BARNES & THORNBURG LLP

1717 Pennsylvania Ave. N.W.
Suite 500
Washington, D.C. 20006-4623
202-289-1313
202-289-1330 (Fax)

www.btlaw.com

Jeffrey S. Longsworth
(202) 408-6918
jeffrey.longsworth@btlaw.com

June 2014 Draft

DRAFT
Confidential/Privileged Memorandum

Post-Construction Stormwater White Paper For the Coalition of Real Estate (CORE) Associations

---

On October 30, 2009, the U.S. Environmental Protection Agency (EPA) began developing new stormwater discharge regulations under the National Pollutant Discharge Elimination System (NPDES) for newly constructed and re-constructed properties. EPA's intent was to significantly expand the scope of its existing stormwater program to regulate "post-construction" stormwater discharges. Such regulations would raise issues regarding EPA's ability under the Clean Water Act (CWA) to regulate the amount of impervious surface at a developed site or the stormwater "flow, velocity or volume" leaving such a site.

Over the following four years, EPA issued Information Collection Requests to developers and other "target" groups, requested comments through various Federal Register notices, and pursued all of the regulatory procedures expected to inform a new regulatory scheme targeting newly and redeveloped properties. EPA had agreed with environmental groups through unrelated settlement agreements to promulgate final post-construction regulations no later than June 2013; however, it missed that deadline and in early 2014, EPA announced that it was "reallocating" resources away from the post-construction rulemaking effort. While no further action has occurred, EPA also has not announced that it will abandon its rulemaking efforts. In fact, EPA has attempted to impose similar post-construction mandates through its municipal stormwater permit program on a case-by-case basis.

This memorandum provides a comprehensive overview of EPA's NPDES stormwater permitting program and legal impediments to EPA's strategy either to directly regulate the amounts of impervious surface or stormwater flow characteristics (absent pollutant discharges) of runoff from otherwise currently unregulated properties, or to indirectly regulate such discharges through the Agency's municipal stormwater permitting powers.

I. INTRODUCTION TO CLEAN WATER ACT PERMITTING PROGRAM AND EPA'S STORMWATER PROGRAM DEVELOPMENT

A. Overview of The Clean Water Act's NPDES and Stormwater Permit Program.

1. CWA's NPDES Permit Program Fundamentals

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). CWA Section 301(a) prohibits "the discharge of any pollutant" by any person, except as authorized by the Act. 33 U.S.C. § 1311(a). To regulate these discharges, CWA Sections 301 and 304 authorize EPA to establish "effluent limitations," defined as restrictions placed upon pollutants that "are discharged from *point sources* into navigable waters." *Id.* §§ 1311, 1314(b), 1362(11) (emphasis added); *see also id.* § 1342(a)(1).

Under CWA Section 301, EPA must develop effluent limitations for "pollutants." 33 U.S.C. § 1311. "'[P]ollutant' means dredged spoil, solid waste,…chemical wastes, biological materials,…heat,…rock, sand, cellar dirt and industrial…waste discharged into water." 33 U.S.C. § 1362(6). The Supreme Court has held that the term "means" in a definition is restrictive; it excludes anything unstated. *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1978); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). Therefore, EPA cannot add to the CWA list of pollutants.

CWA Section 402 provides an exception to CWA Section 301's prohibition by allowing certain pollutant discharges to be authorized by a NPDES permit, provided that the discharges meet appropriate "effluent limitations" contained in the permit. 33 U.S.C. § 1342(a). Thus, the CWA, through the NPDES permit program, limits the discharge of pollutants from "point sources" into waters of the United States based upon the capabilities of the practices or technologies available to control such discharges. 33 U.S.C. §§ 1311(b)(2), 1314(b), 1316(b)(1)(B).

Congress did not provide EPA with unbridled authority. Rather, the CWA "authorizes the EPA to regulate, through the NPDES permitting system, *only* the discharge of pollutants." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005) (emphasis added)." As the D.C. Circuit has explained, "[t]he statute is clear" and contains no language that "undercuts the plain meaning of the statutory text;" EPA may not "meddl[e] inside a facility" because it only has authority over the discharge of pollutants from a point source, and "Congress clearly intended to allow the permittee to choose its own control strategy." *American Iron and Steel Institute v. EPA.*, 115 F.3d 979, 996 (D.C. Cir. 1997). EPA "is powerless to impose conditions unrelated to the discharge itself." *N.R.D.C. v. EPA.*, 859 F.2d 156, 170 (D.C. Cir. 1988) (EPA cannot regulate point sources themselves, only the discharge of pollutants); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 551 (8th Cir 2009) ("the Clean Water Act gives EPA jurisdiction to regulate… only *actual* discharges—not potential discharges, and certainly not point sources themselves.") (emphasis in original).

In its most simplistic description, Congress intended the NPDES permit program to regulate pollutants going into "navigable waters," by requiring permits to control such pollutants passing through "point sources" into such waters. *See* 33 U.S.C. § 1311(a) (prohibiting the "discharge of pollutants" unless permitted elsewhere in the Act). The CWA authorizes EPA to regulate pollutant discharges, but only if they occur from *point sources* and reach waters of the U.S. 33 U.S.C. § 1362(12). "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Importantly, the definition first provides the general concept of a point source (*i.e.*, "any discernable, confined and discrete conveyance"), and then specific examples of point sources (*e.g.*, pipes, ditches, and channels). The definition "connotes the terminal end of an artificial system for moving water, waste, or other materials," and construction sites do not fit into either part of the definition. *Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000). Active construction sites themselves (or any land-development activities for that matter) are not CWA point sources,[1] but discharges leaving the site may qualify either as "point source" or "nonpoint source" depending upon the nature of the discharge. CWA § 304(f) identifies six industrial activities – including "*all* construction activity" – that contain *nonpoint sources*.[2] Congress restricted EPA to developing guidelines for identifying and controlling nonpoint source discharges from these activities. 33 U.S.C. § 1314(f).[3]

---

[1] A construction site is not a "conveyance;" construction sites do not confine anything and are very open. Similarly, they are not "discrete," meaning a "separate entity."

[2] CWA Section 301 prohibits unauthorized point source discharges, but Congress left the "regulation of nonpoint source pollution to the states." *Cordiano v. Metacon Gun Club, Inc.* 575 F.3d 199, 219 (2d Cir. 2009); *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 415 F.3d 1121, 1124 (10th Cir. 2005) (explaining that the CWA deals with nonpoint source pollution merely by "requir[ing] states to develop water quality standards for intrastate waters."); *U.S. v. Plaza Health Labs, Inc.* 3 F.3d 643, 647 (2d Cir. 1993) (providing that the "control of pollutants from runoff is applied pursuant to section 209 and the authority resides in the State or other local agency.") (quoting S. Rep. No. 92-414, 972 U.S.C.C.A.N. 3668, 3744). S*ee Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002) ("the Act provides no direct mechanism to control nonpoint source pollution but rather uses the threat and promise of federal grants to the states to accomplish this task") (internal quotation marks and citations omitted);

[3] See *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 168, n.36 (D.C. Cir. 1982) (section 304(f) "reflects congressional understanding that [section 304(f) activities] are nonpoint source pollution (thus it would be improper to treat all [section 304(f) activities] as point source pollution) . . . ."). *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (section 304(f) activities "are not subject to NPDES permit requirements; rather the Act directs the administrator only to develop guidelines for identifying and controlling such sources . . . ."); s*ee also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988) (Congress intended section 304(f) activities "to be regulated under the 'nonpoint source' category of pollution" through state water quality standards).

Construction sites sometimes contain pipes, ditches, or channels, but the CWA limits EPA's authority to controlling the pollutant discharges that occur from those "point sources" into U.S. waters. Nevertheless, the entire construction site cannot be considered the point source. *See Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (holding that a point source existed on a construction site only because the landowner "collected stormwater by pipes and other means, and that the stormwater was discharged into [a] stream.").

The term "navigable waters" is defined as "waters of the United States, including the territorial seas," but EPA's jurisdictional authority to issue NPDES permits for discharges into such waters has been the subject of significant confusion and litigation. After numerous interpretive guidance efforts over the past 30 years, EPA and the U.S. Army Corps of Engineers (COE) recently published in the *Federal Register* a proposed rule "defining the scope of waters protected under the Clean Water Act." 79 Fed. Reg. 22,187 (April 21, 2014).[4]

2. Congress Added Certain Stormwater Discharges to the NPDES Program

In 1987, Congress added CWA Section 402(p), which established a phased approach to regulating stormwater discharges, as needed. In Phase I, Congress required NPDES permits for stormwater discharges "associated with industrial activities" and "from" certain large and medium municipal separate storm sewer systems (MS4s). 33 U.S.C. § 1342(p)(1)-(4). The industrial permit program was intended to more-or-less mirror the existing NPDES permit program for industrial and sanitary wastewaters. The new MS4 program was intended to have a more limited scope than traditional NPDES permits.

More specifically, Congress limited EPA's NPDES permitting authority over MS4s to controlling the discharge of pollutants *from* the MS4 system to the maximum extent practicable (MEP). 33 U.S.C. § 1342(p)(3)(B)(iii). The MEP standard is undefined in the CWA, meaning that the EPA Administrator or the state NPDES authority may use their discretion to determine appropriate controls of pollutants discharged from MS4s, as long as all such methods of MEP relate to the "control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). The only authority Congress gave EPA regarding over what is discharged *into* the MS4 system is to specifically prohibit "non-stormwater" discharges *into* storm sewers. 33 U.S.C. § 1342(p)(3)(B). Otherwise, EPA's only authority is to develop "controls to reduce the discharge of pollutants" in stormwater discharges *from* MS4s "to the maximum extent practicable." *Id.*

For Phase II, Congress instructed EPA to study all remaining stormwater discharges to determine the nature of pollutants in those discharges, and establish "procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality." *Id.* §1342(p)(5). Based on that study, EPA was required to promulgate regulations designating any additional sources of stormwater

[4] This issue is more thoroughly analyzed in Section II.B.5. below.

discharges to be regulated and to establish a "comprehensive program to regulate such designated sources." *Id.* §1342(p)(6).

Congress also provided EPA and state permitting authorities with the authority to address specific sites that were significant contributors of pollutants to waters of the U.S. even though they may not fit within the "industrial" or "municipal" stormwater programs. 33 U.S.C. § 1342(p)(2)(E). This last category is commonly referred to as EPA's "designation authority."

In sum, the 1987 CWA amendments established "an orderly procedure which will enable the major contributors of pollutants to be addressed first, and all discharges to be ultimately addressed in a manner which will not completely overwhelm EPA's capabilities." 133 Cong. Rec. H168-03 (daily ed. Jan. 8, 1987) (statement of Rep. Roe).

B. EPA's Implementation of the CWA's Stormwater Laws.

To implement CWA Section 402(p)'s Phase I stormwater program, EPA promulgated new regulations that defined the term "associated with industrial activity" to identifies 11 categories of industrial operations that must obtain NPDES stormwater permits. The industrial stormwater program regulates only those discharges specifically enumerated as associated with industrial activity, and other non-industrial stormwater discharges that commingle with regulated industrial stormwater discharges. Purely administrative buildings, administrative parking lots, and stormwater discharges from "non-industrial" areas are not covered by the industrial stormwater program unless they are commingled with industrial stormwater.

EPA defined "industrial stormwater" to also include discharges from construction activities that disturb at least five acres of land or are part of a larger common plan to disturb at least five acres. 40 CFR § 122.26(b)(14)(x). But, while defined as "associated with industrial activity, EPA immediately created a separate permitting program for active construction stormwater discharges. During its Phase II stormwater program expansion, EPA expanded the active construction stormwater permit program to include sites that disturb one or more acres of land or are part of a common plan of development that disturbs that amount. For all regulated construction sites, the operator must file a Notice of Termination to end permitting obligations once the disturbed land has been stabilized. In other words, the NPDES permit obligations and requirements are relevant to construction sites only during active land-disturbing operations. Once stabilized and a Notice of Termination is filed, the developed property is not subject to the NPDES permit program unless the final developed property meets EPA's industrial categories.

As required by CWA § 402(p), EPA also promulgated its municipal stormwater program that requires operators of MS4s that meet minimum size thresholds to obtain NPDES stormwater permits. EPA distinguishes MS4s for NPDES permit obligations on the basis of the density and size of the population being served by the system. Under EPA's MS4 stormwater permit program, MS4 operators are responsible for meeting certain minimum permit requirements and may in turn require those entities that discharge into the MS4 to meet certain conditions or implement practices to minimize the

pollutants ultimately being discharged from the MS4 system.[5] Finally, EPA followed the CWA Section 402(p)(5)-(6) process Congress has set forth to expand the original stormwater permit program. EPA's Phase II rule expanded EPA's construction and MS4 permit programs. *See* 64 Fed. Reg. 68,722 (Dec. 8, 1999).

C. NPDES Permit Requirements and Development Considerations.

1. Technology- and Water Quality-Based Effluent Limitations

The CWA and NPDES permitting program utilizes a two-part approach to developing permit conditions and requirements. Part 1 is a technology-based assessment of the industrial or construction activity generating a regulated discharge. Permit-writers are assisted in their technology-based assessment by certain "effluent limitations guidelines" (ELGs), through which EPA establishes nationally applicable minimum standards within specific industry categories to help ensure national uniformity. Once established, this "best available technology economically achievable" (BAT) standard replaces a permit-writer's "best professional judgment" (BPJ); the standard that must be applied in the absence of previously established ELG technology-based effluent limits.

The second part of the NPDES permit analysis is water quality-based. Water quality-based effluent limitations (WQBELs) are site-specific determinations that account for the current quality of the actual receiving water and a state's "use" classification for that water.[6] State or national criteria may be applied in the absence of site-specific data.[7] NPDES permit-writers are required to include WQBELs for situations in which a discharger has the reasonable potential to cause or contribute to an exceedance of a water quality standard. 33 U.S.C. § 1251(a)(3).

In sum, ELGs set the permitting floor by establishing nationally-applicable BAT. In the absence of an ELG, a permit-writer uses BPJ. Water quality issues then are addressed on a permit-specific basis, as necessary and appropriate to protect designated uses, if the technology-based standards are deemed insufficient to protect such uses.

But while EPA's BAT effluent limitations requirements apply directly to industrial and construction stormwater discharges, MS4s are subject to a different

---

[5] Note that industrial and construction sites that discharge into a regulated MS4 are required to obtain a NPDES industrial stormwater permit as if they discharge directly into a water of the U.S. However, in addition, sites discharging into a regulated MS4 may also have to meet additional requirements or obligations established by the MS4 for all sites that discharge into the MS4 (similar to the industrial pretreatment program for wastewater dischargers into POTWs).

[6] States develop "use" designations pursuant to CWA Section 303(d). The most typical designated use is "fishable/swimmable" that requires the state to ensure the water body protects both human health (associated with recreational contact, fish consumption and as a source of drinking water) and aquatic species using the water body.

[7] EPA's authority to issue water quality standards in an authorized state is found in CWA Section 303(c)(2)(B), which authorizes EPA to issue regulations "setting forth a revised or new water quality standard" in any case where the EPA Administrator "determines that a new or revised standard is necessary to meet the requirements of the Act."

technology-based standard – Maximum Extent Practical or MEP. That standard is not defined by the Clean Water Act. In its 1999 Phase II rulemaking, EPA established six minimum control measures that the Agency believed would provide a flexible, iterative mechanism for MS4s to meet the MEP standard.[8] 40 CFR § 122.34(b).

2. Key Effluent Limitations Considerations.

a. Creating Industry-Specific BAT Standards

CWA Sections 301, 304, and 306 authorize EPA to develop ELGs and new source performance standards (NSPSs) for categories of industries based on various factors. For existing sources, CWA Section 301 essentially mandates ELG standards for conventional pollutants[9] (through development of the "best conventional pollution control technology" (BCT)), and for non-conventional and toxic pollutants[10] (through BAT). 33 U.S.C. §§ 1311(b)(1)(A) & 1311(b)(2)(A). For BAT, CWA § 301(b)(2)(A) provides that EPA set ELGs for existing categories and classes of point sources that "shall require application of the best available technology economically achievable for such category of class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, ..." 33 U.S.C. § 1311(b)(2)(A).

EPA has issued ELGs for about 56 industries. Most ELGs address industrial wastewater, not stormwater, and generally are implemented through individual rather than general permits.[11]

---

[8] The six minimum control measures are: (1) public education and outreach; (2) public participation/involvement; (3) illicit discharge detection and elimination; (4) construction site runoff control; (5) post-construction runoff control; and (6) pollution prevention/good housekeeping. *See* 40 CFR § 122.34(b)

[9] To date, Congress has designated four "conventional" pollutants: "suspended solids;" biochemical oxygen demand; pH; and fecal coliform. 33 U.S.C. § 1314(a)(4). EPA has added "oil and grease" as a conventional pollutant. 40 C.F.R. § 401.16. Otherwise, EPA lists 65 chemicals as toxic pollutants. 40 C.F.R. § 401.15. Other pollutants are considered "non-conventional." 40 C.F.R. § 439.1(n).

[10] All other pollutants that are not "conventional" pollutants. *See* Note 10 above.

[11] EPA has promulgated ELG standards applicable to certain specific types of stormwater discharges. They are:

Regulated Activity	**40 CFR Part/Subpart**
Discharges resulting from spray down or intentional wetting of logs at wet deck storage areas	Part 429, Subpart I
Runoff from phosphate fertilizer manufacturing facilities	Part 418, Subpart A
Runoff from asphalt emulsion facilities	Part 443, Subpart A
Runoff from material storage piles at cement manufacturing facilities	Part 411, Subpart C
Mine dewatering discharges at crushed stone, construction sand and gravel, or industrial sand mining facilities	Part 436, Subparts B, C, or D
Runoff from hazardous waste landfills	Part 445, Subpart A
Runoff from non-hazardous waste landfills	Part 445, Subpart B
Runoff from coal storage piles at steam electric generating facilities	Part 423

b. Determining Site-Specific WQBELs.

The purpose of Water Quality-Based Effluent Limitations (WQBEL) is ensure that a permitted discharge does not result in negative impacts on receiving waters as required by CWA Section 301(b)(1)(C). CWA Section 303 then establishes a three-step, iterative planning process in which states take the lead role in both establishing and achieving water quality standards. First, states are required to adopt water quality standards for all waters within their boundaries subject to the NPDES permit program. 33 U.S.C. §1313. These standards consist of: (1) designated uses (*e.g.*, fishing, swimming) and (2) corresponding water quality "criteria" to protect those designated uses (*e.g.*, a narrative or numeric limit on toxic pollutants that would safely support fishing and swimming). *Id.* §1313(c)(2)(A); 40 C.F.R. §131.3(i); *see also Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). These standards become the "water quality goals" that states strive to meet through an ongoing evaluation and planning program. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).[12]

Secondly, the states identify areas where additional work is needed to achieve water quality standards. States must, for example, develop a list of all waters for which technology-based effluent limitations alone are not stringent enough to achieve water quality standards and calculate the "total maximum daily load" (TMDL) of pollutants that would implement the standards. 33 U.S.C. §1313(d); 40 C.F.R. §130.2; *see also Sierra Club*, 296 F.3d at 1025 ("Each TMDL serves as the *goal* for the level of that pollutant in the waterbody to which that TMDL applies...") (emphasis added).

Finally, each state must adopt a comprehensive "continuing planning process" that "will result in plans for all navigable waters within [the] State, which include ... effluent limitations .., total maximum daily loads .., procedures for revision .., and adequate implementation, including schedules of compliance, for revised or new water quality standards." *Id.* §1313(e)(3). Essentially, the continuing planning process establishes plans designed to implement current water quality standards, review and possibly revise those standards, and then implement the revised standards. States also maintain policies on how WQBELs are developed and implemented into NPDES permits; some may allow for dilution or mixing zone to be included or accounted for in the analysis.

This process becomes more difficult in a general permitting scheme that often lacks the necessary site-specific focus that is appropriate to calculate specific WQBELs. For example, in its Construction General Permit, EPA relies on a series of narrative WQBELs to satisfy the NPDES permit prerequisites.

---

[12] In establishing water quality standards, states must submit to EPA the standards, as well as "anti-degradation policies" and any other general policies related to standards implementation. 40 C.F.R. §§131.10-13.

But while industrial and construction stormwater discharge permits must comply with WQBELs, Congress did not require MS4 discharges to comply strictly with state water quality standards (33 U.S.C. § 1311(b)(1)(C). In *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999), the Ninth Circuit Court of Appeals found that Congress did not mandate strict compliance with state water quality standards, but that Congress provided EPA with limited discretionary authority contained in 33 U.S.C. § 1342(p)(3)(B)(iii), to require such other provisions that the Administrator determines are appropriate "for the control of such pollutants." *Id.* at 1166 (emphasis added).

Therefore, Congress delegated to EPA the authority to regulate pollutant discharges from MS4s through a combination of the MEP technology standard and limited discretionary authority to impose additional limitations on pollutants being discharged from the MS4. It also required EPA to prohibit non-stormwater discharges into MS4s, but otherwise provide great flexibility for the MS4 operator to reduce pollutant discharges from the MS4.

3. Effluent Limitations May Be Expressed as "Numeric" or "Non-Numeric" Controls.

Numeric effluent limitations are a numeric pollutant-specific value for the kind and amount of pollutants that will be allowed to enter a receiving water. The numeric value is dependent on the designated use of the discharge-receiving water. Under CWA Section 304(a)(1), EPA publishes numeric criteria for various pollutants including both acute and chronic toxicity information that EPA recommends to protect human and aquatic life. *See* Preamble, National Toxics Rule, 57 Fed. Reg. at 60,850 (Dec. 22, 1992).

EPA published criteria are "guidance" to the states. States have the authority to modify the EPA recommended criteria; some states choose to adopt the EPA numeric limits and other choose to adjust the recommended limits to account for local exposure information. *See* 40 CFR § 131.11(b). All states are required to have at least some numeric criteria for priority toxic pollutants pursuant to CWA § 303(c)(2)(B).

All NPDES permits must ensure that the discharge(s) it authorizes complies with applicable water quality standards. This is a particular challenge for stormwater permits because more often than not permitting authorities issue "general" permits for stormwater discharges that are broadly applicable to similar sites, as opposed to a site-specific individual permit which is more common for wastewater NPDES permits. But for EPA's general permitting scheme to work, a permitting authority must conclude that uniform (more generalized) requirements will be able to implement the water quality standards mandates. Hence, if technology-based requirements will not result in compliance with applicable water quality standards, then water quality-based limitations must be added in order for the discharges authorized by the general permit to comply with the NPDES mandates.

While EPA's regulations favor developing *numeric* effluent limitations, there may be instances in which they are determined to be unnecessary or infeasible. *See* 61 Fed. Reg. 57,426; 40 CFR § 131.11(b). In such cases, permitting authorities may employ a variety of conditions and limitations, including best management practices (BMPs), performance objectives, narrative conditions, monitoring triggers, action levels (*i.e.*, monitoring benchmarks, toxicity reduction evaluation action levels), etc., as necessary. These are considered *non-numeric* effluent limitations.

EPA regulations specifically authorize BMPs in lieu of numeric limits for NPDES stormwater discharges. For example, 40 CFR § 122.44(k) allows permitting authorities under the NPDES program to include BMPs in permits to control or reduce pollutants when: (1) EPA has established rules to authorize BMP controls for pollutants from industries pursuant to CWA Section 304(e); (2) numeric limitations are infeasible; or (3) BMPs are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Act. Generally, permitting authorities, including EPA, have concluded that it is infeasible to establish numeric limitations in stormwater permits and that BMPs reasonably carry out the purposes and intent of the Act.

4. EPA's Past Reliance on Non-Numeric Effluent Limits

Since the beginning of its stormwater permitting program, EPA has relied heavily upon non-numeric effluent limitations for meeting the CWA requirements. A major reason numeric limits are not appropriate is that wet weather events are highly variable, and it is well-recognized that established sampling techniques do not provide, on their own, a robust mechanism from which to gauge the impacts of industrial activities to the exclusion of other compounding factors. In effect, current monitoring techniques are measuring the variability of the storm event and not the effectiveness of the BMP or other control. Those techniques are not adequate to support a numerically-based compliance program.

Numerous EPA actions and a string of uniformly favorable court decisions have established a firm basis for EPA's BMP approach to stormwater permitting.[13] EPA promulgated its first "multi-sector general permit" (MSGP) to control industrial stormwater discharges in 1995. The preamble to the general permit explains EPA's rationale for establishing BMPs rather than numeric limits:

---

[13] *See NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (prompting the promulgation of 40 CFR 122.44(k)); *In Re: Arizona Municipal Stormwater NPDES Permits for City of Tucson, Pima County, City of Phoenix, City of Mesa, and City of Tempe*, NPDES Appeal No. 97-3 (EAB 1998) (upholding the permit writer's decision not to impose numeric limits on grounds of infeasibility, in particular, due to the unique nature of stormwater discharges in the arid Arizona environment and the uncertainties associated with the impacts of short-term, periodic discharges) (subsequently appealed and decided on other grounds); *Communities for a Better Environment, et al., v. State Water Resources Control Board*, 1 Cal.Rptr.3d 76 (Cal. Ct. App., 2003) (upholding the permit writer's decision not to impose numeric limits on grounds of infeasibility, in particular, due to the need for a comprehensive TMDL study of all sources and causes of impairment, the significant reductions achieved by the permit holder during the previous permit cycle, and the relatively prohibitive costs of additional reductions by the permit holder).

> [T]he permit conditions reflect EPA's decision to identify a number of best management practices and traditional stormwater management practices which prevent pollution in stormwater discharges as the BAT/BCT level of control for the majority of stormwater discharges covered by this permit. The permit conditions applicable to these discharges are not numeric effluent limitations, but rather are flexible requirements for developing and implementing site specific plans to minimize and control pollutants in stormwater discharges associated with industrial activity.

60 Fed. Reg. 50,804 (Sept. 29, 1995).[14] This original MSGP approach was affirmed when EPA reissued the MSGP in 2000 and again in 2008. 73 Fed. Reg. 56,572 (Sept. 29, 2008). The same approaches have been adopted in EPA's Construction General Permit program.

a. <u>EPA's 1996 Interim Stormwater Permitting Policy</u>

In 1996, EPA adopted an interim stormwater permitting policy for WQBELs in stormwater permits (1996 Interim Policy). *See* Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits (EPA 833-D-96-001) (September 1996); *see also* 61 Fed. Reg. 43,761 (August 26, 1996). EPA's policy was predicated on the technical infeasibility of deriving appropriate numeric limits *and* the risk of imposing unnecessarily stringent numeric limits. *Id.* The 1996 Interim Policy states:

> Although NPDES permits must contain conditions to ensure that water quality standards are met, this does not require the use of numeric water quality-based effluent limitations. Under the CWA and NPDES regulations, permitting authorities may employ a variety of conditions and limitations in storm water permits, including best management practices, performance objectives, narrative conditions, monitoring triggers, action levels (i.e., monitoring benchmarks, toxicity reduction evaluation action levels), etc., as the necessary water quality-based limitations, where

[14] EPA has exercised its best professional judgment to set forth effluent limitations contained in its MSGP. This system includes mandatory technologies – sometimes a menu of technologies – that each industrial operator must satisfy. At the same time, it requires that each operator tailor a comprehensive site-specific stormwater plan that best fits the site-specific industrial processes and circumstances. EPA's MSGP Fact Sheet states that the "permit contains effluent limits that correspond to required levels of technology based control (BPT, BCT, BAT) for various discharges under the CWA. When effluent limitations or NSPS applies to the discharge the requirements are incorporated into the permit. Where no effluent guidelines are applicable, "EPA is to determine the appropriate technology-based level of control based on best professional judgment." *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Fact Sheet* at 34; *see also* CWA § 402(a)(1); 40 C.F.R. § 125.6. EPA asserts that, "the technology-based numeric and non-numeric effluent limits in this permit, taken as a whole, constitute BPT for all pollutants, BCT for conventional pollutants, and BAT for toxic and nonconventional pollutants that may be discharged in industrial stormwater." *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Fact Sheet* at 35.

numeric water quality-based effluent limitations are determined to be unnecessary or infeasible. 61 Fed. Reg. 57,426.

The 1996 Interim Policy has served as a foundation for EPA's stormwater permitting approach ever since it was issued.

b. EPA's November 2002 TMDL-Stormwater Policy Memorandum

The 1996 Interim Policy served as the foundation for EPA's more expansive 2002 policy memorandum, titled *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on Those WLAs*. (http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/final-wwtmdl.pdf) (2002 Policy Memorandum). The 2002 Policy Memorandum was distributed to the ten EPA Regions and was meant to outline a policy that supports an "iterative, adaptive management BMP approach, whereby permits include effluent limits . . . that address stormwater discharges, implement mechanisms to evaluate the performance of such controls, and make adjustments . . . as necessary to protect water quality. *See Id.* at 5.

Specifically, WQBELs for NPDES-regulated stormwater discharges that implement requirements in TMDLs under certain circumstances may be BMPs. Additional controls are not necessary if BMPs are sufficient to achieve the TMDL's goals. EPA anticipated that BMPs will be used as WQBELs in many NPDES stormwater permits, particularly for municipal and small construction stormwater discharges. EPA's 2002 Policy Memorandum has provided a solid basis for relying extensively upon a non-numeric approach to effluent limitations in NPDES stormwater permits.

c. EPA's November 12, 2010 TMDL-Stormwater Policy Memorandum (unofficially withdrawn).

On November 12, 2010, EPA issued a new memorandum entitled *Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on Those WLAs"* (2010 Policy Memorandum).

In its 2010 Policy Memorandum, EPA specifically identified four reasons for updating the 2002 Policy Memorandum, as follows:

- Providing numeric water quality-based effluent limitations in NPDES permits for stormwater discharges;
- Disaggregating stormwater sources in a TMDL allocations;
- Using surrogates for pollutant parameters when establishing targets for TMDL loading capacity; and

- Designating additional stormwater sources to regulate and treating load allocations as waste load allocations for newly regulated stormwater sources.

Regulated parties and states raised concerns with EPA's 2010 Policy Memorandum, asserting that EPA did not provide a sufficient basis to modify EPA's previous stormwater/TMDL permitting policies and seeking to have the Memorandum formally withdrawn. In response, EPA invited informal written comments on its 2010 Policy Memorandum in May 2011. In response to those comments, EPA sent revised guidance to the White House Office of Management and Budget (OMB) for review, but EPA never gained OMB approval and has since deleted the draft guidance from its website (but never officially announced its formal withdrawal).

5. EPA's Construction & Development Effluent Limitations Guidelines

Even though EPA's established approach to effluent limitations for its construction stormwater permitting program has been almost exclusively non-numeric (BMP-based), EPA in 1999 agreed – in response to a settlement agreement with various environmental groups – to initiate an ELG rulemaking to develop BAT standards for construction stormwater discharges. In its first attempt at Construction and Development ELG (C&D ELG) standards, EPA's rulemaking ended with its conclusion that a single set of nationally applicable ELG standards was impractical and unnecessary, recognizing that site conditions, the variable nature of precipitation patterns across the country, and other factors prevented the Agency from establishing a national technology standard. *See* 69 Fed. Reg. 22,472 (April 26, 2004).

Several environmental groups and the states of New York and Connecticut challenged EPA's determinations in federal district court in California. *NRDC.v. EPA*, CV04-8307-GHK (C.D.Cal.). The district court ruled in their favor concluding that once EPA initiates an ELG rulemaking under CWA Sections 304 and 306, it must promulgate BAT standards. *Id*. That decision was affirmed in EPA's appeal to the Ninth Circuit. *NRDC* v. *EPA*, 2008 WL 4253944 (9th Cir. 2008). As a result, in December 2009, EPA promulgated new C&D ELG mandates, including a national numeric effluent limit for turbidity of 280 nephlometric turbidity units (NTU) for certain sized construction sites across the country. The National Association of Home Builders (NAHB) challenged that rulemaking in the Seventh Circuit Court of Appeals. *Wisc. Builders Ass'n v. EPA*, 7th Cir. Case Nos. 09-4113, 10-1247, and 10-1876.

After NAHB filed its initial brief in that litigation, EPA announced that it had "miscalculated" the 280 NTU standard and asked the Seventh Circuit to remand that standard back to the Agency for further consideration. EPA ultimately filed a direct final rule to indefinitely stay the 280 NTU standard in anticipation of revising that standard by February 15, 2012. 75 Fed. Reg. 68,305 (November 5, 2010). NAHB and EPA ultimately reached a settlement that required EPA to formally withdraw its numeric

effluent limit and revise its BMP approach through a third C&D ELG rulemaking, which was finalized on March 6, 2014 (79 Fed. Reg. 12.661).

EPA's C&D ELG rulemaking experience provides several important lessons regarding EPA's challenges with setting national standards related to construction stormwater discharges. EPA worked on the C&D ELG rulemaking for 14+ years. Its goal was to develop a numeric effluent limit for an "industrial" activity that is conducted similarly across the entire country and mostly focused on a single pollutant (sediment or "turbidity"). And yet, EPA was unable to defend a numeric effluent standard and ultimately relied on the type of BMP program that was in place at the beginning of the process. That is not so much a criticism of EPA but rather an illustration of how difficult the challenge is to develop national standards that would fairly and effectively apply to stormwater discharges generally.[15]

II. CWA LIMITATIONS ON EPA'S AUTHORITY AND IMPACTS ON THE AGENCY'S NEW EFFORTS TO CONTROL STORMWATER FLOW AND VOLUME

A. Post Construction Overview

According to EPA: "In developed areas,…impervious surfaces such as pavement and roofs prevent precipitation from naturally soaking into the ground. Instead, the water runs rapidly into storm drains, sewer systems, and drainage ditches and can cause: downstream flooding; stream bank erosion; increased turbidity (muddiness created by stirred up sediment) from erosion; habitat destruction; changes in the stream flow hydrograph (a graph that displays the flow rate of a stream over a period of time); combined sewer overflows; infrastructure damage; and contaminated streams, rivers, and coastal water. http://www.epa.gov/oaintrnt/stormwater/index.htm. As it explained in a related guidance document for federal facilities, "[d]esigning facilities based on the goal of maintaining or restoring pre-development hydrology provides a site specific basis and an objective methodology with which to determine appropriate practices to protect the receiving environment."[16]

In 1999, EPA put forth a comprehensive 12-year plan to address post-construction stormwater discharges through its MS4 permitting program. This plan included evaluating a number of research initiatives, pilot projects, two rounds of MS4 permits

---

[15] Note also that while EPA was working on the C&D ELG standard, California was adopting its own construction general stormwater permit that included a numeric effluent limit of 500 NTU for certain construction stormwater discharges. That permit was challenged in California State Court. On December 2, 2011, the California Superior Court overturned the State's 500 NTU numeric standard and found that the State had not demonstrated that any particular technology could achieve that standard…almost twice as lenient as EPA's withdrawn standard. *CA Building Indus. v. State Water Resources Control Board*, (Case No. 34-2009-80000338, CA Superior Court (Sacramento County)).

[16] *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act*, EPA 841-B-09-001 (Dec. 2009).

since EPA's Phase II stormwater program was promulgated, and other related supporting efforts. In the preamble to EPA's 1999 Phase II stormwater rulemaking, EPA explained that it had developed a long-term strategy for assessing and improving municipal stormwater regulations over two permit terms (at least 10 years). Essentially, EPA promised in 1999 to assess progress under its permitting program, stating that:

> Gathering and analyzing data related to the stormwater program, including data regarding the effectiveness of BMPs, is critical to EPA's stormwater program evaluation. EPA does not intend to change today's NPDES municipal stormwater program until the end of this period, except under the following circumstances: a court decision requires changes; a technical change is necessary for implementation; or the CWA is modified, thereby requiring changes. 64 Fed. Reg. 68,771 (Dec. 8, 1999)

To codify that promise, EPA included the following regulatory language in its final Phase II stormwater rulemaking (codified at 40 CFR § 122.37):

> EPA will evaluate the small MS4 regulations at §§ 122.32 through 122.36 and § 123.35 of this chapter after December 10, 2012 and make any necessary revisions. (EPA intends to conduct an enhanced research effort and compile a comprehensive evaluation of the NPDES MS4 storm water program. EPA will re-evaluate the regulations based on data from the NPDES MS4 storm water program, from research on receiving water impacts from storm water, and the effectiveness of best management practices (BMPs), as well as other relevant information sources.)

Elsewhere, EPA provided that:

> Guidance: EPA strongly recommends that until the evaluation of the stormwater program in § 122.37, no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4, except where an approved TMDL or equivalent analysis provides adequate information to develop more specific measures to protect water quality. *See* 40 CFR § 122.34(6)(e)(2).

But EPA did not follow its plan, and instead initiated its (now stalled) December 2009 post-construction rulemaking without the benefits of the types of planned research, pilot projects and other important steps that would inform and justify any final standard. EPA had a limited foundation upon which to base a difficult two-part stormwater program expansion effort.[17] As demonstrated through the C&D ELG rulemaking – for

[17] EPA's 2009 post-construction rulemaking strategy comprised two separate and distinct challenges. First, EPA would have to expand the scope of "regulated facilities" subject to its NPDES stormwater permitting program to include newly or re-developed sites after active construction operations had ended. Next, EPA would need to set a national "retention" standard for post-construction stormwater discharges for those newly or re-developed sites.

which it had much more experience and industry-specific data – crafting new national standards from scratch is a difficult and nearly impossible task under tight deadlines. However, even though EPA has put its national post-construction rulemaking aside due to resource allocation concerns, it continues to pursue the same types of mandates that it considered for the national rulemaking but on a more permit-by-permit approach by asserting pressure on MS4s subject to its authority. Such efforts raise many legal and technical questions regarding EPA's authority and wisdom in pursuing its agenda.

B. Legal Issues Raised by EPA's Post-Construction Mandates

1. Stormwater Permitting Program Expansion Requires Studies, Reports to Congress, and Formal Rulemaking

EPA has no authority to regulate developed sites that are otherwise exempt from permitting pursuant to CWA Section 402(p)(1). Section 402(p)(1) is a broad exemption from NPDES permitting for all stormwater discharges except those identified in Section 402(p)(2). Developed sites and impervious surfaces are not listed in Section 402(p)(2) or in EPA's Phase I or Phase II regulations implementing the stormwater permitting program. Active construction activities that disturb at least five acres of land have been subject to permitting under EPA's industrial stormwater permit program (40 CFR § 122.26(b)(14)(x)) since 1990 and those disturbing at least one acre of land pursuant to 40 CFR § 122.26(b)(15) since 1999. In each instance, the permittee may terminate permit coverage when the site is stabilized. *Id.* Currently, EPA does not have authority or regulations to control stormwater discharges from developed sites that are not "associated with industrial activity." 40 CFR § 122.26(b)(14).

As explained in Section I. above, the CWA sets forth specific processes that allow EPA to designate new sources or categories of sources for NPDES permitting. It may designate an individual site ("a discharge") that contributes to a violation of a water quality standard or is a significant pollutant discharger on a site-specific basis. Or, as it did for the Phase II expansion, EPA may designate classes or categories of pollutant discharges for permitting through a process Congress laid out in CWA § 402(p)(5)-(6) that requires EPA to study stormwater discharges or classes of stormwater dischargers that currently are not regulated by the NPDES stormwater permit program. To the extent that EPA identifies any such dischargers that it believes should be included in the NPDES permitting program, Congress required EPA to submit a report to Congress containing the results from its study. In CWA Section 402(p)(6), Congress granted EPA authority to develop a regulatory program for those designated dischargers based on the results of the studies and the report it submitted to Congress.

During its now stalled post-construction national rulemaking, EPA claimed that it had drafted a Report to Congress, but has never released a copy of that draft or provided specific information to support a Phase II-like program expansion. More significantly, without a formal rulemaking process, EPA should be prohibited from attempting on a permit-by-permit basis that which it otherwise is prohibited from doing without a rulemaking – establishing post-construction retention standards though its MS4 permitting powers.

2. Flow Cannot Be Regulated Because it is Not a Pollutant.

In *Virginia Department of Transportation v. U.S. Environmental Protection Agency*, 2013 U.S. Dist. LEXIS 981 (E.D.Va. Jan. 3, 2013) (hereafter referred to as "*Accotink*," the name of the creek at issue in that case) the federal district court held that the CWA did not confer authority to regulate stormwater flow because stormwater is not a "pollutant," under that term's statutory definition. *Id.* at 5. The court rejected EPA's argument that stormwater flow could be regulated as "proxy" or "surrogate" to effect levels of pollutants already present within a waterbody, while acknowledging that it may be appropriate, in different circumstances, to impose stormwater flow restrictions as a means to regulate *specific pollutant levels demonstrated to be discharged into a waterway within the stormwater flow*. *Id.* at 5-6.

EPA has responded to *Accotink* by attempting to limit its applicability to the development of Total Maximum Daily Loads (TMDLs) under CWA §303(d). That argument is unavailing. The *Accotink* court's logic – based upon the CWA's explicit focus on controlling pollutant discharges into waters of the U.S. – applies with equal force in the context of the NPDES permitting program. Both the NPDES permit program and TMDLs that are incorporated into NPDES permits are expressly limited to the authority conferred by the CWA to regulate the "discharge of pollutants." EPA improperly attempts to confuse the central issue in *Accotink* by framing it as a TMDL controversy that is somehow unrelated to NPDES permitting. The critical issue in *Accotink* relates to the discharge of pollutants (of which "flow" is not one), which is equally and directly applicable to NPDES permitting as it is to setting TMDLs that must be implemented through effluent limitations in those permits. 33 U.S.C. §§ 1311(a), 1313(d), 1314, 1342(a).

In other instances, EPA has attempted to argue that stormwater flow causes stormwater "pollution," attempting to skirt the precise definition of "pollutant" that served as the basis for the *Accotink* decision. In fact, the CWA definition of "*pollution*" is broader than the definition of "pollutant," but EPA cannot substitute the term "pollution" for "pollutant" to expand its authority.

Congress defined "pollution" as "the man-made or man-induced alteration of the chemical physical, biological and radiological integrity of water." 33 U.S.C. § 1362(19). The Supreme Court of Washington, in a case affirmed by the U.S. Supreme Court, succinctly provided that under CWA § 1362(19) "man-induced alteration of streamflow level is 'pollution.'" *State of Washington, Dept. of Ecology v. PUD No. 1 of Jefferson County*, 121 Wash.2d 179, 187 (1993), *aff'd* 511 U.S. 700 (1994); *see also United States v. Tennessee Water Quality Control Board*, 717 F.2d 992, 998-99 (6th Cir. 1983) ("Although alterations in the properties of the water are 'pollution'… all alterations do not fit the narrower definition of 'pollutants'… .").

The Supreme Court has affirmed the importance of the distinction between "pollutants" added to a waterbody versus "pollution" already contained therein. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the Supreme Court described the difference between the discharge (addition) of pollutants to

a water body and the movement of pollutants within a waterbody. 568 U.S. ___ (2013)(Slip Opinion at 3)(further explaining the Court's decision in *South Florida Water Management Dist. v. Miccosukee Tribe* 541 U.S. 95, 109-112 (2004)).[18]

Thus, when substances redistribute within a waterbody, that substance is not being "added" to the waterbody under the CWA. In light of the Court's holding that the movement of pollutants within a waterbody does not constitute an "addition" or discharge, the EPA cannot now credibly take the position that it can regulate flow to prevent streambank erosion down-stream or the impacts of sediment already contained in the streambanks.

3. Impervious Surfaces Are Not Point Sources.

EPA's desired stormwater retention standards are based in part on its authority to specifically regulate impervious surfaces. But impervious surfaces such as roofs, parking lots, and roads do not meet the definition of "point source." *See* Section I.A.1. above. Impervious surfaces do not channelize water. Instead, sheet flow that travels across impervious surfaces is considered non-point runoff, which cannot be regulated under the NPDES stormwater permitting program. *Id*.

In fact, the CWA focuses on point sources rather than nonpoint sources because "differences in climate and geography make nationwide uniformity in controlling non-point source pollution virtually impossible. Also, the control of nonpoint source pollution often depends on land use controls, which are traditionally state or local in nature." *Oregon Natural Desert Assoc. v. United States Forest Service*, 550 F.3d 778, 785 (9th Cir. 2008) (quoting Poirier, *Non-point Source Pollution*, § 18.13); *see also Rapanos v. United States*, 547 U.S. 715, 738 (2006) (recognizing that the "[r]egulation of land use . . . is a quintessential state and local power.").

If EPA now interprets "point source" to include impervious surfaces, it renders that term meaningless and clearly contradicts congressional intent to define the term and differentiate "point sources" from "nonpoint sources." As noted by the Second Circuit Court of Appeals, "the phrase 'discernible, confined, and discrete conveyance' cannot be interpreted so broadly as to read the point source requirement out of the statute." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009). Such a broad interpretation would be contrary to the text and structure of the CWA. The Act defines the term "point source," and leaves all other flows of water to be considered "nonpoint sources," the regulation of which is left to the states. *Id*. at 219-220.

---

[18] Quoting the Second Circuit, the Court explained that "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* (internal quotations omitted).See also *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) (upholding EPA's interpretation of "addition" that required pollutants be introduced "from the outside world."); *but see AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731-32 (4th Cir. 2009) (explaining that under CWA section 401(a)(1), the word "discharge" does encompass water flowing into areas where dredging was to occur.)

EPA's NPDES regulations define the extent to which surface runoff can in certain circumstances constitute point source pollution. The definition of "[d]ischarge of a pollutant" includes "additions of pollutants into waters of the United States from: surface runoff *which is collected or channeled by man.*" 40 CFR § 122.2 (emphasis added). By implication, surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and, consequentially, is not subject to the CWA permit requirement. *See Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999) (relying on "the familiar principle of *expressio unius est exclusio alterius,* the mention of one thing implies the exclusion of the other").

4. EPA's MS4 Permitting Authority is Limited to Discharges From the MS4, Not Into the MS4.

EPA's authority to issue NPDES permits to MS4s also cannot be interpreted to provide authority over discharges that enter the MS4. Congress specifically limited that authority to the discharges from MS4s into navigable waters. Managing stormwater to restore a site to its predevelopment hydrology exceeds EPA's CWA authority because it goes beyond the regulation of a point source discharge by regulating "site design" and EPA's limited authority to mandate control strategies. *See* Section I.A.1. above. It also raises questions about federal usurpation of local land use planning in violation of constitutional protections.

The Supreme Court has repeatedly rejected assertions of federal authority under the CWA that usurp the "quintessential state and local power" found in the "[r]egulation of land use." *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) (Scalia, J. plurality) (citations omitted). *See also Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting expansive reading of CWA jurisdiction because of "significant constitutional questions raised" by "impingement of the States' traditional and primary power over land and water use").

These cases turned on the interpretation of the jurisdictional phrases "the waters of the United States" and "navigable waters," and held that even by using those terms to broadly define the proper subject matter of federal jurisdiction under the CWA, Congress did not authorize federal regulators to supplant local land use decision-making. *Rapanos*, 547 U.S. at 738-39 ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase 'the waters of the United States' hardly qualifies." (citation omitted)); *Solid Waste Agency*, 531 U.S. at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation."). EPA's current permit-by-permit strategy to compel certain MS4s to make specific choices with regard to post-construction performance standards is arguably a more direct and unauthorized affront on local land use mandates than the waters of the U.S. cases cited above.

5. MS4s Cannot Be Considered Waters of the United States Or Otherwise Justify EPA Attempts to Regulate Discharges Into MS4s.

EPA's recent proposed rule to define "waters of the United States" raises issues and concerns regarding whether an MS4 could be considered a jurisdictional water and allow EPA further authority to regulate discharges into an MS4 other than those already mandated in CWA Section 402(p)(2). A logical reading of the CWA supports the position that neither ditches nor MS4s should be considered waters of the U.S. In its most simplistic description, Congress intended the NPDES permit program to regulate pollutants *going into* "navigable waters," by requiring permits to control such pollutants passing through "point sources" into such waters. *See* 33 U.S.C. § 1311(a) (prohibiting the "discharge of pollutants" unless permitted elsewhere in the Act).

Congress also made clear that ditches are "point sources" by specifically including them in its definition of the term "point source." 33 U.S.C. § 1362(14) ("point source" means <u>any</u> discernible, confined and discrete conveyance, <u>including but not limited to any</u> pipe, <u>ditch,</u> channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged …."(emphasis added)).

The CWA does not define the term "ditch" separately, but its use in the term "point source" and subsequently in EPA's regulations that define MS4s (*i.e*., regulated point source discharges) makes an alternative finding that a ditch is a water of the U.S. interpretively improbable if not logically impossible. In other words, if a ditch comprising part of an MS4 also is found to be a "tributary" of a connected water body, it cannot also generate a point source discharge of pollutants and be permitted. The Supreme Court has found clearly that the transfer of pollutants within a waterbody is not the "discharge" of pollutants through a point source. *See S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 104-105 (2004) ("discharge" requires addition of pollutants from one "meaningfully distinct" waterbody to another, *through* a point source).

The CWA Section 402(p) and EPA's related stormwater permitting program regulations are consistent with the concept that MS4s are point sources that discharge into waters of the U.S., and the Agency has never implied that an MS4 could separately be a water of the U.S. CWA Section 402(p)(2)(C)-(D) establish EPA's obligation to include large and medium sized MS4s into the NPDES permit program, regulating the discharges "from" such MS4s into waters of the U.S. Section 402(p)(3)(B)(iii) establishes the technology-based standard that EPA must apply to MS4s "to reduce the discharge of pollutants" from the MS4. EPA's implementing regulations support these concepts. *See e.g.*, 40 CFR 122.26(d)(1)(iv) requiring MS4 permit applicants to list "water bodies" that receive discharges from the MS4.

In describing the Agency's preferred monitoring approach for MS4s, EPA states clearly that "monitoring of outfalls close to the point of discharge to waters of the United States is generally preferable when attempting to identify priorities for developing

pollutant control programs," for the MS4 system. 55 Fed. Reg. 48,057 (November 16, 1990). EPA also described the relationship between regulated industrial and MS4 discharges in such a way that makes perfectly clear that MS4s are not waters of the U.S. In response to comments from a municipality that neither the terms "point source" nor "discharge" should be used for industrial releases into an MS4 because "that gives the impression that such systems are navigable waters," EPA stated:

> In this rulemaking, EPA always addresses such discharges as "discharges through municipal separate storm sewer systems, as opposed to "discharges to waters of the United States. Id. at 47,997.

Later, while expanding on the discussion of applying water quality standards to an industrial discharge into an MS4, EPA was careful to make clear that the water quality standards do not apply to the MS4, but must be "based on meeting applicable water quality standards at the boundary of a State established mixing zone (for States with mixing zones) located in the receiving waters of the United States." Id. at 48,037. Not only does this description make perfectly clear that an MS4 cannot be a water of the U.S., but it also implies that the permit writer establishing the water-quality based effluent limit for an industrial discharger can use the dilution associated with the MS4 system in calculating such a limit (*i.e.,* compliance at the edge of the mixing zone in the receiving water).

Further, EPA defends its inclusion of roadside drainage systems and ditches as part of MS4 systems by stating that the rulemaking "addresses conveyances that are part of a separate storm sewer system that discharges stormwater into waters of the United States," and that there was specific public support for including roadside drainage systems in the definition of MS4. Id. at 48,036. In reality, the main purpose of an MS4 is to transport stormwater away from upland areas. However, using a "navigable water" in such a manner would plainly violate EPA's regulation that "in no case shall a State adopt waste transport … as a designated use for any water of the United States." 40 C.F.R. § 131.10(a).

In 1999, EPA expanded its stormwater permitting program by adding, *inter alia*, certain smaller MS4 systems to the NPDES permit program. In doing so, EPA provided certain waivers for small systems, provided that the permitting authority "has evaluated all waters of the U.S., including small streams, tributaries, lakes, and ponds that receive a discharge from the MS4." 40 CFR §§ 122.32(e) and 122.35(d). In its preamble, EPA explains that the purpose for evaluating the waterbody that receives the MS4 discharges is to determine if controls are needed to prevent impacts on any impaired waters and compliance with any applicable Total Maximum Daily Load (TMDL). 64 Fed. Reg. at 68,746 (December 8, 1999). If an MS4 could also be considered a water of the U.S. – or any part of it – then CWA Section 303 would require states to develop "designated uses" for the water in municipal sewer systems and potentially TMDLs for the MS4. Such a scenario is entirely inconsistent with existing EPA regulations such as the waiver provisions set forth above.

III. CONCLUSION

EPA initiated its efforts to limit discharges from new or re-developed properties during its Phase II stormwater program expansion in 1999. It set out a plan to collect the type of information and support for future rulemaking and permit development. But it did not follow its 12-year plan and in 2009, it initiated a more aggressive effort to develop post-construction standards. Our coalition has participated in every step of EPA's rulemaking effort, including commenting and supporting members through EPA's information collection request, Small Business Regulatory Enforcement Fairness Act small entity review process, and numerous Agency meetings along the way. It then actively engaged in at least one of EPA's efforts to use its permitting authority to mandate such standards, filing an amicus brief in such a permitting dispute. In the process, we have assessed, discussed, and analyzed many aspects of EPA's post-construction rulemaking effort, which has helped to culminate in this White Paper on the key topics and considerations.

EPA has never fully set forth its legal theory for its alleged authority for preventing stormwater discharges from occurring or the specific relationship between the discharges it would allow and any need to control any specific pollutants contained therein. CWA §402(p)(3)(B)(iii) does not authorize EPA to eliminate or control stormwater flow or mandate the prevention of stormwater discharges, but rather requires the pollutants in the MS4 discharge to be reduced to the MEP standard. Instead, the CWA sets forth a specific path for EPA to follow to fulfill any significant expansion of its stormwater permit program.

While EPA may argue that limiting stormwater flows helps it to achieve the goals of the Clean Water Act, it is still bound by the specific limitations in the Act that require it to focus on the discharge of pollutants from point sources to waters of the U.S. Executive agencies may not sidestep specific legislative requirements in their zeal to achieve a statute's overall objective.[19]

But that is not to say that state or local authorities cannot use their independent authorities to protect state and local human health and the environment. They do not need separate CWA authority to impose the kinds of green infrastructure or land-use

---

[19] *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)("No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."); *Nat'l. Mining Assoc. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998)("In a press release accompanying the adoption of the Tulloch Rule, the White House announced: "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking." White House Office on Environmental Policy, Protecting America's Wetlands: A Fair, Flexible, and Effective Approach (Aug. 24, 1993). While remarkable in its candor, the announcement contained a kernel of truth. If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress. Without such an amendment, the Act simply will not accommodate the Tulloch Rule.").

planning requirements that EPA is otherwise attempting to force upon them. What is evident, however, is that the CWA does not appear to support EPA's top-down federal efforts to mandate pre-development hydrology standards for new or re-developed properties.