IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VIRGINIA DEPARTMENT OF TRANSPORTATION, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	Civil Action No.: 1:12-cv-00775-LO-TRJ

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF FOR THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, AND THE AMERICAN PUBLIC WORKS ASSOCIATION IN SUPPORT OF PLAINTIFFS

INTRODUCTION

The National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA) and the American Public Works Association (APWA) (collectively the *"amici"*) respectfully request leave to file the accompanying *amicus* brief and attached exhibits in support of the Plaintiffs' Motion for Judgment on the Pleadings with regard to Count I of their Complaint. *Amici* represent a broad coalition of local government stormwater management agencies, which all have a keen interest in the outcome of this case. EPA's attempt to regulate stormwater volume or "flow" as a surrogate for the pollutants it is authorized to regulate under the Clean Water Act raises issues of national significance impacting the vital interests of *amici* and the citizens they represent. The impact of a ruling that EPA has the authority to establish total Maximum Daily Loads (TMDLS) for

stormwater "flow" would have serious consequences for the *amici* and their members in their efforts to comply with the Clean Water Act and the permits under which they operate their Municipal Separate Storm Sewer Systems (MS4s). Furthermore, *amici* respectfully submit that their proposed *amicus* brief would provide helpful guidance to the Court in evaluating the parties' arguments and defenses.

STATEMENT OF INTEREST AND REASONS FOR GRANTING MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

The *amici* represent municipal governments and a large number of city and county public works organizations responsible for the operation, oversight and management of municipal separate storm sewer systems. *Amici* also represent agencies, companies and professionals involved in ensuring that such systems are designed, funded, operated and maintained in compliance with applicable laws and regulations. Together, *amici* are responsible for ensuring that public stormwater and wastewater treatment systems meet the stringent and costly requirements of the Clean Water Act.

NACWA represents the interests of nearly 300 of the nation's publicly owned wastewater and stormwater management agencies. NACWA has 15 public utility and municipal members in the Commonwealth of Virginia, including Fairfax County. NACWA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day.

NAFSMA is a national non-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, bureaus, departments, and other instruments of state and local government.

NAFSMA's 100 member agencies serve a combined population of approximately fifty (50) million people.

APWA is an organization of 28,500 public works professionals, including city and county Public Works Directors responsible for stormwater management, water and wastewater services, waste collection, and other municipal services. APWA has nearly 900 members in its Mid Atlantic Chapter, including in Virginia. APWA members and their agencies are responsible for planning, budgeting, design and management of municipal stormwater programs.

Amici have a keen interest in the outcome of this case. In response to EPA's unexpected and unannounced release of the draft EPA Flow Memo discussed in the Complaint, ¶ 29 and Exhibit A, the *amici* submitted written comments and objections to the Agency, held meetings with EPA representatives to express their concerns and to track the Agency's as-yet incomplete process of making a determination whether to withdraw, revise or reissue the EPA Flow Memo as a final guidance document. The legal authority asserted by the Agency in the draft EPA Flow Memo would represent a major expansion of the Agency's existing regulatory program for establishing stormwater TMDLs, and the *amici* have a vital interest in the outcome of that process as well as in any ruling by this Court on the validity of the authority that EPA appears to claim in this case.

The Court has broad discretion to permit a nonparty to participate in a lawsuit as *amicus curiae*. *See, e.g.*, *Nat'l Ass'n of Homebuilders v. U.S. Army Corps of Eng'rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007) (allowing nonparty organization to participate as *amicus curiae*, reasoning that the court might benefit from the nonparty's input), *rev'd on other grounds* 663 F.3d 470 (D.C. Cir. 2011). The filing of an *amicus* brief "should normally be allowed when a party is not represented completely or not represented at all, when the *amicus* has an interest in some other

case that may be affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers or the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F. 3d. 1062, 1064 (7th Cir. 1997), (quoted in *Jin v. Ministry of State Security*, 557 F. Supp. 2d. 131, 137 (D.D.C. 2008); *see also Hoptowit v. Ray*, 682 F.2d. 1237, 1260 (9th Cir. 1982) ("there is no rule that *amicus* must be totally disinterested"); *Cobell v. Norton*, 246 F. Supp. 2d. 59, 69 (D.D.C. 2003) (in a case involving "individual Indian money accounts" the court accepted an amicus brief addressing the "potential impact that such relief might have on American Indian tribes").

Here, *amici* can provide valuable insight to the court on the background of EPA's newly-asserted authority to regulate stormwater "flow," and about the ongoing controversy over the issuance of the EPA Flow Memo as described in the Plaintiffs' Complaint at ¶128.

CONCLUSION

Amici, the National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies and the American Public Works Association, respectfully request that the Court grant their motion for leave and accept for filing the accompanying *amicus* brief and attached exhibits.

Dated: November 16, 2012

Respectfully submitted,

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I hereby certify that on the 16th day of November, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing to the following:

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BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, AND THE AMERICAN PUBLIC WORKS ASSOCIATION IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

The National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA) and the American Public Works Association (APWA) (collectively the *"amici"*) respectfully submit this brief and attached exhibits in support of the Plaintiffs' Motion for Judgment on the Pleadings with regard to Count I of their Complaint. *Amici* represent a broad coalition of local government stormwater management agencies. EPA's attempt to regulate stormwater volume or "flow" as a surrogate for the pollutants it is authorized to regulate under the Clean Water Act raises issues of national significance impacting the vital interests of *amici* and the citizens they represent. A ruling that EPA has the authority to establish total Maximum Daily Loads (TMDLS) for stormwater "flow"

would have serious consequences on *amici* and their members in their efforts to comply with the Clean Water Act and the permits under which they operate their Municipal Separate Storm Sewer Systems (MS4s).

ARGUMENT

Amici agree with the Plaintiffs that EPA's action in adopting the Accotink TMDL exceeds the Agency's statutory authority and violates the Clean Water Act (CWA), because "flow" is neither a "pollutant" as defined in the Act, nor a permissible "surrogate" for such a pollutant. Neither the CWA nor the Agency's implementing regulations give EPA the authority to regulate "flow" as a surrogate for pollutants in TMDLs. CWA § 303(d) requires each State to establish the total maximum daily load for specific "pollutants," at a level necessary to implement the applicable water quality standards for those pollutants. Stormwater flow or volume, while it may contribute to "pollution" within the meaning of CWA § 502(19), is not a "pollutant" as defined in CWA § 502(6). Furthermore, EPA's existing TMDL regulations in 40 CFR § 130.7(c)(1)(ii) follow the requirements of CWA § 303(d) by requiring TMDLs to be established for "all *pollutants* preventing or expected to prevent attainment of water quality standards" (emphasis added). Neither EPA nor the Commonwealth of Virginia have adopted water quality standards for stormwater volume or "flow."

Indeed, any attempt to do so by the EPA would raise serious constitutional questions, as an improper intrusion of the federal government into the area of local land use planning. The Supreme Court has previously warned against attempts by EPA to intrude upon the States' traditional and primary power over land and water use. *See Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001), *citing Hess v. Port Auth. Trans-Hudson Corp*., 513 U.S. 30, 44 (1994) ("Regulation of land use [is] a function traditionally performed by local

governments") and noting that Congress chose in the Clean Water Act to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). Similarly, in *Rapanos v. U.S. Army Corps of Eng'rs*, 547 U.S. 715, 737, the Court noted that the regulation of land use "is a quintessential state and local power," and that the Clean Water Act was never intended to give EPA the authority to become a "*de facto* regulator" of local property, with "the scope of discretion that would befit a local zoning board." Yet that is precisely the effect of the federally-mandated limitations on stormwater "flow" contained within the TMDL at issue in this case.

According to ¶ 123 of the Plaintiffs' Complaint, EPA adopted the Accotink TMDL in part to drastically change and expand EPA's national TMDL regulatory program. Furthermore, EPA took this action without adhering to rulemaking procedures and instead merely issued an informal guidance document to justify its approach, namely the Memorandum from James A. Hanlon, Director, EPA Office of Wastewater Management, re: "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'" (November 12, 2010) (the "EPA Flow Memo") (Exhibit A to Plaintiffs' Complaint). But the rationale offered by EPA in this informal guidance memorandum, at 5, cannot overcome the lack of statutory authority for its position. For example, the statement in 40 CFR §130.2(i) that "TMDLs can be expressed in terms of mass per time, toxicity or other appropriate measure" does not relieve a permitting authority of the obligation to calculate the necessary load for specific pollutants, as required by CWA § 303(d)(1)(C) (TMDLs shall be established for those "pollutants" identified under § 304(a)(2)(D)). Nor does the mere fact that "it may be difficult to identify a specific pollutant (or pollutants) causing the impairment" for waters impaired by

stormwater sources excuse the requirement that "TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards." 40 CFR § 130.7(c)(1)(ii).

Moreover, as Plaintiffs have stated in their Complaint, at ¶ 128, the EPA Flow Memo was not only issued without public notice and comment, but to this date it has never been formally adopted as a final guidance or policy statement. The EPA Flow Memo was originally posted on the "Stormwater Program" web page of EPA's Office of Wastewater Management on or about November 12, 2010, with no prior announcement that it was under development by the Agency or solicitation of input from the regulated community. Within a matter of weeks, numerous stakeholder groups sent letters to the Agency objecting to the lack of transparency with which a memorandum proposing to make sweeping changes in the Agency's existing approach to the development of TMDLs for municipal stormwater sources was issued. On January 28, 2011, NACWA, NAFSMA and APWA jointly submitted written comments on the draft EPA Flow Memo (Attachment 1 hereto), objecting that the expression of such a fundamental change in EPA's approach to MS4 permitting in an informal guidance memorandum, without public review or comment and without publishing notice of its issuance in the Federal Register, was improper, and requesting that it be withdrawn.

On March 17, 2011, EPA contacted each of the *amici* via email, stating that it was "soliciting comments" on the memorandum and would accept comments until May 16, 2011. EPA stated further that it planned to make a decision by August 15, 2011 either to "retain the memorandum without change, to reissue it with revisions, or to withdraw it." A written notice of this invitation to submit comments, unsigned but printed on EPA letterhead, was subsequently posted on EPA's website (Attachment 2 hereto).

Representatives for the *amici* met with EPA officials to discuss their concerns on April 12, 2011, and reiterated their position that the CWA and its implementing regulations do not give EPA the authority to regulate "flow" as a surrogate for pollutants in TMDLs. Pursuant to the Agency's written invitation, the *amici* also submitted additional comments on the draft EPA Flow Memo to the Agency on May 12, 2011 (Attachment 3 hereto).

Speaking at NAFSMA's annual meeting on October 31, 2011, James Hanlon, then the Director of EPA's Office of Wastewater Management, stated that the Agency had subsequently received 195 written comments in response to its invitation. He also indicated that EPA was still reviewing those comments, and had not yet made a determination whether to withdraw, revise, or reissue the draft EPA Flow Memo as a final document. As of this date, the "Public Comments" invitation remains posted on the web page referenced above, but the draft EPA Flow Memo itself has been removed (see Attachment 4 hereto). The *amici* have been informed that a revised version of the EPA Flow Memo was submitted by the EPA to the Office of Information and Regulatory Affairs at the Office of Management and Budget, but as of this date it has not been publicly released or proposed as a formal regulatory action by the Agency.

Consequently, even if EPA had the constitutional or statutory authority to expand its TMDL regulatory program to establish limitations on stormwater "flow," which the *amici* contend it does not, the EPA Flow Memo would not provide a proper basis for that expansion.

CONCLUSION

For each of the foregoing reasons, *amici*, the National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies and the American Public Works Association, respectfully request that the Court grant the Plaintiffs' Motion for Judgment on the Pleadings with regard to Count I of the Complaint.

Dated: November 16, 2012

Respectfully submitted,

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January 28, 2011

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Dear Ms. Jackson and Mr. Silva:

The undersigned municipal organizations write in response to the recent distribution of a November 12, 2010 memorandum from James A. Hanlon, Director of the Office of Wastewater Management, and Denise Keehner, Director of the Office of Wetlands, Oceans and Watersheds, to all Water Management Division Directors in EPA Regions 1 – 10, entitled "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.'" In this memorandum, EPA states that it is "updating and revising" four elements of the 2002 guidance in order to reflect "current practices and trends" in permits and WLAs for stormwater discharges, specifically:

- Providing numeric water quality-based effluent limitations in NPDES permits for stormwater discharges;
- Disaggregating stormwater sources in a WLA;
- Using surrogates for pollutant parameters when establishing targets for TMDL loading capacity; and
- Designating additional stormwater sources to regulate and treating load allocations as wasteload allocations for newly regulated stormwater sources.

The undersigned organizations have serious concerns both with the substance of this memorandum, particularly with the first and third elements above, and with the process and timing of its distribution. We believe that the memorandum contains significant misstatements of the existing law and regulations applicable to municipal separate storm sewer systems (MS4s), and that even if the memorandum itself is not subject to judicial review any future NPDES

permits or TMDLs based on the guidance contained in the memorandum would be subject to legal challenge.

Process and Timing

As it stands, the November 12 memorandum would make sweeping changes in the Agency's existing approach to the development of WLAs for municipal stormwater sources and the issuance of MS4 permits for those sources. These changes appear to reflect some of the options that are currently being considered by the Agency in the context of the national rulemaking it has initiated to strengthen its stormwater regulatory program. That initiative was announced by the Agency on December 28, 2009 (74 Fed. Reg. 68617), and EPA has subsequently stated that its intention is to issue a final regulation by November of 2012. All of the undersigned organizations and many of their individual members have participated in this rulemaking initiative, and have submitted written comments to the Agency regarding its proposed changes to the stormwater permit program. The unexpected release of the November 12 guidance memorandum is particularly inappropriate in light of this ongoing rulemaking effort, because the substance of the memorandum effectively presumes the outcome of that initiative before a proposed version of the regulation has been made available for public review and comment.

Furthermore, the issuance of the November 12 memorandum without solicitation of any input from the regulated community is procedurally improper, because the memorandum proposes significant substantive changes to existing EPA policy. For example, the 2002 guidance stated that:

> EPA expects that most WQBELs for NPDES-regulated municipal and small construction storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances.

This statement was consistent with EPA's existing stormwater regulations at 40 CFR §122.34 and with the guidance contained in EPA's August 26, 1996 *Interim Permitting Approach for Water-Quality Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg.43761, and its November 6, 1996 *Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 57425. Each of the latter two documents were formal policies signed by the Assistant Administrator for Water and duly published in the Federal Register. In contrast to the approach described in those formal regulations and policy statements, the November 12 memorandum states that EPA's "expectations have changed as the stormwater permit program has matured," and that:

> EPA now recognizes that where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges should contain numeric effluent limitations where feasible to do so.

The expression of such a fundamental change in EPA's approach to MS4 permitting in an informal guidance memorandum, without public review or comment and without publishing notice of its issuance in the Federal Register is improper. A substantial body of case law suggests that when an agency significantly changes its interpretation of an existing policy, the agency must do so after engaging in formal notice and comment rulemaking. *See, e.g., Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997); *Appalachian Power Co. v. EPA*, 208 f.3d 1015 (DC. Cir. 2000). In *CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003), the D.C. Circuit Court of Appeals held that a document containing "clear and unequivocal language, which reflects an obvious change in established agency practice," is subject to notice and comment rulemaking requirements under the Administrative Procedure Act. Similarly, in *Alaska Professional Hunters Ass'n, Inc. v. Federal Aviation Administration*, 177 F.3d 1030 (D.C. Cir. 1999), the court stated that:

> When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment. *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C.Cir.1997), is to the same effect: a modification of an interpretive rule construing an agency's substantive regulation will, we said, "likely require a notice and comment procedure."

The November 12 memorandum clearly reflects a fundamental change in the Agency's previous interpretations of its existing municipal stormwater permit regulations. To move from the position that numeric effluent limitations will be used "only in rare instances" to a recommendation that such limits should be used "where feasible" is the type of "obvious change" in the Agency's permitting regime that was addressed in the *CropLife* decision. 329 F.2d at 881.

Indeed, the memorandum goes even further than this, by stating that the type of numeric, water quality-based effluent limitations that EPA now expects to see included in both municipal and industrial stormwater permits should "use numeric parameters such as pollutant concentrations, pollutant loads, or numeric parameters acting as surrogates for pollutants, such as stormwater flow volume or percentage or amount of impervious cover." This would represent a dramatic change in the type of conditions that have been required in such permits over the last two decades of the stormwater program. Despite certain verbal assurances that we have received from the Agency that it does not intend to impose such restrictions as end-of-pipe limits on each individual MS4 outfall, that is the advice which the memorandum appears on its face to be giving to State and Regional permitting authorities.[1] If the memorandum means what it appears to say, it would be a major shift in policy that should only be adopted after formal consultation with affected members of the regulated community and the public at large.

[1] As noted at page 4 of the memorandum, EPA recognized at the time of its original, 2002 guidance memo that "the available data and information usually are not detailed enough to determine waste load allocations for NPDES-regulated storm water discharges on an outfall-specific basis." However, the memorandum suggests that permit writers now "may have better data or better access to data and, over time, may have gained more experience since 2002" in developing WLAs for specific categories of discharges.

Mischaracterization of Existing Law and Regulation

1. Compliance with Water Quality Standards.

We have serious concerns with EPA's mischaracterization of the applicable statutory and regulatory requirements for municipal stormwater permits in the memorandum. The Agency's purported justification for the imposition of numeric effluent limitations in MS4 permits relies upon a distortion of the plain language of the Clean Water Act (CWA), and a mischaracterization of the Ninth Circuit's holding in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999). The opening clause of CWA § 402(p)(3)(b)(iii) states that, unlike industrial stormwater permits, MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ." A subordinate clause goes on to specify that such controls shall include "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." Each of those controls is subject to the limitation in the first clause that they shall be required "to the maximum extent practicable."

However, EPA's November 12 memorandum paraphrases this provision in a manner which suggests that the final clause referring to "such other provisions as the Administrator or the State determines appropriate" is independent and coequal with the requirement to reduce pollutants to the "maximum extent practicable." This paraphrase distorts the syntax of § 402(p)(3)(B)(iii) and the intent of Congress in enacting this provision. The November 12 memorandum also suggests, incorrectly, that the Ninth's Circuit's opinion in *Defenders* supports this misreading of the statute. It is true that, in *dicta* at the end of its decision, the court suggested that the "such other provisions" clause allowed EPA the discretion to include "either management practices or numeric limitations" in MS4 permits. The court did not say, however, that the discretion to include numeric limitations or to require compliance with water quality standards could be exercised without regard to the "maximum extent practicable" limitation in the statute. That issue was not presented by the facts of the case before it, and it was not addressed in the court's opinion. Had the court so ruled, it would have been contrary to the plain language of the statute and subject to reversal on appeal.

In fact, the federal courts have consistently ruled that the MEP standard is the only standard that MS4 discharges are required to meet. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 966 F.2d 1292, 1308 (9th Cir. 1992) (CWA § 402(p)(3)(B) "retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999) (CWA § 402(p)(3)(B) "replaces" the requirements of § 301 with the MEP standard for MS4 discharges, and it creates a "lesser standard" than § 301 imposes on other types of discharges); *Environmental Defense Center v. EPA*, 319 F.3d 398 (9th Cir. 2003), *vacated, rehearing denied by, and amended opinion issued at* 344 F.3d 832 (9th Cir. 2003) (CWA "requires EPA to ensure that operators of small MS4s 'reduce the discharge of pollutants to the maximum extent practicable'"); *Mississippi River Revival, Inc. v. City of St. Paul*, 2002 U.S. Dist. LEXIS 25384 (N.D. Minn. 2002) ("the CWA specifically exempts municipal storm water permittees" from the requirement to ensure that water quality standards are met).

Consequently, the Agency's recommendation in the November 12 memorandum that, where feasible, NPDES authorities should include numeric effluent limitations as necessary to meet water quality standards whenever MS4 discharges have the reasonable potential to cause or contribute to an excursion of those standards not only signals a dramatic change in EPA's existing policy, but also exceeds the Agency's authority under the CWA. The qualification that such limits shall be used where "feasible" appears to relate only to the permitting authority's technical ability to calculate the necessary limitations, whereas the "maximum extent practicable" standard in the CWA was intended to encompass both the technical and economic achievability of the controls imposed on municipal dischargers. Further, stormwater discharges are highly variable in peak and volume. Implementation of numeric effluent limits to stormwater discharges fails to recognize this variability. Current stormwater treatment technologies are generally limited to treating the first 3/4" to 1" of rainfall during a 24 hour period. Technologies to economically treat larger or longer storms do not exist. Lastly, many existing state water quality standards were developed prior to the 1987 CWA amendments that led to the creation of NPDES programs for stormwater management. Consequently, they did not foresee the need to consider the ramifications of managing stormwater when setting water quality standards. Most existing standards are limited to consideration of steady-state streamflow conditions that occur during dry weather. Existing water quality standards are therefore inappropriate for managing transitory, non-steady state storm flow conditions and inappropriate for establishing numeric effluent limits in stormwater permits for storm flow conditions.

Moreover, it is not at all clear that the types of numeric effluent limitations contemplated by the memorandum are "feasible" in a purely technical sense. For example, a recent study on "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities" contained in the Storm Water Panel Recommendations to the California State Water Resources Control Board (June 19, 2006) concluded that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges," and that "[f]or catchments not treated by a structural or treatment BMP, setting a numeric effluent limit is basically not possible." EPA suggests in the memorandum that State and EPA have obtained "considerable experience" in calculating TMDLs and WLAs for stormwater sources since 2002, that monitoring the impacts of stormwater sources has become "more sophisticated and widespread," and that "better information" on the effectiveness of stormwater controls is now available. However, it does not provide that information in this memorandum, nor does it suggest that the recent information and experience to which it alludes support the technical feasibility of reducing the impact of municipal stormwater sources to meet the type of numeric effluent limitations it seeks to impose. The undersigned organizations would appreciate the opportunity to review and discuss this information.

2. Consistency with TMDL Wasteload Allocations.

The November 12 memorandum also misrepresents existing law in stating that, if the State or EPA has established a TMDL for an impaired water that includes WLAs for stormwater discharges, "permits for either industrial stormwater discharges or MS4 discharges must contain effluent limits and conditions consistent with those WLAs." The requirement to meet TMDL WLAs is merely a subset of the requirement to meet water quality standards, which those WLA's

are calculated to implement.[2] Since MS4 discharges are not subject to the requirement to meet water quality standards to begin with, they cannot be required to comply with TMDL WLAs without regard to the "maximum extent practicable" standard established in the Act.

The only authority cited in the memorandum for EPA's assertion that both industrial and municipal stormwater permits must contain effluent limitations consistent with TMDL WLAs is a subsection in the Agency's general NPDES permit regulations at 40 CFR § 122.44(d)(1)(vii)(B). However, that rule does not apply to municipal stormwater permits. The opening sentence of 40 CFR § 122.44 states that "each NPDES permit shall include conditions meeting the following requirements when applicable." The rule then enumerates a variety of permit conditions, some of which apply to municipal stormwater permits, and others that do not. The subject of subsection (d) is the requirement to ensure compliance with state water quality standards, which (as discussed above) applies to all NPDES permits except MS4 permits.

The opening sentence to subsection (d) of the rule has been included in the Agency's general NPDES permit regulations since 1983, long before the 1987 CWA amendments created the separate and independent "maximum extent practicable" standard for MS4 discharges. In 1989, subsection (d) was expanded by the addition of the seven subparagraphs in § 122.44(d)(1) to further describe the procedures a permitting authority should use to determine whether an NPDES permit must include a water quality-based effluent limit. 54 Fed. Reg. 23868 (June 2, 1989). Each of the additional provisions was intended to describe the procedures for implementing state water quality standards. Subparagraph (vii) was added to describe two fundamental principles for deriving water quality-based effluent limits: first, that they must be derived from water quality standards, and second that they must be consistent with any WLAs based upon those water quality standards. *Id*.

Shortly after the 1989 revisions to 40 CFR § 122.44 were promulgated, EPA issued an August 21, 1989 memorandum from James R. Elder, Director, Office of Water Enforcement, to Water Management Division Directors, Regions I – X entitled "New Regulations Governing Water Quality-Based Permitting in the NPDES Permitting Program" That memorandum emphasized that the additional provisions in 40 CFR § 122.44(d) were merely intended to clarify existing requirements for water quality-based permitting. As explained in the memorandum,

> Subsection (d) covers water quality standards and state requirements. Prior to the promulgation of these new regulations the subsection was non-specific, requiring only that NPDES permits be issued with requirements more than promulgated effluent guidelines as necessary to achieve water quality standards. We have strengthened considerably the requirements of §122.44(d). The new language is very specific and requires water quality-based permit limits for specific toxicants and whole effluent toxicity where necessary to achieve state water quality standards. (Emphasis added.)

Because MS4 permits are not required to achieve state water quality standards, as discussed above, none of the requirements in 40 CFR § 122.44(d) are applicable to such permits. Pursuant to the plain language of the CWA, and consistent with the Ninth Circuit's decision in *Defenders*

[2] Cf. 40 CFR § 130.2(h): "WLAs constitute a type of water quality-based effluent limitation."

of Wildlife v. Browner, EPA may exercise its discretion to require MS4 discharges to comply with water quality standards, or WLAs based on those standards, only to the "maximum extent practicable."

Use of Surrogates for Pollutant Parameters

The undersigned organizations all support the goal of reducing pollutants and improving water quality. However, we have serious concerns with EPA's suggestion in the November 12 memorandum that NPDES authorities should use a numeric target for stormwater volume or impervious cover as a "surrogate parameter" for specific pollutants when developing TMDL WLAs for waters impaired by stormwater sources. We do not believe that the CWA or the Agency's implementing regulations give EPA the authority to regulate flow as a surrogate for pollutants in TMDLs. CWA § 303(d) requires each State to establish the total maximum daily load for specific "pollutants," at a level necessary to implement the applicable water quality standards for those pollutants. Stormwater flow or volume, while it may contribute to "pollution" within the meaning of CWA § 502(19), is not a "pollutant" as defined in CWA § 502(6). We do not believe that the statement in 40 CFR §130.2(i) that "TMDLs can be expressed in terms of mass per time, toxicity or other appropriate measure" relieves the permitting authority of the obligation to calculate the necessary load for specific pollutants. Nor does the mere fact that "it may be difficult to identify a specific pollutant (or pollutants) causing the impairment" for waters impaired by stormwater sources excuse the requirement that "TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards." 40 CFR § 130.7(c)(1)(ii).

Although the concept of using flow or impervious cover as surrogates for pollutants in setting TMDL loading targets may have been implemented in some States (Connecticut, Maine and Vermont), as EPA suggests, to our knowledge the legal basis for this approach has not yet been examined by the courts, and it has been opposed in other locations. For example, the comments filed by the Commonwealth of Virginia Department of Transportation (VDOT) to the draft Benthic TMDL for Accotink Creek in Fairfax County, Virginia, point out that since stream flow is not a pollutant the draft TMDL fails to establish a quantifiable load for anything within the legal definition of a pollutant. VDOT recommends, instead, that stream flow and subsequent reductions in flow be identified as possible best management practices during implementation as opposed to being used for the WLA.[3]

We agree that reductions in stormwater flow through the implementation of BMPs, including "green infrastructure" and "low impact development" can help reduce pollutant loads from municipal stormwater sources and achieve improvements in water quality. However, under the Agency's existing statutory and regulatory authority, those reductions cannot be expressed as specific numeric targets for stormwater flow volume or impervious cover in calculating TMDL WLAs.

[3] Comments submitted to EPA Region 3 on August 11, 2010.

Conclusion

The undersigned organizations and their members are committed to improving municipal stormwater quality through the use of BMPs and green infrastructure/LID concepts. We are eager to continue working with the Agency on water quality improvements for both stormwater and non-stormwater discharges. However, the implementation of numeric limits continues to be inappropriate both economically and technologically until such time as treatment technology advances to a state where larger volume flows can be treated in a more economic fashion. Given these difficulties and in light of the dramatic changes to EPA's existing policies for municipal stormwater permits reflected in the November 12 memorandum, as well as the fundamental shortcomings in the Agency's analysis of its legal authority for those changes, we recommend that the memorandum be withdrawn for further consideration. That process should include consultation with the regulated community, and we look forward to working with the Agency in that regard. Further, such sweeping changes to the Agency's municipal stormwater program are premature and should not be implemented prior to the release of the final regulations that the Agency is expecting to issue by November of 2012.

Sincerely,

Peter B. King
Executive Director
American Public Works Association

Ken Kirk
Executive Director
National Association of Clean Water Agencies

Susan Gilson
Executive Director
National Association of Flood & Stormwater Management Agencies

cc: Nancy Stoner, OW
James Hanlon, OWM
Denise Keehner, OWOW
Water Management Division Directors, Regions 1-10
Water Quality Branch Chiefs, Regions 1 - 10
Permits Branch Chiefs, Regions 1 – 10
Association of State and Interstate Water Pollution Control Administrators

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF
WATER

March 17, 2011

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 Storm Water Sources and NPDES Permit Requirements Based on Those WLAs". The memorandum is available at: http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf. The 2010 memorandum reflects the considerable experience States and EPA have obtained in developing TMDLs and stormwater permits since 2002.

A number of stakeholders expressed concern that they did not have the opportunity to provide input before the memorandum was issued and have asked questions about the substance of the memorandum. EPA is soliciting comments on the 2010 memorandum and will accept comments until May 16, 2011. EPA plans to make a decision by August 15, 2011 to either retain the memorandum without change, to reissue it with revisions, or to withdraw it.

A key issue addressed in the 2010 memorandum is the feasibility of including numeric effluent limitations in National Pollutant Discharge Elimination System (NPDES) permits for stormwater discharges. The 2002 memorandum stated that EPA expected that numeric effluent limitations for stormwater discharges would be rarely used. The guidance provided in the 2010 memorandum recognizes developments over the past eight years and reflects current use of numeric limitations in stormwater permits. EPA has found that the use of numeric effluent limitations no longer is a novel or unique approach to stormwater permitting. As such, the 2010 memorandum reflects EPA's view that there has been an incremental evolution of the stormwater permits program and the TMDL program that has been occurring since 2002, such that numeric effluent limitations are no longer as rare as they were in 2002.

Some stakeholders are concerned that the 2010 memorandum can be read as advising NPDES permit authorities to impose end-of-pipe limitations on each individual outfall in a municipal separate storm sewer system. In general, EPA does not anticipate that end-of-pipe effluent limitations on each municipal separate storm sewer system outfall will be used frequently. Rather, the memorandum expressly describes "numeric" limitations in broad terms, including "numeric parameters acting as surrogates for pollutants such as stormwater flow volume or

percentage or amount of impervious cover." In the context of the 2010 memorandum, the term "numeric effluent limitation" should be viewed as a significantly broader term than just end-of-pipe limitations, and could include limitations expressed as pollutant reduction levels for parameters that are applied system-wide rather than to individual discharge locations, expressed as requirements to meet performance standards for surrogate parameters or for specific pollutant parameters, or could be expressed as in-stream targets for specific pollutant parameters. Under this approach, NPDES authorities have significant flexibility to establish numeric effluent limitations in stormwater permits.

EPA emphasizes that the discussion in the November 12, 2010 memorandum is intended solely as guidance to regulatory authorities as they implement CWA Programs. The statutory provisions and EPA regulations described in this document contain legally binding requirements. This memorandum is not a regulation itself, nor does not it change or substitute for those provisions and regulations. Thus, it does not impose legally binding requirements on EPA, States, or the regulated community, nor does it confer legal rights or impose legal obligations upon any member of the public. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling.

The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of this guidance and the appropriateness of the application of this guidance to a particular situation. EPA and State permit writers and other decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from those described in this guidance where appropriate.

Comments on the November 12, 2010, memorandum should be submitted by May 16, 2011 by either:

- Email to weiss.kevin@epa.gov
- Mail: Kevin Weiss
  Water Permits Division
  U.S. Environmental Protection Agency
  Room 7334 EPA East
  1200 Pennsylvania Avenue, NW
  Washington DC 20460

If additional information is necessary, please contact Kevin Weiss at (202) 564-0742.

May 12, 2011

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

Dear Mr. Weiss:

The undersigned municipal organizations are responding to EPA's solicitation of comments addressing the November 12, 2010 memorandum from James A. Hanlon, Director of the Office of Wastewater Management, and Denise Keehner, Director of the Office of Wetlands, Oceans and Watersheds, to all Water Management Division Directors in EPA Regions 1 – 10, entitled "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.'" We submitted detailed comments on this memorandum in our letter to Administrator Lisa Jackson and then Assistant Administrator for Water Peter Silva on January 28, 2011. We are again providing you with our January letter as an attachment which provides our comments on the agency's memorandum in detail and request that you consider our comments during your review of the memorandum.

We very much appreciate EPA's request for comments on this memorandum, as well as the Office of Water's willingness to meet with us in early April to discuss correspondence between the Agency and our municipal organizations regarding the memorandum. As we indicated during the April meeting, we are very concerned about the timing, process and content of the memo and urge EPA to withdraw it in its entirety. If upon further review EPA decides to reissue the memorandum with revisions, we strong encourage the Agency to delay reissuance of the memorandum until the current post-construction stormwater rulemaking process has been completed. Since the memorandum has implications for the NPDES stormwater program, withdrawing the memo until after the stormwater regulation has been issued would be a reasonable and welcomed approach.

Our organizations have been told by EPA Office of Water staff that more than 30 states are currently using the approach outlined in the memorandum for stormwater permitting in their respective states. At the meeting in April and again in this letter, we are requesting a list of those states and information on these permitting approaches. Specifically, in the Agency's March 17, 2011 letter soliciting comments on the memorandum, it suggests that "EPA has found that the use of numeric effluent limitations no longer is a novel or unique approach in stormwater permitting." We have serious questions about the accuracy of this assertion, and whether the Agency is failing to take into account the fundamental legal and practical distinctions that must be drawn between the use of numeric "effluent limitations" on the one hand, and numeric "benchmarks," "triggers," or "measurable goals" on the other. Without more specific information on the particular states and permitting approaches to which EPA refers, we cannot provide meaningful comment on the fundamental premise on which the Agency's memorandum is based.

One of the issues we discussed at the April meeting was the need for a mechanism for urban stormwater agencies to offer helpful insights to EPA as they move forward with the stormwater regulation process. On behalf of

APWA, NACWA and NAFSMA, we would again like to make this offer. We feel that the experience of our organizations could provide useful insights to the Agency as it moves forward with this endeavor and help to pave the way forward with a better understanding of EPA's ultimate regulatory approach for the future of the NPDES stormwater program. We would like to discuss this in greater detail and could provide a number of representatives from our respective organizations with expertise on the program from the local level to be available to EPA for such discussions. Again, thank you for your interest in our comments and we look forward to working with you on this and other urban water resource issues in the future.

Sincerely,

Peter B. King
Executive Director
American Public Works Association

Ken Kirk
Executive Director
National Association of Clean Water Agencies

Susan Gilson
Executive Director
National Association of Flood & Stormwater Management Agencies

January 28, 2011

Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Peter Silva
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Jackson and Mr. Silva:

The undersigned municipal organizations write in response to the recent distribution of a November 12, 2010 memorandum from James A. Hanlon, Director of the Office of Wastewater Management, and Denise Keehner, Director of the Office of Wetlands, Oceans and Watersheds, to all Water Management Division Directors in EPA Regions 1 – 10, entitled "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.'" In this memorandum, EPA states that it is "updating and revising" four elements of the 2002 guidance in order to reflect "current practices and trends" in permits and WLAs for stormwater discharges, specifically:

- Providing numeric water quality-based effluent limitations in NPDES permits for stormwater discharges;
- Disaggregating stormwater sources in a WLA;
- Using surrogates for pollutant parameters when establishing targets for TMDL loading capacity; and
- Designating additional stormwater sources to regulate and treating load allocations as wasteload allocations for newly regulated stormwater sources.

The undersigned organizations have serious concerns both with the substance of this memorandum, particularly with the first and third elements above, and with the process and timing of its distribution. We believe that the memorandum contains significant misstatements of the existing law and regulations applicable to municipal separate storm sewer systems (MS4s), and that even if the memorandum itself is not subject to judicial review any future NPDES

permits or TMDLs based on the guidance contained in the memorandum would be subject to legal challenge.

Process and Timing

As it stands, the November 12 memorandum would make sweeping changes in the Agency's existing approach to the development of WLAs for municipal stormwater sources and the issuance of MS4 permits for those sources. These changes appear to reflect some of the options that are currently being considered by the Agency in the context of the national rulemaking it has initiated to strengthen its stormwater regulatory program. That initiative was announced by the Agency on December 28, 2009 (74 Fed. Reg. 68617), and EPA has subsequently stated that its intention is to issue a final regulation by November of 2012. All of the undersigned organizations and many of their individual members have participated in this rulemaking initiative, and have submitted written comments to the Agency regarding its proposed changes to the stormwater permit program. The unexpected release of the November 12 guidance memorandum is particularly inappropriate in light of this ongoing rulemaking effort, because the substance of the memorandum effectively presumes the outcome of that initiative before a proposed version of the regulation has been made available for public review and comment.

Furthermore, the issuance of the November 12 memorandum without solicitation of any input from the regulated community is procedurally improper, because the memorandum proposes significant substantive changes to existing EPA policy. For example, the 2002 guidance stated that:

> EPA expects that most WQBELs for NPDES-regulated municipal and small construction storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances.

This statement was consistent with EPA's existing stormwater regulations at 40 CFR §122.34 and with the guidance contained in EPA's August 26, 1996 *Interim Permitting Approach for Water-Quality Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg.43761, and its November 6, 1996 *Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 57425. Each of the latter two documents were formal policies signed by the Assistant Administrator for Water and duly published in the Federal Register. In contrast to the approach described in those formal regulations and policy statements, the November 12 memorandum states that EPA's "expectations have changed as the stormwater permit program has matured," and that:

> EPA now recognizes that where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges should contain numeric effluent limitations where feasible to do so.

The expression of such a fundamental change in EPA's approach to MS4 permitting in an informal guidance memorandum, without public review or comment and without publishing notice of its issuance in the Federal Register is improper. A substantial body of case law suggests that when an agency significantly changes its interpretation of an existing policy, the agency must do so after engaging in formal notice and comment rulemaking. *See, e.g., Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997); *Appalachian Power Co. v. EPA*, 208 f.3d 1015 (DC. Cir. 2000). In *CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003), the D.C. Circuit Court of Appeals held that a document containing "clear and unequivocal language, which reflects an obvious change in established agency practice," is subject to notice and comment rulemaking requirements under the Administrative Procedure Act. Similarly, in *Alaska Professional Hunters Ass'n, Inc. v. Federal Aviation Administration*, 177 F.3d 1030 (D.C. Cir. 1999), the court stated that:

> When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment. *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C.Cir.1997), is to the same effect: a modification of an interpretive rule construing an agency's substantive regulation will, we said, "likely require a notice and comment procedure."

The November 12 memorandum clearly reflects a fundamental change in the Agency's previous interpretations of its existing municipal stormwater permit regulations. To move from the position that numeric effluent limitations will be used "only in rare instances" to a recommendation that such limits should be used "where feasible" is the type of "obvious change" in the Agency's permitting regime that was addressed in the *CropLife* decision. 329 F.2d at 881.

Indeed, the memorandum goes even further than this, by stating that the type of numeric, water quality-based effluent limitations that EPA now expects to see included in both municipal and industrial stormwater permits should "use numeric parameters such as pollutant concentrations, pollutant loads, or numeric parameters acting as surrogates for pollutants, such as stormwater flow volume or percentage or amount of impervious cover." This would represent a dramatic change in the type of conditions that have been required in such permits over the last two decades of the stormwater program. Despite certain verbal assurances that we have received from the Agency that it does not intend to impose such restrictions as end-of-pipe limits on each individual MS4 outfall, that is the advice which the memorandum appears on its face to be giving to State and Regional permitting authorities.[1] If the memorandum means what it appears to say, it would be a major shift in policy that should only be adopted after formal consultation with affected members of the regulated community and the public at large.

[1] As noted at page 4 of the memorandum, EPA recognized at the time of its original, 2002 guidance memo that "the available data and information usually are not detailed enough to determine waste load allocations for NPDES-regulated storm water discharges on an outfall-specific basis." However, the memorandum suggests that permit writers now "may have better data or better access to data and, over time, may have gained more experience since 2002" in developing WLAs for specific categories of discharges.

Mischaracterization of Existing Law and Regulation

1. Compliance with Water Quality Standards.

We have serious concerns with EPA's mischaracterization of the applicable statutory and regulatory requirements for municipal stormwater permits in the memorandum. The Agency's purported justification for the imposition of numeric effluent limitations in MS4 permits relies upon a distortion of the plain language of the Clean Water Act (CWA), and a mischaracterization of the Ninth Circuit's holding in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999). The opening clause of CWA § 402(p)(3)(b)(iii) states that, unlike industrial stormwater permits, MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ." A subordinate clause goes on to specify that such controls shall include "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." Each of those controls is subject to the limitation in the first clause that they shall be required "to the maximum extent practicable."

However, EPA's November 12 memorandum paraphrases this provision in a manner which suggests that the final clause referring to "such other provisions as the Administrator or the State determines appropriate" is independent and coequal with the requirement to reduce pollutants to the "maximum extent practicable." This paraphrase distorts the syntax of § 402(p)(3)(B)(iii) and the intent of Congress in enacting this provision. The November 12 memorandum also suggests, incorrectly, that the Ninth's Circuit's opinion in *Defenders* supports this misreading of the statute. It is true that, in *dicta* at the end of its decision, the court suggested that the "such other provisions" clause allowed EPA the discretion to include "either management practices or numeric limitations" in MS4 permits. The court did not say, however, that the discretion to include numeric limitations or to require compliance with water quality standards could be exercised without regard to the "maximum extent practicable" limitation in the statute. That issue was not presented by the facts of the case before it, and it was not addressed in the court's opinion. Had the court so ruled, it would have been contrary to the plain language of the statute and subject to reversal on appeal.

In fact, the federal courts have consistently ruled that the MEP standard is the only standard that MS4 discharges are required to meet. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 966 F.2d 1292, 1308 (9th Cir. 1992) (CWA § 402(p)(3)(B) "retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999) (CWA § 402(p)(3)(B) "replaces" the requirements of § 301 with the MEP standard for MS4 discharges, and it creates a "lesser standard" than § 301 imposes on other types of discharges); *Environmental Defense Center v. EPA*, 319 F.3d 398 (9th Cir. 2003), *vacated, rehearing denied by, and amended opinion issued at* 344 F.3d 832 (9th Cir. 2003) (CWA "requires EPA to ensure that operators of small MS4s 'reduce the discharge of pollutants to the maximum extent practicable'"); *Mississippi River Revival, Inc. v. City of St. Paul*, 2002 U.S. Dist. LEXIS 25384 (N.D. Minn. 2002) ("the CWA specifically exempts municipal storm water permittees" from the requirement to ensure that water quality standards are met).

Consequently, the Agency's recommendation in the November 12 memorandum that, where feasible, NPDES authorities should include numeric effluent limitations as necessary to meet water quality standards whenever MS4 discharges have the reasonable potential to cause or contribute to an excursion of those standards not only signals a dramatic change in EPA's existing policy, but also exceeds the Agency's authority under the CWA. The qualification that such limits shall be used where "feasible" appears to relate only to the permitting authority's technical ability to calculate the necessary limitations, whereas the "maximum extent practicable" standard in the CWA was intended to encompass both the technical and economic achievability of the controls imposed on municipal dischargers. Further, stormwater discharges are highly variable in peak and volume. Implementation of numeric effluent limits to stormwater discharges fails to recognize this variability. Current stormwater treatment technologies are generally limited to treating the first 3/4" to 1" of rainfall during a 24 hour period. Technologies to economically treat larger or longer storms do not exist. Lastly, many existing state water quality standards were developed prior to the 1987 CWA amendments that led to the creation of NPDES programs for stormwater management. Consequently, they did not foresee the need to consider the ramifications of managing stormwater when setting water quality standards. Most existing standards are limited to consideration of steady-state streamflow conditions that occur during dry weather. Existing water quality standards are therefore inappropriate for managing transitory, non-steady state storm flow conditions and inappropriate for establishing numeric effluent limits in stormwater permits for storm flow conditions.

Moreover, it is not at all clear that the types of numeric effluent limitations contemplated by the memorandum are "feasible" in a purely technical sense. For example, a recent study on "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities" contained in the Storm Water Panel Recommendations to the California State Water Resources Control Board (June 19, 2006) concluded that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges," and that "[f]or catchments not treated by a structural or treatment BMP, setting a numeric effluent limit is basically not possible." EPA suggests in the memorandum that State and EPA have obtained "considerable experience" in calculating TMDLs and WLAs for stormwater sources since 2002, that monitoring the impacts of stormwater sources has become "more sophisticated and widespread," and that "better information" on the effectiveness of stormwater controls is now available. However, it does not provide that information in this memorandum, nor does it suggest that the recent information and experience to which it alludes support the technical feasibility of reducing the impact of municipal stormwater sources to meet the type of numeric effluent limitations it seeks to impose. The undersigned organizations would appreciate the opportunity to review and discuss this information.

2. Consistency with TMDL Wasteload Allocations.

The November 12 memorandum also misrepresents existing law in stating that, if the State or EPA has established a TMDL for an impaired water that includes WLAs for stormwater discharges, "permits for either industrial stormwater discharges or MS4 discharges must contain effluent limits and conditions consistent with those WLAs." The requirement to meet TMDL WLAs is merely a subset of the requirement to meet water quality standards, which those WLA's

are calculated to implement.[2] Since MS4 discharges are not subject to the requirement to meet water quality standards to begin with, they cannot be required to comply with TMDL WLAs without regard to the "maximum extent practicable" standard established in the Act.

The only authority cited in the memorandum for EPA's assertion that both industrial and municipal stormwater permits must contain effluent limitations consistent with TMDL WLAs is a subsection in the Agency's general NPDES permit regulations at 40 CFR § 122.44(d)(1)(vii)(B). However, that rule does not apply to municipal stormwater permits. The opening sentence of 40 CFR § 122.44 states that "each NPDES permit shall include conditions meeting the following requirements when applicable." The rule then enumerates a variety of permit conditions, some of which apply to municipal stormwater permits, and others that do not. The subject of subsection (d) is the requirement to ensure compliance with state water quality standards, which (as discussed above) applies to all NPDES permits except MS4 permits.

The opening sentence to subsection (d) of the rule has been included in the Agency's general NPDES permit regulations since 1983, long before the 1987 CWA amendments created the separate and independent "maximum extent practicable" standard for MS4 discharges. In 1989, subsection (d) was expanded by the addition of the seven subparagraphs in § 122.44(d)(1) to further describe the procedures a permitting authority should use to determine whether an NPDES permit must include a water quality-based effluent limit. 54 Fed. Reg. 23868 (June 2, 1989). Each of the additional provisions was intended to describe the procedures for implementing state water quality standards. Subparagraph (vii) was added to describe two fundamental principles for deriving water quality-based effluent limits: first, that they must be derived from water quality standards, and second that they must be consistent with any WLAs based upon those water quality standards. *Id*.

Shortly after the 1989 revisions to 40 CFR § 122.44 were promulgated, EPA issued an August 21, 1989 memorandum from James R. Elder, Director, Office of Water Enforcement, to Water Management Division Directors, Regions I – X entitled "New Regulations Governing Water Quality-Based Permitting in the NPDES Permitting Program" That memorandum emphasized that the additional provisions in 40 CFR § 122.44(d) were merely intended to clarify existing requirements for water quality-based permitting. As explained in the memorandum,

> Subsection (d) covers water quality standards and state requirements. Prior to the promulgation of these new regulations the subsection was non-specific, requiring only that NPDES permits be issued with requirements more than promulgated effluent guidelines as necessary to achieve water quality standards. We have strengthened considerably the requirements of §122.44(d). The new language is very specific and requires water quality-based permit limits for specific toxicants and whole effluent toxicity where necessary to achieve state water quality standards. (Emphasis added.)

Because MS4 permits are not required to achieve state water quality standards, as discussed above, none of the requirements in 40 CFR § 122.44(d) are applicable to such permits. Pursuant to the plain language of the CWA, and consistent with the Ninth Circuit's decision in *Defenders*

[2] Cf. 40 CFR § 130.2(h): "WLAs constitute a type of water quality-based effluent limitation."

of Wildlife v. Browner, EPA may exercise its discretion to require MS4 discharges to comply with water quality standards, or WLAs based on those standards, only to the "maximum extent practicable."

Use of Surrogates for Pollutant Parameters

The undersigned organizations all support the goal of reducing pollutants and improving water quality. However, we have serious concerns with EPA's suggestion in the November 12 memorandum that NPDES authorities should use a numeric target for stormwater volume or impervious cover as a "surrogate parameter" for specific pollutants when developing TMDL WLAs for waters impaired by stormwater sources. We do not believe that the CWA or the Agency's implementing regulations give EPA the authority to regulate flow as a surrogate for pollutants in TMDLs. CWA § 303(d) requires each State to establish the total maximum daily load for specific "pollutants," at a level necessary to implement the applicable water quality standards for those pollutants. Stormwater flow or volume, while it may contribute to "pollution" within the meaning of CWA § 502(19), is not a "pollutant" as defined in CWA § 502(6). We do not believe that the statement in 40 CFR §130.2(i) that "TMDLs can be expressed in terms of mass per time, toxicity or other appropriate measure" relieves the permitting authority of the obligation to calculate the necessary load for specific pollutants. Nor does the mere fact that "it may be difficult to identify a specific pollutant (or pollutants) causing the impairment" for waters impaired by stormwater sources excuse the requirement that "TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards." 40 CFR § 130.7(c)(1)(ii).

Although the concept of using flow or impervious cover as surrogates for pollutants in setting TMDL loading targets may have been implemented in some States (Connecticut, Maine and Vermont), as EPA suggests, to our knowledge the legal basis for this approach has not yet been examined by the courts, and it has been opposed in other locations. For example, the comments filed by the Commonwealth of Virginia Department of Transportation (VDOT) to the draft Benthic TMDL for Accotink Creek in Fairfax County, Virginia, point out that since stream flow is not a pollutant the draft TMDL fails to establish a quantifiable load for anything within the legal definition of a pollutant. VDOT recommends, instead, that stream flow and subsequent reductions in flow be identified as possible best management practices during implementation as opposed to being used for the WLA.[3]

We agree that reductions in stormwater flow through the implementation of BMPs, including "green infrastructure" and "low impact development" can help reduce pollutant loads from municipal stormwater sources and achieve improvements in water quality. However, under the Agency's existing statutory and regulatory authority, those reductions cannot be expressed as specific numeric targets for stormwater flow volume or impervious cover in calculating TMDL WLAs.

[3] Comments submitted to EPA Region 3 on August 11, 2010.

Conclusion

The undersigned organizations and their members are committed to improving municipal stormwater quality through the use of BMPs and green infrastructure/LID concepts. We are eager to continue working with the Agency on water quality improvements for both stormwater and non-stormwater discharges. However, the implementation of numeric limits continues to be inappropriate both economically and technologically until such time as treatment technology advances to a state where larger volume flows can be treated in a more economic fashion. Given these difficulties and in light of the dramatic changes to EPA's existing policies for municipal stormwater permits reflected in the November 12 memorandum, as well as the fundamental shortcomings in the Agency's analysis of its legal authority for those changes, we recommend that the memorandum be withdrawn for further consideration. That process should include consultation with the regulated community, and we look forward to working with the Agency in that regard. Further, such sweeping changes to the Agency's municipal stormwater program are premature and should not be implemented prior to the release of the final regulations that the Agency is expecting to issue by November of 2012.

Sincerely,

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Executive Director
American Public Works Association

Ken Kirk
Executive Director
National Association of Clean Water Agencies

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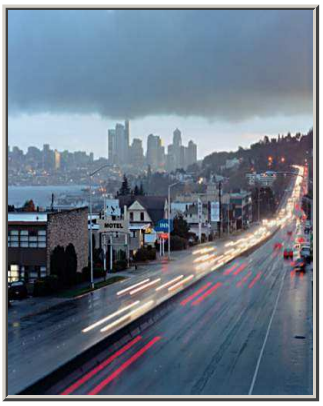
Permits Branch Chiefs, Regions 1 – 10
Association of State and Interstate Water Pollution Control Administrators

U.S. ENVIRONMENTAL PROTECTION AGENCY

National Pollutant Discharge Elimination System (NPDES)

Stormwater Program

OVERVIEW



Stormwater runoff is generated when precipitation from rain and snowmelt events flows over land or impervious surfaces and does not percolate into the ground. As the runoff flows over the land or impervious surfaces (paved streets, parking lots, and building rooftops), it accumulates debris, chemicals, sediment or other pollutants that could adversely affect water quality if the runoff is discharged untreated. The primary method to control stormwater discharges is the use of best management practices (BMPs). In addition, most stormwater discharges are considered point sources and require coverage under an NPDES permit. For more information about the Stormwater program, visit the Stormwater Basic Information page.

Most states are authorized to implement the Stormwater NPDES permitting program. EPA remains the permitting authority in a few states, territories, and on most land in Indian Country.

WHAT CAN I FIND ON THIS WEB SITE?

This section contains technical and regulatory information about the NPDES stormwater program. It is organized according to the three types of regulated stormwater discharges – municipal separate storm sewer systems (MS4s), construction activities, and industrial activities. It also provides links to general stormwater topics and tools available.

To access the full list of NPDES stormwater information, such as stormwater state contacts and stormwater state web sites, use the navigation tool box on the right side of this page.

To search for additional information within the NPDES program, enter a keyword in the Search NPDES box at the top of this page.

Basic Information

Featured Information

- Proposed Stormwater Rulemaking
- Public Comments on November 12, 2010 Memorandum on Establishing TMDL WLAs for Stormwater Sources (PDF) (2 pp, 108 KB)
- National Research Council Report on Urban Stormwater (PDF) (529 pp, 10.5MB)
- National Menu of BMPs
- Stormwater Webcasts
- Forest and Logging Roads

Municipal Information

Featured Information

- MS4 Permit Improvement Guide (PDF) (119 pp, 1.5MB)
- Road-Related Municipal Separate Storm Sewer Systems (MS4s)
- Managing Stormwater in Your Community: A Guide for Building an Effective Post-Construction Program EXIT Disclaimer
- Urban Stormwater Retrofit Manual (PDF) (262 pp, 11.7MB) EXIT Disclaimer
- IDDE Manual and Supporting Materials
- Stormwater Case Studies

You will need Adobe Reader to view some of the files on this page. Files are best viewed in Internet Explorer and Adobe 8.0 or higher. See EPA's PDF page to learn more.

Construction Information

Featured Information

- Regulation of Oil and Gas Construction Activities
- 2012 Construction General Permit (CGP)
- Construction SWPPP Guidance
- Low Erosivity Waiver (LEW) Calculator
- CGP Electronic Notice of Intent (eNOI) System

Industrial Information

Featured Information

- Industrial Stormwater Monitoring and Sampling Guide
- Industrial SWPPP Guidance
- Water Locator Tool
- 2008 Multi-Sector General Permit (MSGP)
- Industrial Sector Fact Sheets
- MSGP Electronic Notice of Intent (eNOI) System

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