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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR
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August 17, 2011

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

Dear Administrator Jackson,

We are writing to express our concerns over EPA's forthcoming stormwater regulations, specifically post construction limits from newly developed and redeveloped sites (developed sites), which the agency intends to propose September 2011. Currently the Clean Water Act (CWA) section 402 permit programs apply only to discharges from active construction sites. We believe that EPA's plan to regulate developed sites and post-construction stormwater discharges exceeds the Agency's statutory authority. We ask that you provide a clear, detailed explanation and the sources of EPA's authority to promulgate these regulations.

To assist you in addressing our specific concerns we ask that you provide a response to the following questions and cite any statutory text, case law or legislative history that you believe supports your interpretation of the CWA. We further request that you provide these responses at least two weeks in advance of proposing any regulations for stormwater discharges from developed sites:

Study and Report to Congress; Timing of Regulations

1. CWA sections 402(p)(5) and (6) (42 U.S.C. § 1342(p)(5)-(6)) direct EPA first to conduct a study and then report to Congress before developing new stormwater permit regulations. We believe this is a condition that must be satisfied prior to EPA initiating regulatory development. Contrary to the CWA, we understand EPA is well down the path of developing a new stormwater program to regulate precipitation that may runoff from developed sites. We have heard that EPA plans to provide this study and report to Congress sometime in August. When can Congress expect the stormwater report from EPA?

2. It is critical that Congress receive this report before EPA issues any proposed rules in this area. The correct sequence should be a report to Congress first. Then Congress should give EPA direction based on that report, before the agency issues a proposed rule for public comment. Otherwise, EPA is already far 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 any stormwater 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 2012.¹
 - a. What is the basis for these dates?
 - b. To give Congress enough time to review the forthcoming EPA study – and then give feedback to EPA – will the agency agree to change this schedule and give more time for congressional review, before a proposed rule is published by the agency?

Landowner Questionnaires from 2010

1. In laying the foundation for any developed sites regulations, last year EPA gathered information from the real estate industry. In 2010, EPA sent over 3000 information collection requests 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 used 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 the landowner questionnaires available to Congress and the public and be placed in the docket?

Authority and Basis for New Post-Construction Regulations

1. As stated above, EPA's regulations under the current CWA stormwater program are limited to requiring permits at active construction sites. EPA 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://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm>

- a. Does EPA think it already has the authority from Congress, to develop new regulations to control stormwater runoff after the construction process ends?
 - b. Does EPA need authorization from Congress to enact new post-construction stormwater regulations?
 - c. In CWA section 402(p)(2)(B) (33 U.S.C. § 1342(p)(2)(B)), 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 regulations for stormwater discharges from developed properties?
2. In the context of a small business impact review panel conducted last year, 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 mimic 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 the operators at active construction sites. For new regulations of discharges following construction, regulations could be imposed to control stormwater based simply on land ownership.
 - a. Might new stormwater regulations for developed sites require owners and managers of already-built properties – for example, homeowners, homeowner associations, business owners, and store owners – to get permits to manage rain run-off?
 - b. Has EPA done any analysis of the costs to landowners of such a program?
4. Court decisions make clear that EPA only has the authority to regulate the “actual” discharges of pollutants from point sources, and not “potential” discharges. Yet, in the developed sites context 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 as “stand-ins” for potential discharges.

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

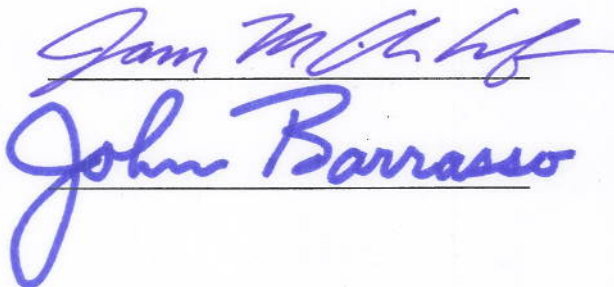
Property Retrofits

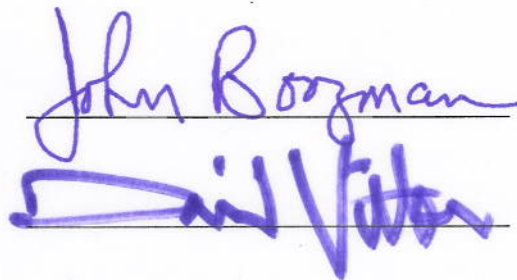
1. EPA has indicated that these new regulations could require that developed sites be "retrofitted" to control stormwater.
 - a. How would retrofit regulations work?
 - b. Would EPA directly require land and building owners to install "green vegetated roofs"?
 - c. Would parking lots need to be torn 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 counties and municipalities 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 concerning that the agency continues spending limited resources pursuing regulatory development.

Thank you for your prompt attention to this matter.

Sincerely,


John Barrasso


John Bozeman