

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)(14) (including active construction stormwater discharges within the definition of 40 CFR § 122.26(b)(14) and (15)), are subject to NPDES permitting, and in many instances discharge to impaired waters subject to or soon to be subject to TMDLs.¹

¹ A copy of FSWA members is available upon request.

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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 Congressional intent to define the term and differentiate "point sources" from "non-point sources."
- EPA has not established procedures to assess stormwater discharges' reasonable potential to exceed final acute values. Without specifically derived stormwater-based water quality standards, which in turn depend greatly on many site-specific characteristics of the receiving water, EPA has no basis for a broad numeric effluent limit approach.
- In its November 2010 Memorandum, EPA implies that permitting authorities may freely designate "stormwater sources" for NPDES permitting and wasteload allocations. However, the Clean Water Act Section 402(p) sets forth a process for designating individual sites or separate categories, and that process cannot be ignored.
- EPA asserts, without 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. EPA's assertion through a Memorandum, which until mid-March was final, was not subject to any public process, and was not subject to notice-and-comment procedures as required by the Administrative Procedures Act, is improper.

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 intent of the Act.

A major reason numeric limits are not appropriate is that wet weather events are highly variable, and it is well-recognized that established sampling techniques do not provide, on their own, a robust mechanism from which to gauge the impacts of industrial activities to the exclusion of other compounding factors. In effect, current monitoring techniques are measuring the variability of the storm event and not the effectiveness of the BMP or other control. Those techniques are not adequate to support a numerically-based compliance program.

Numerous EPA actions and a string of uniformly favorable court decisions have established a firm basis for EPA's BMP approach to stormwater permitting.³ EPA promulgated

² At this time, the FSWA is reserving comment on the issue of "disaggregating sources in WLAs." Consistent with other comments presented here, the FSWA generally believes EPA lacks sufficient data and information to make specific WLAs.

³ See *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (prompting the promulgation of 40 CFR 122.44(k)); *In Re: Arizona Municipal Stormwater NPDES Permits for City of Tucson, Pima County, City of Phoenix, City of Mesa, and City of Tempe*, NPDES Appeal No. 97-3 (EAB 1998) (upholding the permit writer's decision not to impose numeric limits on grounds of infeasibility, in particular, due to the unique nature of stormwater discharges in the arid Arizona environment and the uncertainties associated with the impacts of short-term, periodic discharges) (subsequently appealed and decided on other grounds); *Communities for a Better Environment, et al., v. State Water Resources Control Board*, 1 Cal.Rptr.3d 76 (Cal. Ct. App., 2003) (upholding the permit writer's decision not to impose numeric limits on grounds of infeasibility, in particular, due to the need for a comprehensive TMDL study of all

its first “multi-sector general permit” (MSGP) to control industrial stormwater discharges in 1995. The preamble to the general permit explains EPA’s rationale for establishing BMPs rather than numeric limits:

[T]he permit conditions reflect EPA’s decision to identify a number of best management practices and traditional stormwater management practices which prevent pollution in stormwater discharges as the BAT/BCT level of control for the majority of stormwater discharges covered by this permit. The permit conditions applicable to these discharges are not numeric effluent limitations, but rather are flexible requirements for developing and implementing site specific plans to minimize and control pollutants in stormwater discharges associated with industrial activity.

60 Fed. Reg. 50,804 (Sept. 29, 1995). This original MSGP approach was affirmed when EPA reissued the MSGP in 2000 and again in 2008. 73 Fed. Reg. 56,572 (Sept. 29, 2008).

In 1996, EPA adopted an interim permitting policy for water quality-based limits in stormwater permits. *See* Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits (EPA 833-D-96-001) (September 1996); *see also* 61 Fed. Reg. 43,761 (August 26, 1996). EPA’s policy was predicated on the technical infeasibility of deriving appropriate numeric limits and the risk of imposing unnecessarily stringent numeric limits. *Id.* The 1996 Interim Policy has served as a foundation for EPA’s stormwater permitting approach ever since, including EPA’s 2002 TMDL/stormwater permitting memorandum that the November 2010 Memorandum attempts to modify. The Interim Policy states:

Although NPDES permits must contain conditions to ensure that water quality standards are met, this does not require the use of numeric water quality-based effluent limitations. Under the CWA and NPDES regulations, permitting authorities may employ a variety of conditions and limitations in storm water permits, including best management practices, performance objectives, narrative conditions, monitoring triggers, action levels (i.e., monitoring benchmarks, toxicity reduction evaluation action levels), etc., as the necessary water quality-based limitations, where numeric water quality-based effluent limitations are determined to be unnecessary or infeasible. 61 Fed. Reg. 57,426.

The use of BMPs for wet weather dischargers was also fundamental to EPA’s Water Quality Guidance for the Great Lakes System regulation (“GLI”), as discussed in both the preamble to the proposed GLI and the Water Quality Guidance for the Great Lakes System: Supplementary Information Document, March 1995 (“SID”). The GLI contains an exclusion for wet weather discharges. 40 CFR 132.4(e)(1) (“The Great Lakes States and Tribes are not required to apply these implementation procedures in establishing controls on the discharge of any pollutant by a wet weather point source.”). In the preamble to the proposed rule, EPA indicated that states should have discretion to apply the GLI implementation procedures in wet weather due to the significant differences between wet weather and dry weather discharges. 58

sources and causes of impairment, the significant reductions achieved by the permit holder during the previous permit cycle, and the relatively prohibitive costs of additional reductions by the permit holder).

Fed. Reg. 20802, 20841 (April 16, 1993). In addition, EPA stated that it has not developed a generic set of implementation procedures for uniform application to wet weather discharges due to the high degree of variability associated with wet weather conditions. *Id.* Rather, in these situations EPA favors the use of best professional judgment by permit writers that are familiar with local wet weather conditions. *Id.*

The wet weather exclusion was discussed in the SID as part of the response to comments on the proposed GLI. In the SID, EPA explained that the wet weather exclusion was proposed and retained in the final GLI because the GLI implementation procedures “do not address the significant differences that can exist between wet weather point source discharges and dry-weather point sources discharges.” SID at page 60. In addition, EPA stated that significant differences in rates, durations, and composition of the resulting wet weather flows can exist during and immediately following wet weather events. *Id.*

Despite nearly 20 years of advocating a BMP-based approach to NPDES stormwater permitting, which has proven to be effective in a substantial majority of permit scenarios, EPA now proposes a complete reversal, a numeric effluent limitations (NEL) approach in lieu of BMPs. EPA’s justification for the reversal is its assertion that “numeric WQBELs in stormwater permits can clarify permit requirements and improve accountability and enforceability.” Memorandum at 2. On the surface, comparing monitoring results to a numeric limit is an easier way to determine compliance than a more qualitative assessment of a stormwater pollution prevention plan (SWPPP). But this kind of comparison grossly oversimplifies the issues involved in properly managing and controlling the impacts of diffuse and inherently unpredictable stormwater runoff. EPA has provided no basis or justification for how it would (or has?) developed stormwater-specific WQBELs or how it would establish a monitoring protocol that accounts for rain-event variability, fate and transport from an outfall to a receiving stream (sometimes a mile or more away from the outfall itself), background levels of “pollutants,” facility run-on, or a myriad of other issues that must be addressed in advance to ensure that any NEL approach is fair and appropriate.

In its email requesting comments, EPA indicates that “developments over the past eight years” help to justify the use of NELs, but there is no docket for this proceeding and EPA has not provided the public with any details concerning any of those “developments.” To date, NELs have been used sporadically in a select number of stormwater-based effluent limitations guidelines (technology-based NELs), to address coal-pile runoff in EPA’s MSGP, and in a small subset of individual stormwater permits (or combined stormwater/industrial wastewater permits) around the country. The FSWA cannot identify any NPDES general permit that relies upon water quality-based NELs as enforceable limits. Even the newly proposed (and controversial) California industrial stormwater general permit rejects the outright imposition of NELs in favor of BMPs, action levels to assess the effectiveness of those BMPs, and different corrective action scenarios that generally follow the logic and substance of EPA’s MSGP-2008. In all likelihood, a direct NEL approach likely would require active treatment, which generally is recognized as not feasible in many stormwater situations.

While the Memorandum purports to assist permitting authorities in making NPDES-based permitting decisions, it completely ignores any explanation or guidance for developing a monitoring protocol that would address the issues raised above, whether it would include both

grab and composite samples (requiring automated sampling?), be based on daily or monthly protocols, or be in any way limited by storm size, to name a few. In that regard, the permitted/regulated entities also would want a level of national uniformity in any resulting protocols and must be included in developing such protocols.

We strongly believe that EPA is obligated to maintain the existing BMP approach unless and until all of the technical and legal foundations can be laid for something different. Absent such a foundation, we urge EPA to withdraw the Memorandum.

2. EPA Must Establish Stormwater-Based WQS Before Moving Towards a More Numeric-Based Effluent Limitations Scheme.

Typically, in order for a permitting authority to establish water quality-based numeric limits for a specific discharge, the permit writer must first assess the discharger's "reasonable potential to exceed" (RPE) certain "final acute values" (FAV). This requires a level of scientific scrutiny that EPA overlooks in the Memorandum. It also requires a comparison to relevant wet weather water quality standards, which are not yet in place in many parts of the country.

The magnitude, duration, and frequency of exceedance that are used to develop acute criteria (*i.e.*, FAV) are not applicable to storm water discharges, given their intermittent nature and subsequent effluent variability.⁴ Hence, any reliance on FAV to justify a reasonable potential conclusion with regard to stormwater certainly would be misplaced from a technical perspective.

EPA cannot legitimately apply acute aquatic water quality criteria to stormwater discharges in the same manner as they are applied to routine, continuous discharges. Such an application has no technical basis, and in fact, it is demonstrably incorrect. The acute (short-term) water quality criterion ("CMC" or "AAC") is defined in terms of magnitude, duration (or averaging period), and frequency.⁵ For instance, at a hardness of 200 mg/l (CaCO₃):

- Freshwater aquatic organisms and their uses should not be affected unacceptably if the 1-hour average copper concentration does not exceed 34 µg/L more than once every 3 years on the average.
- Freshwater aquatic organisms and their uses should not be affected unacceptably if the 1-hour average zinc concentration does not exceed 210 µg/L more than once every 3 years on the average.

In developing the existing acute criteria, EPA used a single-number criterion (applied in-stream) to reflect toxicological and practical realities. Aquatic organisms do not generally

⁴ See Preamble U.S. EPA's Proposed Rule on Water Quality Standards for the Great Lakes System, 58 Fed. Reg. 20840-42 (Apr. 16, 1993).

⁵ Magnitude is the allowable concentration of a pollutant. Duration is the period of time over which the in-stream concentration is averaged for comparison with criteria concentrations. This specification limits the duration of concentrations above the criteria. Frequency is how often criteria can be exceeded.

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 time when concentrations are lower.

EPA's existing water quality criteria were developed with "clean" lab water, which is not representation of bioavailable pollutants in stormwater, including suspended solids, organic chemicals (*i.e.*, lignins and tannins) that chelate metals and absorb organics. These conditions often decrease the bioavailability of both metals and organics. Hence, existing water quality criteria are fundamentally unable to represent the toxicity of pollutants in stormwater runoff.

In the *Technical Support Document For Water Quality-based Toxics Control* ("TSD") and in support of the National Toxics Rule and California Toxics Rule, EPA provided a rationale for the definition and selection of the averaging period. EPA explained that consideration for setting an appropriate averaging period is the length of time that sensitive organisms can tolerate exposure to a chemical at levels exceeding a criterion without adversely affecting survival. EPA indicated that the acute averaging period may be shorter than the duration of acute aquatic toxicity tests (normally between 48 hours and 96 hours), because acute effects elicited between 4 and 8 hours are about the same as the 96-hour effects **for some chemicals**. Specifically, in the TSD (on page D-3), EPA states:

...the duration of the averaging period for the CMC should be less than 4 hours. One hour is probably an appropriate duration of the averaging period for the CMC because concentrations of **some materials** that are only a factor of two higher than the 96-hour LC50 cause death in one to three hours.... With adequate justification, the CMC and/or CCC averaging periods may be increased or decreased on a site-specific or pollutant-specific basis. (Emphasis added.)

In the 2002 Stormwater Effects Handbook,⁶ EPA discussed stormwater data interpretation and options for determining whether a stormwater discharge is a problem. In the discussion of "benchmarks," application of the national ambient water quality criteria (*e.g.*, CMCs) is *addressed*. In the discussion on averaging periods (as applied to in-stream data) the following is stated (on page 614):

...Yet, these assumptions [1-hr and 4-day averaging periods] do not accurately describe most wet weather runoff exposures. Tests with pentachloroethane (Erickson et al. 1989, 1991) showed that with intermittent exposures, higher pulse concentrations were needed to affect growth, and when averaged over the entire test, effects were elicited at concentrations lower than when under constant exposure. The simplest toxicity model (with first-order, single compartment toxicokinetics and a fixed lethal threshold) could not completely describe the data.

Quite simply, EPA has not identified any specific developments over the past eight years that justify or support a shift from BMPs to numeric effluent limits for stormwater. If the

⁶ USEPA, Richard Field, contact. Chapter 8 of "Stormwater Effects Handbook: A Toolbox for Watershed Managers, Scientists, and Engineers". 2002. CRC Press.

Agency believes that such a shift is “feasible,”⁷ then it must first invest the time and resources necessary to develop dynamic models or other tools to serve as a basis for wet weather water quality standards from which permit writers can derive site-specific numeric limits.

3. EPA Cannot Support a “Surrogate” Approach to Stormwater Permitting.

In the Memorandum, EPA encourages the use of surrogates like flow volume and impervious cover. However, we respectfully dispute EPA’s legal authority to regulate flow or cover through the TMDL and NPDES programs.

Impervious surface, on its own, is not subject to regulation under the NPDES permit program. In fact, impervious surface is neither a point source nor a pollutant. Rather, it is a feature of the landscape that influences how water is carried on and off the land. Congress predicated the stormwater permitting program in Section 402(p) of the Clean Water Act on point source discharges of pollutants from certain categories of dischargers, including municipal separate storm sewers and industrial activities. Congress defined “point source” to mean “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Impervious surfaces such as roofs, parking lots, and roads clearly are not point sources. Impervious surfaces do not channelize water. Instead, sheet flow that travels across impervious surfaces is considered non-point runoff, which is not regulated under the stormwater permitting program or subject to enforceable wasteload allocations under the TMDL program.

If EPA now interprets “point source” to include impervious surfaces, it renders that term meaningless and clearly contradicts Congressional intent to define the term and differentiate “point sources” from “non-point sources.” As noted by the Second Circuit Court of Appeals, “the phrase ‘discernible, confined, and discrete conveyance’ cannot be interpreted so broadly as to read the point source requirement out of the statute.” *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009). Such a broad interpretation would be contrary to the structure of the CWA. The Act defines the term “point source,” and all other flows of water are nonpoint sources, the regulation of which is left to the states. *Id.* at 219-220.

EPA’s NPDES regulations define the extent to which surface runoff can in certain circumstances constitute point source pollution. The definition of “Discharge of a pollutant” includes “additions of pollutants into waters of the United States from: surface runoff *which is collected or channeled by man.*” 40 CFR § 122.2 (emphasis added). By implication, surface

⁷ EPA mentions the word “feasible” repeatedly in the Memorandum, but fails to further discuss the concept of “feasibility” within the stormwater permitting context. In terms of raw calculation, one might assert that almost anything might be considered “feasible.” The more relevant and appropriate interpretation tempers the hypothetical “feasibility” with a more real world consideration of the types of challenges (technical and economic) associated with stormwater permitting (addressed above) within the NPDES scheme. In many (most) cases, numeric limits are neither appropriate (because of site conditions, difficulty collecting and controlling flow, etc.) nor necessary (because BMPs are adequate and EPA has provided no record to show otherwise). In any event, the term “feasible” should not be manipulated to change the traditional interpretations of either how EPA has implemented 40 CFR § 122.44(k) or its historic interpretations of the MS4 standard of “maximum extent practical.”

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 could argue successfully that flow is a surrogate measurement for all of the various pollutants contained in a particular flow, it would be forced to make site-specific calculations and determinations, because every site’s flow characteristics are unique. EPA could not justify a national standard for flow as a surrogate for other pollutants because such a standard may be way too stringent for some sites and not stringent enough for others. Without more from EPA, there appears to be no legal, technical, or factual basis for establishing a NEL approach to stormwater permitting based on a surrogate approach, use of flow or volume, or regulating impervious surfaces.

4. *The CWA Sets Forth the Mechanism for Expanding the Stormwater Program Through “Designations.”*

In its November 2010 Memorandum, EPA implies that permitting authorities may freely designate “stormwater sources” for NPDES permitting and wasteload allocations. However, Clean Water Act Section 402(p) sets forth conditions and procedures for designating individual sites or separate categories, and those conditions and procedures cannot be ignored. For individual sites, permitting authorities must determine that an individual discharge at a particular site is contributing to violation of a water quality standard or is a significant pollutant source based on a sufficient record.⁸ For categories of stormwater discharge, Section 402(p)(1)-(4) specifies the process EPA must follow before requiring permits.

First, EPA must “study” classes of stormwater discharges not designated by Congress or otherwise subject to the stormwater permitting program, AND THEN report back to Congress regarding the results of any such studies. *See CWA Section 402(p)(5)*. In turn, EPA must follow a specific process to develop stormwater regulations for newly designated and currently unregulated stormwater discharges. *See CWA Section 402(p)(6)*. The statutory scheme is clear on its face; Congress set as a condition precedent to any new categorical designation and subsequent regulatory program that EPA first conduct a study pursuant to CWA Section 402(p)(5) and submit it to Congress before proceeding with a specific process for such new regulations under CWA Section 402(p)(6).

⁸ Recognizing that there might be significant non-industrial or non-MS4 sources of stormwater pollution, Congress provided EPA and authorized states with the authority to designate “a discharge” for permitting other than industrial or MS4 discharges already included in the permitting program. *See CWA Section 402(p)(2)(E)*. But that authority is limited to individual discharges (“a discharge”) that the permitting authority specifically determines “contributes to a violation of a water quality standard or is a significant contributor of pollutants” to U.S. waters. This provision demands a case-by-case assessment and determination.

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, 1033-34 (D.C. Cir. 1999) (*Alaska Prof'l. Hunters*), quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997).

As noted above, EPA published its 1996 Interim Permitting Policy in the *Federal Register*, setting forth its policy in favor of BMPs in lieu of NELs. The Memorandum seems to repudiate this policy without reference to it or notice in the *Federal Register* that the 1996 Interim Permitting Policy has been modified or withdrawn. Hence, both the 1996 Interim Permitting Policy and the newly conflicting Memorandum arguably have binding effect but directly conflict. EPA should withdraw the Memorandum while it fixes these administrative procedural errors.

In addition, not only does the Memorandum alter EPA's approach to stormwater permitting, but it also directs the states to follow EPA's lead in implementing their own NPDES permitting programs. Such a directive also would necessitate notice-and-comment rulemaking pursuant to the APA. As the DC Circuit found in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000):

If an agency acts as if a document issued at headquarters is controlling in the field . . . if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes ‘binding.’

EPA cannot issue such “binding” directives without pursuing appropriate notice-and-comment rulemaking. Because EPA did not pursue such rulemaking, it must withdraw the Memorandum pending a more formal process.⁹

⁹ We note that EPA's March 17, 2011 informal request for comment will not satisfy the APA procedures implicated by the Memorandum. The March 17 request never appeared in the Federal Register, there is no assigned docket, and EPA has not met other rulemaking requirements, including for example compliance with the Regulatory

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 stormwater permitting programs and logical steps for making improvements to those programs. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.

Very truly yours,

Jeffrey S. Longworth
FSWA Coordinator and Counsel

cc: FSWA Membership

Flexibility Act (5 USCA §§ 601 *et seq.*). We have no doubt that the changes set forth in the Memorandum, if fully implemented, would have a significant impact on a substantial number of small businesses.