

**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,

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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)