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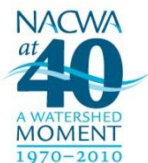
Attention: Docket ID No. EPA-HQ-OW-2009-0817

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA's) December 28, 2009, Federal Register notice announcing the Agency's intent to initiate a national rulemaking process related to stormwater discharges from new development and redevelopment. NACWA is the leading advocacy organization on behalf of the nation's clean water and stormwater utilities. Our members are on the front lines of environmental protection working every day to improve the quality of our nation's waters. NACWA recognizes the need to address the growing water quality problems created by urban stormwater and is supportive of innovative efforts to confront these issues. We look forward to working with EPA over the next two years to develop a stormwater rule that improves water quality but is also sensitive to the financial, regulatory, and political realities currently facing the nation's stormwater and clean water utilities.

NACWA's comments have been compiled by the Association's member utilities, including members of our Stormwater Management Committee. We have divided our comments into three sections: the first section contains a few general comments on EPA's effort, the second section addresses information on existing stormwater control practices, and the third section contains comments on EPA's preliminary considerations for modifying and/or supplementing current federal stormwater regulations.

**General Comments**

While NACWA is supportive of innovative efforts to improve the national stormwater program, we believe the success of this rulemaking effort will ultimately depend in large part on how involved the municipal stormwater community is in helping to craft it. Municipal separate stormwater sewer system (MS4) utilities all across the country have a wealth of information and knowledge on the effectiveness



of various stormwater management practices, how these practices could be improved, and the real issues and necessary conditions involved in implementing innovative stormwater management at the local level. These utilities also have valuable ideas on how future stormwater regulations should best be structured to improve water quality and minimize future issues from redevelopment and new development. It is critical that these professionals have the opportunity to share their insights with EPA during the development process and that EPA be willing to listen.

It is also critical that any new stormwater rule be structured to account for varying types of geography, climate conditions, and soil conditions across the country that will impact the effectiveness of stormwater management practices. Utilities are well aware of these issues. Many NACWA members have developed and are implementing innovative local stormwater management codes today. We urge EPA to understand what makes these local efforts successful and what steps the Agency can take to facilitate other communities in implementing such programs. NACWA was pleased to hear during the recent “listening sessions” that EPA will account for regional and local variability to develop a federal program that truly advances stormwater management. Essential to this is understanding existing state and local laws related to land use, planning, zoning, building, and stormwater management and a concerted effort on the part of EPA to craft a program that avoids conflicts with these laws. It is particularly important that EPA’s efforts not undercut the advances that some state and local governments have made in controlling stormwater runoff through innovative approaches. Many NACWA members have made investments based on their local and state stormwater regulations and believe that any new federal regulations must be able to accommodate similar, existing state and local efforts.

Another key component is looking at stormwater permitting issues within the larger context of a watershed approach. NACWA believes that choices about the scope and type of stormwater regulations, including stormwater design standards, criteria for new and redevelopment, treatment of sensitive areas, prioritization of pollutants, and similar issues are best handled in the context of watershed permits that look at all the sources of pollution within a given watershed. It is only by taking this “wide-angle view” of permitting and by looking at the entire watershed that water quality improvements can be achieved in the most efficient and effective manner and with the greatest benefit to watershed residents. The ability to engage in water quality trading is an important element of a watershed approach and can be a valuable tool in stormwater management. NACWA encourages EPA to incorporate a watershed approach and water quality trading in any future stormwater rule proposal.

#### **Information on Stormwater Control Practices**

NACWA believes it is critical that EPA have accurate and complete data on the effectiveness of existing stormwater management practices before developing changes or additions to municipal stormwater requirements. The proposed Information Collection Request (ICR) EPA will be circulating to stormwater utilities should help gather some of this information. However, as NACWA has previously commented, we believe the ICR should include additional questions to gather more information on the effectiveness of current stormwater control efforts.

Some NACWA members are troubled that EPA is proceeding with significant revisions to stormwater regulations without first conducting the enhanced research effort and comprehensive evaluation of the federal MS4 stormwater program called for in existing stormwater regulations at 40 CFR 122.37. There is also concern

that EPA's current efforts are being driven by a 2008 National Research Council report on urban stormwater that lacked meaningful stakeholder input from municipalities and MS4 permit holders. A comprehensive set of data on existing municipal stormwater techniques provided by those utilities which manage stormwater on a daily basis is critical to the success of any new rulemaking effort.

While NACWA believes distributed stormwater management systems such as on-site retention can play a key role in handling wet weather flows, we are also concerned by much of the uncertainty surrounding their use. Distributed systems installed on private lots cannot practicably be maintained by municipalities -- even inspections and enforcement can be problematic if the systems are widely distributed across the landscape. This lack of control means municipalities cannot be sure that such systems will either be maintained to preserve their functionality, or even be kept on-site -- e.g. rain gardens could be filled in, dispersion paths paved, or rain barrels discarded -- even organic matter tilled into topsoil has a limited life and must be regularly replenished, something municipalities cannot guarantee will be done by property owners. To have a chance of being effective, the use of distributed systems on private lots will require a vigorous and sustained education program. However, such programs are currently being targeted for budget cuts in many municipalities during these tough economic times. NACWA is also concerned that to date there seems to have been little consideration and insufficient studies about the impact of widespread infiltration technologies on groundwater and the hydrologic system as a whole. These are all issues on which EPA needs to gather additional information before proceeding with its planned revisions to the existing stormwater regulations.

#### **Comments on EPA Preliminary Considerations**

NACWA has the following comments on EPA's five preliminary considerations for modifying or supplementing EPA's stormwater regulations.

*Expand the area subject to federal stormwater regulations* – As a general statement, NACWA is supportive of efforts to bring previously unregulated discharges within the permitting structure of the National Pollutant Discharge Elimination System (NPDES) permitting program. Such an approach is necessary to effectively manage any watershed and would help to level the playing field by making currently exempt dischargers responsible for the quality of their stormwater rather than placing all the burden on existing Phase I and Phase II communities and construction sites. Better regulation of currently unpermitted discharges is an important step towards controlling all sources of pollution within a given watershed and improving water quality. NACWA is particularly supportive of expanding the NPDES program to currently unregulated sources if it is done as part of an overall watershed approach to permitting.

One of the key issues related to expanding the area subject to federal MS4 regulation is determining the appropriate jurisdictional boundaries for such an expansion. NACWA would encourage EPA to consider using existing township or city boundaries to determine such jurisdiction or, in the situation where a sewerage district already has existing MS4 program responsibilities, the boundaries of the sewer district. Jurisdictional boundaries based on existing township or sewer district boundaries may ultimately prove more workable, encounter less political opposition, and allow for permits that are more narrowly tailored to specific, local water quality concerns. In the event there are areas outside these boundaries, such as large areas of new development, EPA could develop a regulation that looks at the amount of impervious surface to be created as part of the development and require that any large development with a ratio of impervious surface to pervious surface above a certain threshold be required to obtain a post-construction MS4 permit. It is also important to work within jurisdictional boundaries because if EPA is going to require any additional local codes – such as

the ordinances required under the current Phase II rule – communities can only adopt and implement these across their whole jurisdiction.

While NACWA is generally supportive of the idea of expanding the areas subject to federal stormwater regulations, we are concerned about the increased regulatory and financial burden that such an approach would place on MS4 utilities. Existing utilities would be required to expand their regulatory oversight at a time when many municipal budgets are shrinking, and in some cases local municipalities may have to create entire new stormwater utilities to oversee an expanded federal regulatory program. Any efforts by EPA to increase the area subject to federal MS4 regulation must also come with increased federal regulatory and financial assistance to stormwater utilities to help them respond to an increased federal mandate. An increase of the federal stormwater regulations without additional federal support will only further burden municipal utilities when local resources are already stretched to the breaking point. Furthermore, NACWA is opposed to any regulatory changes that would obligate sewer districts or publicly owned treatment works to take MS4 responsibility. The decision about what local government entity will oversee the stormwater program must be left up to local communities to decide and in many cases mandating a local sewer district to assume MS4 responsibility may run counter to applicable local and state laws.

*Establish specific requirements to control stormwater discharges from new development and redevelopment* – NACWA is in favor of requirements for new development or redevelopment that would call for a certain percentage of stormwater to be retained on-site, provided that there are alternative options available due to site-specific constraints. Managing stormwater on-site and preventing excess stormwater flows from running off impervious surfaces is a key step towards improving water quality in many of the nation's watersheds, particularly in urbanized areas. The use of green infrastructure can play a critical role in on-site management of precipitation by allowing for infiltration, evapotranspiration, and beneficial reuse of stormwater. As one of the original signatories with EPA to the Green Infrastructure Statement of Intent, NACWA believes green infrastructure solutions can play a major role in reducing wet weather and stormwater flows. We believe EPA should explore ways to encourage developers and communities to use green infrastructure as an on-site stormwater control practice for new development and redevelopment when appropriate.

However, in formulating an on-site stormwater requirement, NACWA cautions EPA against creating a structure for the use of green infrastructure that limits the ability of local utilities to choose the management practices that work best for their communities. Any on-site management standard must take into account varying types of soil conditions, climate conditions, and geography across the country, recognizes that a standard which works in one part of the country will not be practical in another part. This is particularly true with the use of green infrastructure, whose effectiveness varies widely depending on local conditions. Many communities and clean water utilities are interesting in exploring how green infrastructure and low impact development can be used to improve water quality but are concerned about possible federal mandates requiring the use of specific green infrastructure technologies that are inappropriate for a given region. EPA should develop stormwater regulations for new and redevelopment that support the use of green infrastructure but do not result in inappropriate stormwater management practices being implemented as a response respond to federal mandates without consideration of real watershed and land use conditions.

In developing on-site stormwater retention standards, NACWA encourages EPA to be sensitive to the unique challenges facing redevelopment projects, particularly in economically depressed urban areas. Many large cities rely on redevelopment projects in industrial or economically depressed areas to revitalize neighborhoods, attract new business and residents, and increase the tax base. Overly restrictive stormwater requirements for

redevelopment that ultimately deter investors and developers from pursuing urban redevelopment projects will be counterproductive economically, socially, and environmentally. It is imperative that federal environmental mandates not unnecessarily impede the redevelopment so desperately needed by many of the nation's urban centers. This sensitivity may speak to the need for different standards between urban redevelopment, with all its attendant social and economic implications, and new development in previously undisturbed suburban and exurban areas. EPA must also recognize that there are often competing priorities when designing urban landscapes, such as creating bike or walking paths that might compete for space with infiltration technologies such as rain gardens.

Additionally, NACWA believes that responsibility for maintaining on-site stormwater management control measures such as green infrastructure must remain with the property owner. NACWA is opposed to any requirements that would assign maintenance responsibilities to stormwater utilities for stormwater control practices located on private property without associated funding streams. Beyond the obvious legal impediments that such an arrangement would face, municipal stormwater utilities simply do not have the resources to take charge of maintenance and upkeep for control measures on private property. Private property owners must carry this responsibility, possibly with a set of incentives and/or penalties to encourage compliance. However, EPA must also recognize the inability of utilities to guarantee the performance of control measures on private property and account for this in stormwater regulations.

*Develop a single set of consistent requirements for Phase I and Phase II MS4s* – NACWA believes there is value in developing a single, overarching set of requirements for all stormwater utilities, such as including a set of minimum measures for both Phase I and Phase II utilities. Many of the challenges to improving stormwater quality are common to all communities large and small, so the existence of criteria based merely on population no longer makes sense. A set of broad standards and regulations would ensure a base level of consistency in permitting stormwater discharges in all parts of the country, which NACWA believes would ultimately benefit the stormwater community. As an example, one item that NACWA members believe should be available to all MS4s is the ability to regulate and inspect industrial facilities.

However, NACWA believes that standardized regulations must also be flexible enough to allow each MS4 permit to be tailored to the specific water quality, environmental, and economic needs of local communities, with stormwater control practices based on what makes sense for each community, and its environmental needs. Any broad regulations must take into account the varying differences in urbanization, climate, and soil type between Phase I and Phase II communities in different parts of the country. Additionally, some NACWA Phase I communities question the continued value of wet weather monitoring requirements that are not required of Phase II permit holders. For congruency with Phase II communities, regulations should be changed to no longer require Phase I communities to annually monitor wet weather discharges. While wet weather monitoring may have served a purpose for discharge characterization during the Phase I permit application process, it is very resource intensive and has yielded little tangible benefits toward improving water quality.

*Require MS4s to address stormwater discharges in areas of existing development through retrofitting of the sewer system, drainage area, or individual structures with improved stormwater control measures* – NACWA is strongly opposed to any new regulations that would require MS4 utilities to retrofit existing areas of development within the stormwater sewer system. Such an approach would be very expensive and place a tremendous financial burden on local communities at a time of severe economic crisis. As an example, EPA's own estimates for stormwater retrofits in the Chesapeake Bay watershed, as outlined in the Agency's draft Bay strategy document, approach \$8 billion. Simply put, municipalities do not have the resources to meet these costs. Any new stormwater

requirements promulgated by EPA that include a mandate for retrofitting of existing development will be met with strong municipal opposition. If mandatory retrofits are required, federal funding for such retrofits is a necessity as unfunded requirements will only result in increased stormwater fees on municipal customers who have already been burdened by significant sewer rate increases required for EPA-mandated combined sewer overflow and sanitary sewer overflow reduction projects. We understand the need to address existing impervious area that has no stormwater control but this is best done through each redevelopment project and not a wholesale change to existing impervious surface.

*Need for additional changes to stormwater regulations in sensitive areas* – NACWA has no specific position on this issue, but generally believes that protection of waterbodies in sensitive areas from all sources of water impairment is a key component to an effective watershed approach. However, we believe the term “sensitive area” needs to be clearly defined. Additionally, many sensitive areas already receive additional protection under existing state and local regulation and EPA should avoid conflict with these existing rules.

Thank you for the opportunity to provide these comments. Please do not hesitate to contact me at [kjones@nacwa.org](mailto:kjones@nacwa.org) or 202/533-1803 if you have any questions or would like to discuss these comments further. NACWA looks forward to continued dialogue with EPA over the coming months during the development process of a new stormwater rule.

Sincerely,

A handwritten signature in black ink that reads "Keith J. Jones". The signature is written in a cursive, flowing style.

Keith J. Jones  
General Counsel