Associated Builders & Contractors, Inc.
Associated General Contractors of America
American Road and Transportation Builders Association
Building Owners and Managers Association International
International Council of Shopping Centers
NAIOP, the Commercial Real Estate Development Association
National Association of Home Builders
National Association of Real Estate Investment Trusts
National Multi Housing Council
National Apartment Association
The Real Estate Roundtable

February 1, 2011

The Hon. John Mica
Chairman
Committee on Transportation & Infrastructure
U.S. House of Representatives
2165 RHOB
Washington, DC 20515

The Hon. Darrell Issa
Chairman
Committee on Oversight & Government Reform
U.S. House of Representatives
2157 RHOB
Washington, D.C. 20515

The Hon. Harold Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
H-307 The Capitol
Washington, DC 20515

Re: Recommendation for Committee Investigations of Federal Regulations; ***Imminent EPA Regulations on Stormwater Runoff***

Dear Chairmen Mica, Issa, and Rogers:

The undersigned organizations represent hundreds of thousands of businesses, both large and small, in the real estate and construction industries. This letter specifically responds to Chairman Issa's request to identify current and proposed federal regulations that negatively impact job growth and preservation. We strongly encourage your respective Committees to investigate efforts by the U.S. Environmental Protection Agency (EPA) to develop new regulations that would, for the first time, require federal permits for stormwater runoff from already-developed properties. These rules are intended to regulate the rain and other precipitation that flows from land where homes, businesses,

stores, and other buildings have been constructed. See EPA's website at http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm.

The Nation's building and construction contracting industries have been in a severe recession for several years, and still suffer unemployment at a rate of 21 percent. EPA's "Post-Construction Run-Off" regulations will pose a major obstacle for our industries' recovery. We fear that such an unprecedented, complex, and costly expansion of the federal program to control ordinary runoff will forestall a sustained economic recovery for our members.

Under the existing Clean Water Act (CWA) and its implementing regulations, EPA's permitting authority is limited to controlling runoff from ***active*** construction sites, where soils are being disturbed during the development process. But once construction activity stops, so does EPA's regulatory reach under current law. While there are many unaddressed problems with this present regime, EPA's plan to create new federal regulations would impose additional requirements on landowners to manage rainwater ***after*** construction ends:

- EPA's imminent regulations could mandate that ordinary homeowners and commercial building owners ***retrofit*** existing properties with expensive new technologies to manage flows that occur when it rains. For example, EPA is considering whether property owners might need to tear out parking lots and replace them with pervious surfaces that allow rainwater infiltration but are considerably more expensive to build and maintain.
- EPA could create complicated and extraordinarily costly requirements as part of a project's design phase, to manage runoff after construction concludes.
- EPA is considering a regulatory structure where post-construction permits do not come from the federal agency directly, but are imposed through new federal requirements on municipalities that own and operate storm sewer systems.
- EPA may impose a combination of all of these elements – working synergistically to add exponential expenses to the individuals and companies that design, develop, build, own, and manage real property.

EPA's stated intent is for storm flows from already-developed properties to "mimic" pre-development hydrology in terms of the amount, velocity, temperature, and other aspects of precipitation runoff. Indeed, as evidenced by a presentation from the agency to the regulated community in the context of a recently convened small business impact review panel, EPA's regulations from developed sites ***"could be based on the hydrology of the land before construction (e.g., forest, prairie, meadow)."*** See Slide 7 (complete slide deck attached). At meetings of the small business review panel, EPA personnel were unable to answer basic questions about how these new rules would impact brownfield redevelopments or existing developments on former swamp or landfill (such as Washington, D.C.). Regulations that set unattainable standards for our cities and suburbs – the locales for growth and development in our country – to retain the characteristics of

a "forest, prairie, [or] meadow," could have devastating impacts as we strive to maintain our Nation's competitive edge in the international marketplace.

Senators James Inhofe and Michael Crapo have already expressed concerns regarding EPA's course of action. They wrote letters last year to Administrator Lisa Jackson (attached), voicing their questions and concerns with the process that EPA is pursuing to develop post-construction runoff regulations. The Senators further questioned whether the agency even has the authority from Congress to develop such regulations. With all due respect to EPA, we find its responses to the Senators' letters (also attached) wholly inadequate. EPA has no authority to regulate rain or the flow of water. And, even where stormwater picks up pollutants, is collected in conveyances, and is discharged into a statutory "navigable water," Congress has expressly limited EPA's regulatory authority, recognizing that stormwater is different from end of pipe wastewater discharges. Accordingly, the current Clean Water Act directs EPA to first conduct a study, and then report to Congress, on the need for and scope of any additional stormwater regulations. See CWA Sections 402(p)(5)-(6), 42 U.S.C. §§ 1342(p)(5)-(6). This important safeguard that Congress built into the CWA's fabric must not be ignored by EPA, nor should Congress allow EPA to amend the CWA through the *fait accompli* of an illegitimate regulatory process.

In this regard, it is telling that EPA is committed to issuing final post-construction runoff regulations by November 2012 – timed to the next Presidential election – because this is the date set forth in court settlement documents that the agency negotiated with environmental litigants. Of course, the CWA establishes no such deadline for new regulations. EPA should not be allowed to upset the prescribed process of a reasoned study and report to Congress in its rush to regulate by an arbitrary date selected by the parties to end a lawsuit.

Our organizations are fully committed to protecting the integrity of our Nation's water resources. We applaud the major gains made by EPA, industry stakeholders, and environmental groups alike, in improving and maintaining water quality since the initial days of the CWA's enactment. At the same time – and especially as we strive to recover from The Great Recession – we must heed President Obama's recent call to "promot[e] economic growth, innovation, competitiveness, and job creation," "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends," and enact agency rules that "take into account benefits and costs, both quantitative and qualitative." See January 18, 2011 Executive Order § 1, "Improving Regulation and Regulatory Review" (available at http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order)

To conclude, we submit that EPA's imminent post-construction stormwater regulations warrant the attention and investigation by the Committees on Transportation and Infrastructure, Oversight and Government Reform, and Appropriations.

Thank you for your consideration. We look forward to working with you and your Committees in the 112th Congress on this and other matters affecting the real estate and construction sectors.

Sincerely,

Associated Builders & Contractors, Inc.
Associated General Contractors of America
American Road and Transportation Builders Association
Building Owners and Managers Association International
International Council of Shopping Centers
NAIOP, the Commercial Real Estate Development Association
National Association of Home Builders
National Association of Real Estate Investment Trusts
National Multi Housing Council
National Apartment Association
The Real Estate Roundtable

cc: Hon. Mike Simpson
Chair
House Appropriations Subcommittee on
Interior, Environment and Related Agencies

Hon. Nick Rahall
Ranking Member
House Transportation & Infrastructure Committee

Hon. Elijah Cummings
Ranking Member
House Oversight & Government Reform Committee

Hon. Norm Dicks
Ranking Member
House Appropriations Committee

Attachments:

(1) EPA PowerPoint Slide Deck, "Stormwater Small Business Advisory Panel Outreach with Small Entity Representatives" (Dec. 7, 2010)

(2) Letter from Senators James M. Inhofe and Mike Crapo to EPA Administrator Lisa P. Jackson, regarding "process" issues with development of Post-Construction Runoff Regulations (July 7, 2010)

(3) Letter from EPA Assistant Administrator Peter S. Silva to Senator James M. Inhofe, responding to "process" letter (August 11, 2010)

(4) Letter from Senators James M. Inhofe and Mike Crapo to EPA Administrator Lisa P. Jackson, regarding "authority" issues with Post-Construction Runoff Regulations (July 7, 2010)

(5) Letter from EPA Assistant Administrator Peter S. Silva to Senator James M. Inhofe, responding to "authority" letter (July 30, 2010)

Stormwater Small Business Advisory Review Panel Outreach with Small Entity Representatives

December 7, 2010

Purpose

- To seek input from Small Entity Representatives
  - Range of regulatory options being considered
  - Analytical approach to evaluating these options

Stormwater Rulemaking

EPA is considering developing performance standards for discharges from new and redevelopment that promote green infrastructure practices that mimic natural processes to infiltrate and recharge, evapotranspire, and/or harvest and use precipitation

As part of this effort, EPA is also,

- Exploring options for expanding the universe of federally regulated municipal separate storm sewer system (MS4s),
- Exploring the desirability of establishing different requirements for transportation facilities,
- Evaluating options for establishing retrofit requirements on MS4s,
- Evaluating additional provisions specific to the Chesapeake Bay

EPA intends to propose a rule in September 2011 and to take final action by November 2012

Benefits of Stormwater Rule

Proactively Protects Local Water Quality

- Development and sprawl are increasing at a rate faster than population growth. Increased impervious cover associated with this development impacts water quality by increasing pollutant loadings and stormwater discharges that cause stream erosion.
- EPA's rule seeks protect water quality from these adverse water quality impacts

Helps to Restore Impaired Waters

- Stormwater discharges are a primary cause of water quality impairment
- One goal of EPA's rule is to restore these impaired waters by establishing standards that must be met as redevelopment occurs and by promoting retrofits of stormwater practices that have not been effective in protecting streams from stream erosion and pollutant loading

Green infrastructure provides a cost-effective means of protecting water quality from stormwater discharges

Benefits of Stormwater Rule

Cities should also realize other benefits from a rule that promotes green infrastructure. Green infrastructure

- Reduces the amount of rainwater that enters sewer systems, thereby reducing overflows of raw or partially treated wastewater
- Increases job diversity by creating a demand for certified installers, operations and maintenance staff, and landscape architects
- Creates more liveable communities by providing more trees, vegetation and open space
- Mitigates urban heat island effects
- Reduces energy usage
- Recharges groundwater and restores depleting groundwater supplies
- Creates more habitat for wildlife
- Improves air quality

Green infrastructure offers cities a holistic approach to solve many problems

EPA's stormwater rule aims to provide standards with appropriate flexibility so that states and cities can tailor solutions and take advantage of the benefits of green infrastructure in a way that best meets their needs

MS4 Expansion Regulatory Options

- No change - 2010 Urbanized Area defined by Census.
- Extend coverage to jurisdiction boundaries of the MS4 rather than urbanized area boundary
- Extend coverage to urbanized clusters (Census)
- Extend coverage to Metropolitan Statistical Areas (Census)
- Extend coverage to Metropolitan Planning Areas (FHA)
- Regulate based on a population or impervious cover threshold
- Extend coverage to watershed boundaries (using HUC defined watershed)
- Regulate all MS4s and allow States to exclude areas
- Require states to designate additional regulated MS4s

Possible Requirement for New Development

Natural hydrology with regard to discharge volume, rate and duration must be maintained or restored for discharges from newly developed sites using practices that infiltrate, evapotranspire, or harvest and use the discharge volume.

This could be based on the hydrology of the land before construction (e.g., forest, prairie, meadow).

Regulatory Options for New Development Standard to Meet Requirement

1. Permitting authorities must, in their permits or state rule, establish specific numeric standards that ensure compliance with the requirement

   Note: EPA plans to provide guidance to states to assist them in developing the numeric standard

2. Permitting authorities must, in their permits or state rule, comply with the requirement by either:
   a. Adopting the numeric criteria in the federal rule, or
   b. Developing State-specific numeric criteria that are as protective as the criteria in the federal rule

Exceptions

- For all options, there could be exceptions if the numeric standard cannot be met. For example,
  - groundwater pollution concern for source water protection
  - conflict with water rights
  - site constraints, especially for new transportation projects
- Permitting authority could develop offsite mitigation or payment in lieu programs, develop an alternative standard or develop another mitigation measure

Additional Regulatory Considerations

- EPA could apply the requirement to sites discharging to the MS4 AND sites outside regulated MS4s
- EPA expects to establish a size threshold of sites
- EPA could allow states to approve a numeric standard developed for a specific site with unique conditions using an EPA calculator as an alternative to meeting state's numeric standard

Current Volumetric Retention Standards for Discharges from New Development

State or Locality (date enacted)	Size Threshold	Standard
Vermont (2003, draft 2010)	1 acre	Capture 90 percent of the annual storm events
New Hampshire (2009)	1 acre; 100,000 sq ft outside MS4	Infiltrate, evapotranspire or capture first 1.0 inch from 24-hr storm
Wisconsin (2010)	1 acre	Infiltrate runoff to achieve 60% - 90% of predevelopment volume based on impervious cover level
West Virginia (2009)	1 acre	Keep and manage on site 1" rainfall from 24-hour storm preceded by 48 hours of no rain
Montana (2009)	1 site	Infiltrate, evapotranspire, or capture for reuse runoff from first 0.5" of rain
Portland, OR (1990)	500 sq ft of impervious cover	Infiltrate 10-yr, 24-hr storm.
Anchorage, AK (2009)	10,000 sq ft	Keep and manage the runoff generated from the first 0.52 inches of rainfall from a 24 hour event preceded by 48 hours of no measureable precipitation

Portland Example

Volume Control Requirement: Infiltration of the 10-year storm

Threshold: Projects that develop or redevelop over 500 square feet of impervious surface and properties that propose new offsite discharges or new connections to the public system are required to comply with stormwater requirements for the impervious area draining to the discharge point

Requirements are based on feasibility of infiltration and point of discharge. Unless complete infiltration of the 10-year storm can be accomplished, an offsite discharge point must be identified (discharge point means the ultimate destination for the stormwater leaving a particular site, such as onsite infiltration, or offsite flow to pitch, stream, public or private storm sewer system, or combined sewer system.)

Infiltration and discharge exceptions:
- Sites with soils that do not infiltrate at less than 2.0 inches/hr tested infiltration rate
- Unstable soils
- Contamination or high risk of contamination
- Wellhead protection areas

Offset mitigation:
If site-specific circumstances make it impractical to implement onsite pollution reduction or flow control to the specified standards, applicants can fulfill all or a portion of their stormwater management obligations by compensating the City for the future development of offsite facilities

Regulatory Options for Redevelopment Standard

- Redevelopment standard is the same as the standard for new development, however additional exceptions are provided
- Same as Option 1, except that credits are given for developing in certain areas (e.g., brownfields)
- Redeveloped sites must be designed and constructed to reduce by 20% (or other percent reduction) the impervious cover from the preconstruction condition
- Combination of (1) and (3) – some states already have this

Current Volumetric Standards for Onsite Retention of Discharges from Redevelopment

State or Locality (date enacted)	Size Threshold	Redevelopment Standard
Vermont (2008; draft 2010)	1 acre	Reduce impervious cover by 20% or treat 20% of WQ volume
New Hampshire (2008)	1 acre; 100,000 sq ft outside MS4	Same as new development
Wisconsin (2010)	1 acre	40% TSS reduction from parking areas and roads or MEP
West Virginia (2009)	1 acre	0.2" reduction of 1" on site retention standard and additional 0.2" reductions exist
Montana (2009)	1 acre	Same as new development
Portland, OR (1999)	500 sq ft of impervious cover	Same as new development
Anchorage, AK (2009)	10,000 sq ft	Same as new development

West Virginia Example of Redevelopment Standard Exceptions

New Development Standard. Keep and manage on site the first one inch of rainfall from a 24-hour storm preceded by 48 hours of no measurable precipitation

- This first one inch of rainfall must be 100% managed with no discharge to surface waters except when the project is eligible for a reduction based on the type of development (see redevelopment standard below) or when off-site mitigation or payment in lieu is used

Redevelopment standard.

A reduction of 0.2 inches from the one inch on-site retention standard may be applied for redevelopment projects. Additional 0.2 inch reductions (up to a maximum reduction of 0.75 inches) may be applied for:

- Brownfield redevelopment
- High density (>7 units per acre)
- Vertical Density (Floor to Area Ratio (FAR) of 2 or >18 units per acre)
- Mixed use and Transit Oriented Development (within ½ mile of transit)

Possible Regulatory Approach for Municipal Retrofits

Requirement - MS4s must develop and implement a retrofit plan

What could a municipal retrofit plan look like?
- Identification of sensitive waters
- Identification of stormwater contribution to degradation or impairment
- Development of goals and milestones for reducing stormwater contributions
- Identification of priority projects and initiatives to meet permit-term milestones including retrofits for public sites undergoing redevelopment or routine repair and maintenance
- Development of incentives for retrofits on private property

Who it could apply to?
- Phase I MS4s
- Phase I&II MS4s
- Phase I & II MS4 that have waters impaired for stormwater

Examples of Retrofit Programs

Portland, OR
- Manage 56% of stormwater by 2040

Milwaukee, WI
- Reduce TSS by 40% by 2013 in MS4 areas

Philadelphia, PA
- Manage 34% of impervious cover over next 20 years

NYC's Sustainable Stormwater Management Plan
- Improve public access to tributaries by 90% by 2030 and detain or capture over 1 billion gallons of stormwater annually

Use of Residual Designation Authority in the Charles River Watershed, MA
- Reduce P annual discharge by 65%

Washington DC
- Using Green Build out Model to identify goals to reduce stormwater discharges to District's rivers

Examples of Chesapeake Bay Specific Requirements

- Apply the post construction standard to smaller sized newly developed and redeveloped sites than covered by the national standard.
- Expand the universe of regulated discharges beyond what would occur through national provision
- Establish shorter time frames to implement retrofit requirements and extend retrofit requirements to large existing properties that do not discharge to a federally regulated MS4
- Require MS4s to restrict the use of fertilizers and pesticides

Industrial Program

Replace the SIC code system with the NAICS system to modernize the identification of industrial discharges covered by NPDES stormwater regulations.

Phase II MS4 carry out industrial program as described in Phase I requirements.

Clarify that stormwater discharges from government owned/operated maintenance yards are industrial stormwater discharges.

Analytical Methodologies

The following slides will describe the analytical methodologies that will be applied to develop costs and evaluate regulatory flexibility approaches for

- MS4 Expansion
- New and Redeveloped sites
- Retrofits

Analytical Method: MS4 Expansion

GIS Spatial Analysis for each option to estimate additional impervious cover, population, area and additional MS4s that could be covered

- Will consider development over a 30 year period (until 2040)

Analyze cost of MS4 Program, primarily using ICR data and using model MS4 approach

- Costs will be scaled from model site to regional and national levels for each expansion option

Analyze pollutant loading reduction for MS4 expansion options

Analytical Method: New and Redeveloped Sites

Overview

- Will use a model site and model firm approach
  - Model sites identified by project type (e.g., commercial, residential, mixed use, etc.) and geographic location
  - Model firms will represent firms of different sizes and type (e.g., residential builders, commercial developers, etc.)
- Will consider development over a 30 year period (until 2040)
- Will consider range of controls including flood control to flood control plus water quantity/quality controls
- Costs will be scaled from model site to regional and national levels based on information on number of projects reported in survey responses
- Model projects will be assigned to model firms using a probabilistic approach
- Will conduct a screening test that accounts for both the financial and project performance characteristics of businesses that would perform projects that might be subject to rule

Analytical Method: Retrofits

- Use a model MS4 approach
  - Model MS4s identified by % impervious cover and geographic location
- Estimate cost of MS4 scale retrofit plan
- Estimate cost of implementing MS4 retrofit plan

Questions pertaining to the standards for new development

- What are your suggestions on the options for the provisions in the federal rule for new development standards?
- What are your suggestions for an appropriate size threshold?
- We have identified several possible criteria for exceptions for the standards. Are others needed? If, so, what are they and why are they needed?

Questions pertaining to standards for redevelopment

- What are your suggestions for the provisions in the federal rule for redevelopment?
- Should additional criteria for exceptions be considered, beyond those identified? If so, what are they and why are they needed?
- For redeveloped sites, what factors should EPA consider if we establish a % reduction in impervious cover as a requirement for redevelopment?

Questions pertaining to retrofits

- Which MS4s should be required to develop retrofit plans?
- What are the essential components of a plan?
- How should we determine the appropriate length of time for MS4s to implement the plan?

Appendix: SBA Discussion

New Development Additional Exceptions

In addition to items listed on slide 9, consider the following exceptions in new development

Where standard cannot be met

- Cost prohibitive
- Engineering restrictions (overall site size, steep slopes, soil characteristics, incompatibility with underground utilities

Where standard conflicts with other policy goals and/or state/local laws and regulations

- Local building, zoning, or land use requirements
- Negative effects on ecological processes of receiving waters
- Contaminated soil concerns
- Building stability concerns
- Solar power projects
- Smart growth planning (zoning code conflicts)
- Grandfathering existing TMDLs

Appendix: SBA Discussion
Minimum Regulatory Option

- Phase II Requirements - Gather and analyze data on LID BMP effectiveness post-2012
- Set MS4 requirements based on post-2012 analysis
- Grandfather existing TMDLs
- Establish guidance with goals for development, redevelopment and retrofits (i.e., April 2010 MS4 Permit Improvement Guide)
- Iterative evaluation of demonstration projects allowing analysis of cost and effects on water quality criteria

Appendix: SBA Discussion
Additional Questions

- Compare EPA example regulations with current law and/or minimum option (slide 28)
- Discuss advantages and disadvantages of example regulations and minimum option, including discussion of costs and benefits.
- Explain how small business and small community costs can be minimized while achieving statutory objectives
- Comment on applicability of November 2010 TMDL Stormwater guidance to rulemaking

Attachment 2

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

July 7, 2010

The Honorable Lisa P. Jackson
Administrator
United State Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Room 3000
Washington, D.C. 20460

Dear Administrator Jackson:

On June 9, 2010, EPA concluded a public comment period with regard to long and short versions of Owner/Developer Questionnaires (the "Questionnaires") as part of the above-referenced regulatory docket. We understand the questionnaires are currently being reviewed by the Office of Management and Budget (OMB) as required by the Paperwork Reduction Act, and that OMB must issue a control number before the Questionnaires can be released to the public.

The long Questionnaire, page 2, states that these information collection activities are being undertaken because "EPA's Office of Water (OW) is considering revisions to the current National Pollutant Discharge Elimination System (NPDES) regulations including the establishment of standards for long term stormwater discharges from developed sites." We were very surprised to learn from concerned constituents that EPA plans to distribute the Questionnaires to property owners and developers as soon as next month (August 2010). We were alarmed to learn that in a notice published at 74 Fed. Reg. 56,191, 56,193 (col. 1) (Oct. 30, 2009), EPA stated it "intends … to take final action no later than November 2012" in issuing "requirements, including design or performance standards, for stormwater discharges from, at a minimum, newly developed and redeveloped sites."

As you know, stormwater discharges are not the same as discharges from industrial processes or municipal treatment works. In 1987, Congress amended the Clean Water Act (CWA) to ensure that EPA did not attempt to regulate stormwater in the same manner as these discharges. In doing so, Congress also provided itself with a role in the stormwater regulatory process. Specifically, CWA section 402(p)(2) limits EPA's authority to issue regulations for stormwater discharges other than a discharge associated with an industrial activity, a stormwater discharge from municipal separate storm sewer systems serving populations of 100,000 or more, and a discharge for which EPA has made a determination that it contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (Phase I stormwater regulations).

Before EPA can regulate any other discharge of stormwater, Congress has required EPA to conduct a study to determine the nature and extent of pollutants in the discharges and to establish procedures and methods to control the discharges to the extent necessary to mitigate water quality impacts, and to submit a report to Congress on the results of the study. CWA section 402(p)(5). EPA conducted such a study and submitted a report to Congress. *See* Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress (U.S. EPA, 1995, EPA 833-K-94-002). After following the process set forth in the CWA, EPA now regulates stormwater from small construction sites and municipal separate storm sewer systems in urbanized areas. (Phase II stormwater regulations).

Congress has been active in overseeing EPA's development of stormwater regulations. For example, in 1991, Congress extended certain deadlines associated with the Phase I stormwater regulations. *See* section 1068 of the Intermodal Surface Transportation Efficiency Act (P.L. 102-240). In 1999, Congress directed EPA to submit two reports to the Committee on Environment and Public Works in the Senate and the Committee on Transportation and Infrastructure in the House of Representatives, related to EPA's Phase II regulations (in addition to the 1995 report noted above) – and prohibited EPA from issuing those regulations until these additional reports were submitted. *See* section 431(a) of the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 2000 (P.L. 106-74).

We hope that you do not consider the study and report to Congress required under CWA section 402(p) to be merely a paperwork exercise to be conducted concurrently with the promulgation of regulations. EPA has previously recognized that "[r]ulemaking under CWA section 402(p)(6) is to be based on a study that EPA was directed to provide to Congress under section 402(p)(5)." *See* Report to Congress on the Phase II Storm Water Regulations (U.S. EPA, 1999, EPA 833-R-99-001), at 1-2. EPA also has previously recognized that "CWA section 402(p)(5) directed EPA to provide reports to Congress on the different components of this study." *Id.*

To assist in oversight of EPA's responsibilities under section 402(p) of the CWA, please respond to the following questions:

1. As stated above, EPA "intends ... to take final action no later than November 2012" in issuing "requirements, including design or performance standards, for stormwater discharges from, at a minimum, newly developed and redeveloped sites." 74 Fed. Reg. 56,191, 56,193 (col. 1) (Oct. 30, 2009).

    a. Why has EPA established November 2012 as the date by which it intends to take final action in issuing stormwater regulations for discharges from developed and redeveloped sites?

    b. Does EPA believe it is compelled by law that November 2012 is the deadline by which it must issue such final requirements? If so, please direct us to the statutory section compelling this action.

2. CWA Section 402(p)(5) provides that EPA "shall conduct a study" to for the purposes of identifying classes of stormwater discharges not identified by Congress or otherwise subject to current CWA regulations, and then report back to Congress on the results of such a study. It is our understanding that EPA has not conducted a section 402(p)(5) study on stormwater discharges from developed and redeveloped sites. Further, it is our understanding that EPA has not submitted a report to Congress on that study.

   a. Does EPA plan to conduct a section 402(p)(5) study on stormwater discharges from developed and redeveloped sites, and submit to Congress a report on such a study's results? If yes, when will EPA conduct the study, complete it, and report back to Congress?

   b. Will EPA provide the public with notice and an opportunity to comment on such a study before it is completed? If yes, when will such public notice and comment be provided?

3. CWA Section 402(p)(5) further provides that the stormwater study must be conducted "in consultation with the States."

   a. If EPA is preparing a section 402(p)(5) study, when does it plan to "consult" with the States? Please explain the procedures and timeframe by which EPA will seek meaningful input from the States in conducting any section 402(p)(5) study.

4. CWA Section 402(p)(6) provides that EPA "shall issue regulations (based on the results of the studies conducted under paragraph (5)) ...."

   a. If EPA intends to complete a section (p)(5) study regarding stormwater discharges from developed and redeveloped sites, when will it be completed relative to the issuance of any ***proposed*** regulations, and relative to the issuance of any ***final*** regulations?

   b. Does EPA plan to proceed with rulemaking regarding stormwater discharges from developed and redeveloped sites before completing the section (p)(5) study on discharges from such sites? If yes, how will EPA's regulations be based on such a study?

   c. When does EPA believe it will commence rulemaking proceedings regarding stormwater discharges from developed and redeveloped sites? Does EPA believe it has already commenced such a rulemaking with the publication of the notice at 74 Fed. Reg. 56,191 (Oct. 30, 2009)? If not, why not? Has EPA already commenced such a rulemaking with some other agency action or publication?

   d. Does EPA believe that a section 402(p)(5) report to Congress can be submitted ***after*** EPA begins a rulemaking process that may result in the issuance of regulations under section (p)(6)? If yes, what does EPA believe is the role of Congress under section 402(p)?

To assist us with our review of EPA's stormwater program and any related information collection activities, please provide substantive responses to the questions asked in this letter at least seven (7) before the Questionnaires are released to the public or within 30 days, whichever is earlier, along with any documentation and any statutory or legal support that you believe is pertinent to your answers to the questions set forth above. Furthermore, please indicate the specific individual(s) with EPA that we should contact for follow-up on each response.

Thank you for your prompt attention to this matter.

Sincerely,

James M. Inhofe
Ranking Member
Senate Committee on Environment
and Public Works

Mike Crapo
Ranking Member
Subcommittee on Water and Wildlife

cc: The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs, Office of Management and Budget

The Honorable Peter S. Silva
Assistant Administrator
U.S. EPA Office of Water

Attachment 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 1 1 2010

OFFICE OF
WATER

The Honorable James M. Inhofe
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Senator Inhofe:

Thank you for your July 7, 2010 letter to Administrator Jackson, in which you requested clarification on the steps the Environmental Protection Agency (EPA) will take under section 402(p) of the Clean Water Act (CWA) to address additional stormwater discharges. Administrator Jackson requested that I respond to your letter.

Section 402(p) of the CWA provides a framework for the EPA to develop a comprehensive regulatory program to address stormwater discharges. Section 402(p)(2) identifies five types of stormwater discharges which were required to obtain a National Pollutant Discharge Elimination System (NPDES) permit prior to October 1, 1992. EPA promulgated regulations addressing these stormwater discharges on November 16, 1990 (55 FR 47990). Section 402(p)(5) of the CWA required EPA, in consultation with the States, to conduct studies on stormwater discharges that were not identified under Section 402(p)(2). Section 402(p)(6) of the CWA provides that EPA, based on the studies required under 402(p)(5) and in consultation with State and local officials, is required to issue regulations which designate additional stormwater discharges to be regulated to protect water quality and establish a comprehensive program to regulate the designated sources of these discharges. This program must, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance and management practices and treatment requirements, as appropriate. EPA issued reports summarizing the studies required under Section 402(p)(5) on February 1, 1994, March 29, 1995 and October 1, 1999. Based on the findings of these studies, and in consultation with State and local officials, EPA promulgated regulations under 402(p)(6) on December 8, 1999 (64 FR 68722).

EPA continues to have the authority to use section 402(p)(6) to designate additional stormwater discharges for regulation under the CWA in order to protect water quality (see *Envt Defense Ctr. v. EPA*, 344 F.3d 832, 873-76 (9th Cir. 2003). EPA continues to collect and analyze information about the implementation of the stormwater program. In 2006, EPA asked the National Research Council (NRC) to conduct a review of the NPDES stormwater program. In October 2008, the NRC released the report Urban Stormwater Management in the United States (The National Academies Press, 2009). The NRC report made a number of recommendations to strengthen EPA's stormwater program.

On December 28, 2009, EPA announced its plans to initiate national rulemaking to establish a comprehensive program to reduce stormwater discharges from new development and redevelopment and make other regulatory improvements to strengthen its stormwater program. In the December 28, 2009 notice, the Agency requested stakeholder input on a number of specific issues being considered and announced a series of listening sessions. EPA also indicated that it intends to take final action under this rulemaking by no later than November 19, 2012.

In your letter, you asked EPA to clarify if it is required to issue regulations by November, 2012. The CWA established deadlines for EPA to issue its initial stormwater regulations, but does not establish deadlines by which EPA must issue subsequent regulations. However, adequate control of stormwater discharges that adversely impact water quality is a priority for the Agency and EPA has committed to address this issue in a November 2009 letter to the Natural Resources Defense Council and Waterkeeper Alliance. In addition, EPA has committed to address this issue in a settlement agreement entered into with the Chesapeake Bay Foundation on May 10, 2010 in *Fowler v. United States of America*, Case No. 1:09-CV-00005 (CKK) (D.Md.). Under the agreement, EPA committed to propose a rule to expand the universe of regulated stormwater discharges and to control such discharges from, at a minimum, newly developed and redeveloped sites, and to take final action on the proposal by November 19, 2012.

You also requested that EPA clarify if it will conduct studies under section 402(p)(5) to support regulating additional stormwater discharges under section 402(p)(6) of the CWA, and if so, how the timing of the studies will relate to the timing of the rulemaking. EPA is developing a supplement to the Reports to Congress used to support the December 8, 1999 stormwater regulations authorized under 402(p)(6). That report will reflect the recommendations of the NRC and will include other scientific technical information collected by EPA since the 1999 report.

Finally, you requested that EPA clarify its plans to consult with the States as it develops the reports required under 402(p)(5). EPA has begun the process of consulting with States, including State representatives who are members of the Association of State and Interstate Water Pollution Control Agencies (ASIWPCA). EPA will continue to consult with States throughout the development of the supplemental Report to Congress. In addition, in accordance with section 402(p)(6), EPA will consult with state and local officials throughout the rulemaking.

If you have any additional questions, please do not hesitate to contact me or your staff may contact Greg Spraul, in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0255.

Sincerely,

Peter S. Silva
Assistant Administrator

Attachment 4

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

July 7, 2010

The Honorable Lisa P. Jackson
Administrator
United State Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Room 3000
Washington, D.C. 20460

Dear Administrator Jackson:

We write to express our concern over EPA's ongoing efforts to compel private citizens to respond to potentially burdensome questionnaires dealing with stormwater runoff from developed sites along with financial performance unrelated to stormwater management. We are informed the Agency has submitted for approval from the Office of Management and Budget an Information Collection Request (ICR) intended for Owners and Developers of commercial property. We are troubled by this action since it appears to exceed EPA's authority under the Clean Water Act.

We ask that you suspend any effort to seek approval for, and postpone any distribution of, this ICR unless and until you demonstrate to our satisfaction the statutory provision(s) in the Clean Water Act that confer appropriate authority upon EPA.

To assist you in addressing our specific concerns we ask that you provide a response to the following questions and cite any statutory text, case law or legislative history that you believe supports your interpretation:

1. Section 308(a)(A) states that only "the owner or operator of any point source" is required to provide information under that section to EPA. Relative to this fact:

   a. Does EPA believe its section 308 authority in distributing these Owner and Developer questionnaires is limited to the owner or operator of a point source?

   b. Does EPA believe that "developed land," *per se*, is a point source?

   c. Can EPA identify any categories or types of "developed land" that do not qualify as a point source?

d. Does EPA have a procedure in place to identify in advance only those potential Owner/Developer questionnaire recipients who own or operate a statutory point source and has EPA pre-tested the procedure's accuracy in this instance?

e. Is there any other section in the CWA upon which EPA relies as the statutory basis for this Owner/Developer ICR?

2. In EPA's opinion, is post-construction, developed property an "industrial activity" under the Clean Water Act?

3. CWA section 502(12) defines "discharge of pollutants" as the addition of any pollutants from a "point source" to a statutory "navigable water."

   a. Does EPA believe that a federally regulated MS4 is a statutory "navigable water"?

   b. Does EPA believe that a non-federally regulated MS4 is a statutory "navigable water"?

Again, we respectfully request that you suspend further action on this Owner/Developer ICR effort until you have fully addressed our concerns, including any necessary clarifications following your initial response.

Thank you for your prompt attention to this important matter.

Sincerely,

James M. Inhofe
Ranking Member
Senate Committee on Environment
and Public Works

Mike Crapo
Ranking Member
Subcommittee on Water and Wildlife

cc: The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs, Office of Management and Budget

The Honorable Peter S. Silva
Assistant Administrator
US-EPA Office of Water

Attachment 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 3 0 2010

OFFICE OF
WATER

The Honorable James M. Inhofe
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Senator Inhofe:

Thank you for your letter of July 7, 2010, in which you expressed concern regarding the Agency's plans to survey owners and developers of property in support of the Agency's rulemaking to address stormwater discharges from the built environment. Administrator Jackson requested that I respond to your letter.

You asked the Agency to address questions in three areas of concern: EPA's authority to collect information under section 308 of the Clean Water Act (CWA); whether EPA considers developed property to be "industrial activity;" and characterization of municipal separate storm sewer systems (MS4s) under the CWA.

First, regarding EPA's authority under section 308 of the CWA, EPA plans to only direct this survey to owners or operators of point sources. Developed property generally includes conduits to collect and transport stormwater, which is then discharged to waters of the U.S. Therefore, owners or operators of developed sites are generally owners or operators of point sources. EPA recognizes that there may be case-by-case instances when a developed site would not be considered a point source, but this would depend on specific circumstances.

Second, regarding whether developed property is "industrial activity" under the CWA, "developed property" is not "storm water discharge associated with industrial activity" under the regulations found at 40 C.F.R. §122.26(b)(14). However, EPA is considering designating certain developed sites as point sources of stormwater to be regulated pursuant to authority under section 402(p)(6) of the CWA.

Finally, with respect to whether MS4s are themselves waters of the U.S., EPA defined "municipal separate storm sewer system" as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels or storm drains) . . . that discharges to waters of the United States; designed or used for

collecting or conveying storm water; . . ." 40 C.F.R. §122.26(b)(8). Therefore discharges to MS4s are discharges to waters of the United States.

Again, thank you for your letter. If you have further questions, please contact me or your staff may call Greg Spraul in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0255.

Sincerely,

Peter S. Silva
Assistant Administrator