements. EPA regulations authorize BMPs in lieu of numeric limits for NPDES stormwater discharges. For example, 40 CFR § 122.44(k) allows permitting authorities under the NPDES program to include BMPs in permits to control or reduce pollutants when: (1) EPA has established rules to authorize BMP controls for pollutants from industries pursuant to § 304(e) of the Clean Water Act; (2) numeric limitations are infeasible; or (3) BMPs are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Clean Water Act. Generally, permitting authorities, including EPA, have concluded that it is infeasible to establish numeric limitations in stormwater permits and that BMPs reasonably carry out the purposes and

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experience steady exposures in-stream, but rather fluctuating exposures, and are generally tolerant of higher concentrations over shorter periods of time because there are compensating periods of

water runoff which is neither collected nor channeled constitutes nonpoint source pollution and consequentially is not subject to the CWA permit requirement. *See Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir.1999) (relying on “the familiar principle of *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of the other”).

EPA also has not provided any justification for regulating stormwater flow or volume under its NPDES permit program. Even if EPA coul

C. EPA Cannot Avoid APA Rulemaking Procedures When It Make a Major Change In Longstanding Policy.

As set forth in Section II.B.1 of these comments (above), EPA has adhered to a long-standing policy and interpretation of its NPDES stormwater permitting program based on flexible BMP-based, non-numeric effluent limits to address many of the variables and uncertainties associated with stormwater runoff in lieu of numeric limits. EPA's interpretations and guidance for its stormwater program have reinforced this consistent theme for over 20 years. Now, EPA asserts – without the benefit of any justification or supporting documentation – that a numeric approach is feasible and that permitting authorities should abandon EPA's prior guidance and the more flexible BMP approach. And, importantly, EPA proposes to make this change through the Memorandum, which until mid-March was final and not subject to any public process through any notice or comment procedures. This is improper and inconsistent with relevant decisional law. The DC Circuit found that “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” *Alaska Professional Hunters Assoc. v. Federal Aviation Admin.*, 177 F.3d 1030, 1033-

II. CONCLUSION

The FSWA has serious concerns about the Memorandum, the manner in which it was issued, and the record on which it is based. We urge EPA to withdraw the Memorandum so that the Agency can address the noted deficiencies in process and substance, and thereafter engage the public in an open and informed rulemaking. We would be happy to meet with EPA or participate in ongoing discussions with other stakeholders regarding the future of EPA's