

May 25, 2011

Mr. Gary Schaner  
Water Permits Division  
Office of Wastewater Management, 4203M  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: Federal StormWater Association Comments on EPA's Request for  
Comments Regarding Proposed Modifications to the 2008 NPDES General  
Permit for Stormwater Discharges Associated with Construction Activities;  
EPA-HQ-OW-2008-0238, 76 Fed. Reg. 22,891 (April 25, 2011)**

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Dear Mr. Schaner:

On April 25, 2011, the Environmental Protection Agency (EPA) published a notice in the Federal Register requesting comments on its *Proposed Modifications to the 2008 NPDES General Permit for Stormwater Discharges Associated with Construction Activities*, 76 Fed. Reg. 22,891 (2008 CGP). The Federal StormWater Association (FSWA) provides the following comments on EPA's proposed modification and recommends that the Agency extend the 2008 CGP through July 13, 2013.

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state NPDES permitting authorities under the Clean Water Act (CWA or the Act). FSWA member entities or their members own and operate facilities located on or near waters of the United States. Many conduct operations that generate "stormwater associated with construction activity" as defined at 40 CFR § 122.26(b)(14)(x) and (15)) and are subject to NPDES permitting in states in which EPA is the permitting authority.<sup>1</sup> Hence, FSWA has standing to submit these comments.

EPA promulgated the 2008 CGP on July 14, 2008, limiting its duration to two years. 73 Fed. Reg. 40,338 (July 14, 2008). EPA subsequently extended the term of the CGP by an additional year in 2010. 75 Fed. Reg. 4,554 (January 28, 2010). Now, EPA is proposing to extend the CGP through January 31, 2012. In doing so, EPA also recognizes that it has the authority to extend the CGP through the entire five year time period set forth in its NPDES regulations for such permits. See 40 CFR § 122.46 and 76 Fed. Reg. at 22,895.

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<sup>1</sup> A list of FSWA members is available upon request.

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In fact, EPA should extend the CGP through the entire five year permit term allowed by law, or through July 13, 2013.

EPA's current extension proposal is based on EPA's need to correct errors it admitted to through litigation challenging its Construction and Development ELG rulemaking. *See* 75 Fed. Reg. 68,215 (November 5, 2010)(EPA discussing reasons for seeking a stay of the 280 NTU turbidity limit and other issues surrounding ongoing litigation in the Seventh Circuit Court of Appeals in the case *Wisconsin Builders Association v. EPA*, Case No. 09-4113). In its proposed extension notice, EPA has oversimplified the issues and errors that it presented to the Seventh Circuit Court of Appeals. In fact, EPA's "Motion for Partial Vacature of the Final Rule, Remand of the Record, to Vacate Briefing Schedule, and to hold Case in Abeyance," that it filed with that court on August 12, 2010 (and which that court approved), identified many issues that required additional rulemaking. Those include:

- the calculation errors associated with the 280 NTU numeric limit;
- issues associated with how the ELGs would be applied to linear construction (including applicable BMPs to active construction operations);
- issues associated with cold weather sites;
- issues associated with small sites that are part of larger projects; and
- "any other issues that reveal themselves to the Agency" during EPA's upcoming C&D ELG correction rulemaking.

(Quoting EPA's Motion at page 9).

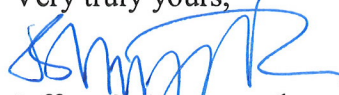
EPA has yet to propose any of these C&D ELG "corrections" and it does not know for certain what "other issues" will reveal themselves during that rulemaking. EPA's ability to complete such a rulemaking prior to January 31, 2012 is unsure at best, especially considering that the Agency's self-imposed deadline for completing that rulemaking falls after that date (*i.e.*, February 15, 2012). EPA also could extend that date by filing a subsequent motion with the Seventh Circuit.

The upcoming C&D ELG correction rulemaking is critical to amending the 2008 CGP and must be completed before any amendments are finalized in order to avoid confusion in EPA's construction stormwater permitting program. There also are significant issues associated with the C&D ELG rulemaking that have been raised by petitioners in the Seventh Circuit litigation that are being held in "abeyance" until at least February 15, 2012, many of which could impact whether any of the new C&D ELG issues EPA has proposed to incorporate into the 2008 CGP are legally authorized under the Clean Water Act. These issues must be allowed to be litigated in full prior to implementing them into any new CGP. Because EPA requested the "abeyance" of that litigation through February 15, 2012, it appears particularly disingenuous to attempt to side-step its requested delay in responding to issues raised in petitioner's briefs, but then to attempt to implement those same provisions in a new CGP.

Therefore, EPA should extend the existing CGP through its full term of July 13, 2013 in order for the Seventh Circuit litigation, EPA's new C&D ELG correction rulemaking, and other issues raised in the newly proposed CGP to be addressed and decided in the public forum prior to being implemented and incorporated into a new permit.

FSWA appreciates the opportunity to comment. If you have any questions or seek additional information from FSWA, please contact me.

Very truly yours,



Jeffrey S. Longworth  
FSWA Coordinator and Counsel

cc: FSWA Membership