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December 13, 2012

Connie Bosma

Municipal Branch Chief, Office of Wastewater Management  
U.S. EPA, Office of Water  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Dear Connie,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to communicate with EPA as the Agency works to develop a new national post-construction stormwater rule. It is NACWA's understanding that EPA intends to release a draft version of the rule for public comment in June 2013, and that the Agency will be working to finalize the draft rule over the next few months. NACWA submits these comments for EPA's consideration as the Agency completes its work on the draft proposal.

Many of the comments included in this letter are similar to suggestions NACWA has previously made to EPA during the rulemaking process. However, we wanted to provide a summary of our current thinking regarding the rulemaking process as EPA moves into its final development phase. We appreciate and thank EPA for its consideration. This comment letter will provide some general thoughts on the rulemaking process, as well as comments on three specific areas that we understand EPA is considering for inclusion in the rule.

### General Overarching Comments

As clean water agencies working on the front lines of stormwater management and environmental protection to improve the health of our nation's waters, NACWA members recognize the need to continue addressing water quality impairment caused by urban stormwater runoff. NACWA understands that in order to meet the challenges presented by urban stormwater, it is necessary to examine the existing methods of stormwater management and consider the use of innovative solutions to reduce the impacts of runoff. NACWA also recognizes and supports a more holistic approach to managing stormwater.

Green infrastructure and other low impact development techniques are rapidly emerging as effective approaches to manage stormwater close to its source. NACWA has been very supportive of green infrastructure, serving with EPA as one of the original signatory organizations to the 2007 Green Infrastructure Statement of Intent, and many NACWA utility members have actively embraced green infrastructure as a way to improve water quality and provide multiple co-benefits to

their communities. NACWA is pleased that EPA has recognized the important benefits of green infrastructure in this context and believes the Agency should appropriately encourage the use of green infrastructure in the stormwater rule proposal.

At the same time, NACWA would like to remind EPA as it develops the new stormwater rule that Congress's 1987 amendments to the Clean Water Act addressing municipal stormwater runoff created a unique standard for municipalities to reduce pollutants in stormwater, known as the "maximum extent practicable" or MEP standard. This was done to differentiate municipal stormwater discharges from industrial discharges, particularly with regard to the cost of compliance with stormwater permits. In creating a separate MEP standard for municipal stormwater permits, Congress clearly intended for cost considerations to be part of the process in determining what kind of requirements are appropriate for permits issued to municipal separate storm sewer system (MS4) dischargers. Any new requirements for municipal dischargers proposed by EPA in the forthcoming rule must adhere to the MEP standard and be developed with consideration of the cost for municipalities to meet new standards. NACWA appreciates EPA's sensitivity thus far during the rulemaking process to cost considerations, and stands ready to assist the Agency in any way possible regarding this critical issue as the rule moves forward.

NACWA is not able to take a formal position on the rule or its components until such time as a draft is available for review. However, based on conversations and meetings we have had with EPA in recent months, NACWA believes we have a good sense of some key areas EPA plans to address. The following comments reflect NACWA's current thinking on some of these issues under consideration by EPA for inclusion in the rule.

### Expanding the Area Subject to Federal MS4 Jurisdiction

NACWA is supportive of efforts to bring previously unregulated discharges within the National Pollutant Discharge Elimination System (NPDES) permitting structure, especially if it is done as part of an overall watershed approach to permitting that looks at all sources of water quality impairment, including agricultural runoff. NACWA believes EPA should continue to study the possibility of expanding the areas subject to MS4 jurisdiction as part of the rulemaking process and looks forward to seeing how EPA addresses this issue in the rule proposal.

One item NACWA understands is under discussion involves the potential to craft a rule that allows EPA (or a delegated state permitting authority) to identify specific dischargers outside of an MS4 jurisdiction that should be regulated due to their impact on downstream water quality. NACWA believes this concept is worthy of additional consideration by EPA for inclusion in the rule. Such an approach could address the growing issue of dischargers, like residential subdivisions or large commercial properties, located outside of a regulated MS4 area creating water quality complications for downstream regulated MS4s and other point sources. Additionally, regulation of these discharges located outside the MS4 will address the significant concern that more stringent regulations within a defined MS4 area will simply encourage developers to go outside an MS4 boundary and develop previously undeveloped areas (or "green fields") in an effort to avoid stormwater regulation.

However, NACWA believes there is confusion around exactly which entity – EPA, the state, or an existing MS4 permittee like a local government – would be responsible for issuing and enforcing such permit regulations against these specific dischargers located outside of a federally regulated MS4, and potentially the regulatory jurisdiction of a local government. NACWA believes that only EPA or a state should be responsible for enforcement of the permit in such areas – not an existing MS4 permittee – as this approach would be in line

with how other “individual” permits are typically addressed under the current NPDES structure. NACWA encourages the Agency to seek comment on this issue if it is included in the draft proposal.

## New Development/Redevelopment Standards

NACWA understands that EPA is actively evaluating the inclusion of new development and redevelopment standards to encourage on-site retention of stormwater as part of the new rule. Some NACWA members are already pursuing such standards to reduce stormwater runoff within their own local stormwater regulations, and the Association and its members recognize the potential value of these standards in helping reduce stormwater flows. However, the ultimate decision on how these standards should be structured is regional and community-specific, and individual municipalities and MS4 permittees need sufficient flexibility in developing them. The differences in existing local stormwater management ordinances across the country are testament to the need for such flexibility.

Accordingly, NACWA believes any new development and redevelopment requirements included in the stormwater rule proposal must take into consideration the varying geographic, climactic, and hydrologic conditions found in different regions of the country, and allow for the development of new development/redevelopment standards that account for these regional variations. It is critical that these performance standards be flexible enough for communities to create new development/redevelopment requirements appropriate for their stormwater needs and watershed management issues. This is particularly true for states where existing laws are problematic for on-site retention and other runoff minimization practices. NACWA also believes that any standards included in the rule proposal should not specify what types of technologies or approaches must be used to meet the standards; instead, this decision should be left to individual communities and permittees.

Additionally, NACWA strongly supports allowing exceptions to the new development/redevelopment criteria if the proposed standards cannot be met, including due to site constraints. Permitting authorities should be given the ability to develop alternative standards or other mitigation measures – such as off-site storage and retention options – as necessary. This would allow for overall watershed management, promote locally appropriate development and conservation solutions, and ensure that these new standards do not drive redevelopment from existing urban areas. With specific regard to redevelopment requirements, NACWA encourages EPA to be sensitive to the unique challenges facing these projects in economically depressed urban areas, including the need for cities to revitalize neighborhoods, attract new business and residents, and increase the tax base.

NACWA also supports the option of allowing for redevelopment performance standards that are different from those for new development. These modified standards could include the opportunity to receive credit for redeveloping in certain areas or a standard that focused on a percent reduction of impervious surface as part of the redevelopment project instead of an on-site stormwater retention performance standard. EPA’s redevelopment standard should focus on how to encourage much needed urban redevelopment in a way that is environmentally responsible and economically viable.

NACWA was pleased to learn during meetings with EPA that the Agency is considering the possibility of phased implementation of new development and redevelopment performance standards, thus providing municipalities and permittees with an opportunity to adapt to these standards and not negatively impact existing redevelopment efforts. NACWA strongly supports this approach and believes it is necessary to allow municipalities and permittees to enact the necessary codes and ordinances for on-site retention in a cost-effective manner. NACWA recommends a minimum of five years for such a “phase in” period, possibly tied to a

permittee's first permit cycle under the new rule. NACWA also suggests that EPA seek comment on an appropriate "phase in" period as part of the draft rule.

## Retrofit Requirements

The potential element of the rule proposal that NACWA is most concerned about at this time is the inclusion of a requirement to manage discharges from existing impervious surfaces that are not part of a redevelopment project. NACWA understands that EPA is no longer referring to this potential approach as a "retrofit requirement." However, from a municipal perspective, such an element in the rule would essentially require retrofits of existing areas of impervious surface separate and apart from any planned redevelopment, including roadways and other public spaces.

As NACWA has previously expressed to EPA, we have significant concerns with mandating stormwater retrofits and do not believe a "retrofit requirement" should be included in the rule. Such an approach would be extraordinarily expensive and would place a tremendous economic burden on local communities at a time when many municipalities are dealing with a period of severe economic distress and are already engaged in expensive infrastructure improvement projects to ensure public health and safety. While NACWA recognizes the need to address existing impervious area as part the effort to reduce stormwater pollution, we believe this is best done either through a redevelopment standard that addresses these issues through each redevelopment project, or via an "incentive based" approach already used by many utilities to incentivize the reduction of impervious surface by property owners.

To the extent any type of retrofit requirement is included in the rule, NACWA believes it must be structured in a way that does not require municipalities and local governments to replace existing infrastructure that is still within its designed service life. Instead, retrofits must only be done in accordance with existing capital improvement schedules, such that any modifications to impervious surface are done when a street or sidewalk is already scheduled for maintenance or replacement. This has the additional benefit of encouraging collaboration between municipal departments, which will be integral to effectively implement retrofits. NACWA is opposed to the unnecessary and costly replacement of existing infrastructure, and was pleased to hear in recent meeting with EPA that the Agency shares these same concerns. NACWA also believes that any potential retrofit component to the rule should come with federal funding to local communities to help address the significant costs that will be involved.

NACWA would appreciate additional clarity on how EPA will determine an appropriate time frame for implementation of retrofits, which MS4s would be required to implement a retrofit plan, and what process a regulating authority would follow for approving a municipality's retrofit plan. NACWA believes that if a retrofit requirement is included, EPA should provide a minimum of five years for municipalities to develop a retrofit plan, and an additional minimum of thirty years to implement the plan, with an option for a longer period of time to implement the retrofits based on a municipality's unique needs and considerations. NACWA is also supportive of an option that would only require retrofits where MS4s discharge to waters impaired for stormwater, instead of making it a requirement for all MS4 permittees. If retrofit requirements are to be included in the rule, NACWA supports applying them only where there is a demonstrated water quality need.

## Additional Issues for Consideration

In addition to the issues outlined above, NACWA would also like to present the following general thoughts for EPA consideration.

First, NACWA is pleased to learn from recent conversations that Agency is considering a 90-day comment period for the draft rule upon its release. NACWA believes 90 days is the minimum amount of time necessary for interested parties to adequately review the rule proposal and provide meaningful public input, and is strongly supportive of a 90-day comment window.

Second, NACWA encourages EPA to draft the proposal with an eye towards how the rule will eventually interact with the Agency's recent Integrated Planning (IP) Framework. The IP approach marks an important step forward by EPA to provide municipalities and local governments with much needed flexibility to prioritize their investments related to wet weather. It is critical that the new stormwater rule be written in such a way that municipal permittees have the option of implementing the rule's requirements as part of a larger integrated planning approach. NACWA believes this could also serve to encourage wider community adoption of the IP process if there is an additional benefit of IP being applicable to new stormwater regulatory requirements.

Third, water quality trading is quickly emerging as an important element of a holistic watershed approach and can be a valuable tool in stormwater management. Although the exact role of municipal stormwater in water quality trading is still emerging, it is critical that the stormwater rule acknowledge the potential role of trading in addressing stormwater concerns and not impede the development of trading markets involving MS4s. NACWA encourages EPA to consider requesting comment on this issue as part of the preamble to the draft proposal, including how to best address water quality trading within the rule.

Fourth, NACWA is aware of suggestions that EPA consider extending certain potential elements in the rule, such as new development and redevelopment standards, beyond MS4 areas to include combined sewer areas as well. NACWA has no specific position on this suggestion at this time, but would strongly encourage EPA to seek comment on this idea before including as part of the rule.

NACWA appreciates the opportunity to provide these comments. If you would like to discuss any of these comments further, please do not hesitate to contact me at [ngardner-andrews@nacwa.org](mailto:ngardner-andrews@nacwa.org) or 202/833-3692, or Brenna Mannion, NACWA's Regulatory Affairs Manager, at [bmannon@nacwa.org](mailto:bmannon@nacwa.org) or 202/533-1839. NACWA looks forward to continued engagement with EPA over the coming months as the Agency works to finalize its stormwater rule proposal.

Sincerely,

A handwritten signature in black ink that reads "Nathan Gardner-Andrews". The signature is written in a cursive, flowing style.

Nathan Gardner-Andrews  
General Counsel