

COMMENTS BY THE FEDERAL STORMWAER ASSOCIATION

**SUBMITTED TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY, SMALL
BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, AND OFFICE OF
MANAGEMENT AND BUDGET REGARDING SMALL ENTITY REPRESENTATIVE
INPUT ON EPA'S POST-CONSTRUCTION STORMWATER RULEMAKING**

January 5, 2011

I. INTRODUCTION

The Federal StormWater Association (FSWA) respectfully submits these comments on EPA's national post-construction stormwater rulemaking (PCSR).¹ FSWA has commented previously pursuant to EPA's prior requests for comments on this post-construction rulemaking, on related information collection requests (ICRs), and on options for expanding its PCSR within the Chesapeake Bay watershed. Pursuant to EPA's request relating to the unique nature of the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel review process, FSWA also is attaching to these comments each of its previous comment submittals relating to these related EPA PCSR efforts.

FSWA very much appreciates participating in the SBREFA panel process and being selected as a small entity representative (SER). FSWA represents a broad coalition of entities either directly or indirectly regulated by EPA's industrial, municipal, and construction stormwater programs. These entities, many of which are small businesses, also could become subject to EPA's PCSR regulations. We hope that our participation in this process has been helpful and that the suggestions that have been provided by FSWA's SER at the meetings and through these comments are helpful to EPA, the Small Business Administration (SBA) and the Office of Management and Budget (OMB) during their upcoming SBREFA reporting and recommendation process.

Through its involvement in EPA's PCSR process over the past year, FSWA has filed significant comments and suggestions for improving both the process underlying this rulemaking and for the substantive issues that may ultimately comprise any final rule resulting from that process. While it is true that many of these comments (and those that follow) may not "support" EPA's initial recommendations for post-construction standards, FSWA's intent is, as it has

¹ FSWA is represented by a small entity representative (SER), Jeffrey Longworth, for EPA's ongoing Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process.

always been, to provide frank and constructive input from the regulated community in an effort to improve, streamline, and enhance environmentally-protective stormwater permitting programs, while ensuring that such programs are “user-friendly” and cost-effective for those that have to obtain such permits to comply with such regulations.

For example, EPA’s “no exposure incentive,” that enabled certain qualified entities to avoid NPDES stormwater permitting obligations, represents the type of collaborative effort that many FSWA members spearheaded to address a difficult stormwater permitting issue facing the Agency.² FSWA hopes that the following comments also will result in the types of changes to EPA’s current PCSR ambitions that will result in a revised and prudent approach to addressing environmental concerns associated with post-construction stormwater environmental risks.

II. EXECUTIVE SUMMARY

EPA previously has developed what appears to be a comprehensive plan to address post-construction stormwater discharges and its municipal stormwater permitting program. That plan sets forth a December 2012 target for reevaluating a number of research initiatives, pilot projects, two rounds of MS4 permits since EPA’s Phase II stormwater program was promulgated, and other related supporting efforts. Now, EPA appears to be abandoning that plan in an effort to take a shortcut towards promulgating a final post-construction discharge standard without the benefits of the research, pilot projects and other important steps that would inform and justify a final standard. Without those intermediate steps and analyses, EPA risks developing standards that could be impossible or unreasonably costly to implement, would have significantly negative impacts on the economy, and may not result in any environmental benefits in many cases.

Specifically, FSWA questions whether EPA’s announced timeline for promulgating the final PCSR regulations, and the negative impacts on the rulemaking process associated with that timeline, is a prudent timeline for such a significant rulemaking, especially in light of EPA’s existing plan for reviewing post-construction stormwater programs. These comments review EPA’s stated reasons for rushing this rulemaking to meet EPA’s announced timeline. FSWA concludes that the November 2012 deadline for the rulemaking is discretionary and that EPA should in fact put off any final deadline for the PCSR regulations until a more thorough and reasoned approach can be implemented. If in fact EPA, SBA, and OMB agree that the deadline is discretionary, then EPA should revisit this SBREFA process at some time in the future.

Based on FSWA’s experience with prior SBREFA review panel efforts, this particular SBREFA review process and related information is deficient and will not result in the type of specific impact analyses by SERs that EPA, SBA, and OMB are accustomed to receiving. Hence, EPA’s rulemaking as a whole will be impacted by the inability to the SERs to provide specific data and input. If EPA extends its discretionary rulemaking deadline, as discussed above, then EPA should redo the current SBREFA process at that later date. In the alternative, if EPA decides not to extend its current rulemaking deadline, EPA still should reconvene a second

² EPA faced a court-ordered mandate to address its “light industry” or “category xi” permitting situation in which EPA might have to force many thousands of small businesses to obtain NPDES permits even though they operated entirely indoors. To fix that issue and to offer many others with an incentive to avoid permitting if they did not expose industrial operations to stormwater, small businesses, EPA, and NGOs negotiated the “no exposure incentive” that became part of EPA’s Phase II stormwater rulemaking.

SBREFA analysis in six-months when it has more information and can conduct an appropriate SBREFA review process.

EPA's PCSR rulemaking, as currently set forth, actually comprises two separate and distinct rulemakings. First, EPA plans to expand the scope of entities subject to its NPDES stormwater permitting program. That, on its own, is a significant and complex rulemaking. Next, EPA proposes to set a national standard for post-construction stormwater discharges from an expanded permitting universe. Hence, it is obvious that to set a national standard, EPA must first know the extent of the entities subject to such a rulemaking. Therefore, EPA should complete the permit program expansion rulemaking as a condition-precedent to a standards-setting rulemaking. To attempt both simultaneously unnecessarily confuses and complicates the rulemakings and inhibits public participation in the rulemaking based on the mere fact that those that may be subject to any future standards cannot yet assess whether they will be included ultimately in the permitting universe subject to some standard.

Finally, many of the specific standards issues raised in this rulemaking are being analyzed by other SERs. Specifically, FSWA recognizes the value of specific comments being submitted by the National Association of Home Builders (NAHB) and the American Short Line and Regional Railroad Association (ASLRRA) and the Association of American Railroads (AAR). Finally, SBA sent out information to SERs from its contractor, Pechan Environmental Consultants, which also provides important information, analyses and suggestions for the PCSR record and consideration.

III. EPA LACKS A SOLID FOUNDATION FOR ITS PCSR

EPA has provided a number of justifications for pursuing the national PCSR under an expedited timeline. None of those reasons or justifications is a compelling reason for unnecessarily rushing such an important rulemaking effort. EPA already had established a program and methodology for addressing post-construction stormwater discharges and modifying its municipal stormwater program that it initiated in 1999 and has been implementing. Now, however, EPA appears willing to abandon that approach for no stated reason. FSWA asserts that such a sudden and unjustified change of tactics would needlessly damage EPA's credibility as the nation's leader in developing stormwater regulations and guidance, putting the stormwater program back on its heels at a time when consistency and leadership is critical.

In this section of our comments, FSWA examines the various justifications set forth by EPA for expediting the PCSR. FSWA concludes that EPA should abandon its current efforts to devise an entirely new post-construction regulatory program and instead re-embrace the long-term program put in place more than 10 years ago. EPA should build on the current research programs, pilot projects, and other developments that should better inform a future PCSR effort. In the alternative, EPA should delay and revisit this SBREFA process in six months once it has been able to better analyze and assess existing programs and information that could better inform any expedited rulemaking effort. In any event, EPA has not provided SERs to date with information that demonstrates that a national standard is feasible or advisable.

A. EPA's Reliance on NRC Study Assertions is Misplaced.

In October 2008, the National Research Council (NRC) issued a report, entitled *Urban Stormwater Management in the United States* (National Academy of Sciences Press), which reviewed EPA's program for controlling stormwater discharges under the CWA. EPA has identified a number of quotations and assertions made in that report to justify the need to pursue the PCRS, while implying urgency in the process. For example, EPA says that the NRC report states that stormwater discharges from the built environment remain one of the greatest challenges of modern water pollution controls, "as this source of contamination is a principal contributor to water quality impairment of waterbodies nationwide." It further says that the NRC recommended that "EPA address stormwater discharges from impervious land cover and promote practices that harvest, infiltrate and evapotranspire stormwater to prevent it from being discharged, which is critical to reducing the volume and pollutant loading to our Nation's waters."

In fact, the roughly 500-page NRC report provides a very academic analysis of EPA's stormwater program and makes many, many recommendations. The academic slant is understandable, considering NRC's panel responsible for drafting the report comprised many top academics on stormwater matters. The panel did not include any individual that represents those subject to NPDES permitting requirements, and the final report lacks that important perspective. Nevertheless, it is a valuable and comprehensive critique and analysis of national stormwater issues and concerns.

Because the report is comprehensive, it must be considered in its entirety because in isolation, various sections or quotes could be perceived as support virtually any – or worse, conflicting – stormwater regulatory propositions. For example, contrary to a national PCRS, the NRC report's primary recommendation states that, "the greatest improvement to the EPA's Stormwater Program would be to convert the current piecemeal system into a watershed-based permitting program." NRC Report at 452. In making that recommendation, the NRC Report recognizes that there is significant variability in watershed conditions, stressors, and regulatory needs that defies EPA's national standards setting approach. The NRC Report supports the proposition that localized decisions regarding stormwater regulatory policy – not dissimilar to EPA's wastewater pretreatment program – will more appropriately consider the "prevailing ecological conditions," help ensure cooperation among various regulatory agencies, and coordinate regulatory conditions to address water quality concerns. *Id.* at 9.

In addition, the NRC Report cautions against over-relying on model-based approaches to stormwater controls. The Report states:

Every model simulates only a subset of the multiple interconnections between physical, chemical, and biological processes found in any watershed, and they all use a grossly simplified representation of the true spatial and temporal variability of a watershed. To speak of a "comprehensive watershed model" is thus an oxymoron, because the science of stormwater is not sufficiently far advanced to determine causality between all sources, resulting stressors, and their physical, chemical, and biological responses. Thus, it is not yet possible to create a

protocol that mechanistically links stormwater dischargers to the quality of receiving streams.

Id. at 277.

Obviously, the NRC Report – and any regulatory approaches encouraged or discouraged by the report's drafters – is an important tool for any future stormwater program modifications. Nevertheless, EPA cannot and should not assert that the NRC Report provides the specific rational or basis for developing a national post-construction stormwater discharge standard, or that that report recommends that EPA promulgate such a program by a certain date. In the alternative, EPA should consider a more focused effort, including, perhaps, re-establishing its Federal Advisory Committee on Wet Weather Flows, to assess the NRC Report and possible regulatory (and suggested statutory) improvements to federal, state, and local stormwater programs. Such an approach would provide the regulated community, environmental groups, and state/local regulators an opportunity to provide input into the process.

B. The Chesapeake Bay Settlement Cannot Mandate a National PCSR.

EPA also asserts that it is compelled to promulgate its PCSR because of its settlement agreement with certain plaintiffs in an action that they brought against EPA relating to Chesapeake Bay water quality issues. In that settlement agreement (provided by EPA to SERs), EPA promised to promulgate a final PCSR by November 19, 2012 (and propose the PCSR by September 30, 2011). EPA had no justification or basis for promising to promulgate a national post-construction stormwater discharge standard to address water quality issues in the Chesapeake Bay. In fact, on December 29, 2010, EPA announced a comprehensive new "pollution diet" for the Chesapeake Bay that it asserts will "restore clean water in [the] Chesapeake Bay and the region's streams, creeks, and rivers." See Press Release at: <http://yosemite.epa.gov/opa/admpress.nsf/90829d899627a1d98525735900400c2b/c15f64f4d172edff852578080061fa30!OpenDocument>. That announcement does not reference the PCSR as a key component for the success of the new Chesapeake Bay program.

Should EPA fail to meet the conditions of its Chesapeake Bay settlement agreement, it would not suffer significant legal ramifications. Having promulgated its new Chesapeake Bay program, EPA faces little risk of any significant legal consequences should the original plaintiffs revive their original complaint based solely on EPA's failure to promulgate the PCSR as promised. Hence, the Chesapeake Bay settlement should not serve as a basis for moving forward with the PCSR.

C. EPA Faces Other Legal Impediments to An Expedited Rulemaking.

In its prior comments (attached), FSWA provided an extensive analysis of the legal challenges EPA faces in expanding its existing stormwater program to previously unregulated entities. In sum, these include whether EPA's targets for expanding its stormwater program are defined as "point source dischargers," whether any such discharges enter "waters of the U.S.," and whether EPA is meeting the conditions precedent set forth by Congress to expand the NPDES stormwater permit program (*see* CWA Section 402(p)(5)-(6)).

In addition, there are significant legal questions about whether EPA has the statutory authority to regulate stormwater “flow” as a pollutant or a surrogate for other pollutants. In a recently released EPA memorandum (dated November 12, 2010) to permitting authorities regarding how stormwater sources should be addressed in permits and Total Maximum Daily Loads (TMDLs) (http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf), EPA clearly asserts its authority to regulate “flow” as a surrogate parameter under CWA Section 303(d) (to prevent biological degradation or habitat alteration-related impairments).³ But EPA’s authority to regulate flow has been the subject of ongoing debate and the specific regulation of “flow” and/or “volume” of stormwater runoff – in the context of a national standard or direct regulatory authority – has not been litigated to date. EPA’s analysis in its November 12, 2010 memorandum is an insufficient basis for justifying any attempt in the PCSR rulemaking to regulate flow. The Agency must set forth its specific statutory foundation for regulating flow prior to proposing any future regulations that rely on using flow as regulatory tool.

In its efforts to regulate the flow and volume of stormwater runoff, EPA also is considering regulating the amount of impervious surface at properties subject to any new regulations. Determining what can or cannot be built on private property or mandating how property is used to meet any future flow or volume restrictions likely represents an effort by EPA to assert federal authority over local land use decisions. Previously, city and county representatives have argued that such actions represent an unconstitutional attempt by the federal government to usurp states’ rights over land use planning in violation of the U.S. Constitution’s Tenth Amendment (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

D. EPA Should Not Abandon its Existing Plan to Review Municipal Permits and Post-Construction Discharges.

EPA’s current PCSR appears to abandon an existing plan to address municipal and post-construction stormwater discharges. In the preamble to EPA’s 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 storm water 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.

³ FSWA asserts that EPA’s November 12, 2010 is a “substantive” rulemaking and that EPA was obligated to seek public notice and comment before adopting its new stormwater permitting approaches contained in that memorandum. See *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998); *Military Order of the Purple Heart of the USA v. Secretary of Veterans Affairs*, 580 F. 3d 1293 (Fed. Cir. 2009); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (DC Cir. 2000). EPA should withdraw that memorandum and solicit public comments on the issues raised therein.

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 storm water 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).

EPA neither discussed nor provided additional information on this strategy to SERs during the SBREFA process and the Agency has not explained why it is now abandoning its ongoing approach and commitment currently contained in its NPDES stormwater regulations at 40 CFR Part 122.

EPA also has entered into an agreement with various stakeholders to develop and implement an “Action Strategy” for “Managing Wet Weather with Green Infrastructure.” *See* http://www.epa.gov/npdes/pubs/gi_action_strategy.pdf. The following organizations are signatories to EPA’s Action Strategy: American Rivers; Association of State and Interstate Water Pollution Control Administrators; National Association of Clean Water Agencies; Natural Resources Defense Council; The Low Impact Development Center; and EPA. Much of the work associated with the Action Strategy is still ongoing.

Similar to the Phase II strategy EPA previously adopted (above), the Agency did not provide information on the Action Strategy to the SERs for use during the SBREFA process. At the very least, EPA should summarize the status and significant findings generated by the 2008 Action Strategy. It is not unreasonable to expect EPA to fully assess what it has learned to date through its Action Strategy prior to initiating a national rulemaking to expand the regulatory universe and establish a standard for post-construction stormwater discharges that EPA asserts must rely extensively on “green infrastructure.”

During EPA's presentations to the SERs in November and December 2010, EPA also provided general information regarding Section 438 of the Energy Independence and Security Act of 2007 (EISA). That section provides:

Sec. 438. Storm Water Runoff Requirements for Federal Development Projects. The sponsor of any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 square feet shall use site planning, design, construction, and maintenance strategies for the property to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow.

One can assume that since the EISA's 2007 enactment, at least one federal facility has developed or redeveloped a project with an impervious footprint exceeding 5,000 square feet, if not tens or hundreds of such projects. In response to FSWA's questions during the SER meetings, EPA admitted that it cannot identify any such project or whether the "sponsors" of any such projects have been successful, and at what cost, in meeting this post-construction stormwater standard. It is reasonable to assume that Congress enacted this law to apply only to federal projects and not to all projects (public and private) in order lead by example and test whether such a strict post-construction stormwater control standard was feasible for other types of projects. It would seem that this type of information would be invaluable to informing EPA's current effort to promulgate the PCSR.

In sum, FSWA asserts that there are no underlying legal or statutory mandates compelling EPA to proceed with its PCSR within its more-or-less self-imposed (discretionary) November 2012 deadline. Moreover, there may be a number of legal impediments to any post-construction stormwater regulatory program that EPA should first address. Concurrently, EPA should be assessing the findings from its 2008 Action Strategy, which appears to coincide with its already established schedule for revising the municipal stormwater program after December 2012. EPA also should provide an assessment or findings from the federal government's experience in its attempts to meet the standards Congress set forth in the EISA.

IV. COMMENTS REGARDING EPA'S SBREFA PROCESS FOR THE PCSR

FSWA's SER representative has served as a SER on many prior SBREFA stormwater and standards setting review panels. In comparison to the type of information and detailed analyses provided to prior SBREFA review panels, this current SBREFA process represents a significant – if not impossible – challenge for SERs to provide valuable information on the potential impacts of EPA's PCSR on small businesses. EPA has, on the one hand, provided a wealth of documents and information to SERs, much of which is of marginal utility, disjointed or lacks sufficient specificity to foster a true discussion regarding potential impacts of the PCSR proposed rulemaking on small businesses. On the other hand, as set forth above, EPA has failed to provide SERs with what appears to be highly relevant information on existing programs, research, and related findings that would inform the SERs regarding specific implementation requirements, costs, and impacts of post-construction stormwater controls.

In fact, it is our experience from past SBREFA panel reviews, that the SERs are provided with actual draft regulatory language or regulatory alternatives so that they can fully consider how any such regulations might impact their small businesses or those of their constituencies. EPA has not provided any regulatory alternatives in this SBREFA review panel, other than providing broad generalities (e.g., expand the existing stormwater program subject to MS4 regulations; establish retrofit requirements for certain MS4s to protect water quality; establish specific requirements for transportation; require on-site retention of a specific size storm event; limit impervious surface, etc.). EPA did not provide sufficiently necessary and appropriate information to the SERs.

Besides generalities on regulatory standards, EPA also identified generally-applicable exceptions that it might consider, but not the specific circumstances that would underlie any such consideration. For example, EPA indicated that it was considering allowing states to approve numeric standards for specific sites with unique conditions "using an EPA calculator." However, EPA did not identify what it would consider "unique." EPA also stated that its "calculator" would not be developed until some time in 2011. These examples help to illustrate the challenges facing SERs in providing specific input and recommendations on EPA's PCSR.

EPA has developed guidance for implementing the provisions of the SBREFA law, entitled *EPA's Action Development Process*, which is, in part, intended to avoid the situations facing SERs in this panel. Section 4.7.4 informs EPA "rulewriters" that they should conduct small entity outreach by distributing "sufficient information to your small entity representatives about your regulation so that they can provide you with informed feedback on the elements of an Initial Regulatory Flexibility Analysis..." The elements of such an analysis include a descriptions of; (1) the number of small entities (and perhaps a specific estimate) to which a proposed rule will apply; (2) projected reporting, recordkeeping, and other compliance requirements; (3) other federal rules that may duplicate, overlap or conflict with the proposed rule; and (4) significant alternatives to the proposed rule that might accomplish the same objectives and which will minimize the economic impact on small entities. EPA has not met its own obligations in this panel review process, which makes it that much more challenging for SERs to meet their obligations to provide specific information to EPA about the possible impacts of a proposed rulemaking on their operations.

V. EPA'S PCSR TRULY COMPRISES TWO SEPARATE RULEMAKINGS

A. EPA First Desires to Expand Its Current NPDES Stormwater Program To Include Previously Unregulated Entities.

As an initial matter, EPA is proposing to expand its current NPDES stormwater program universe to include some group of currently unregulated entities. As summarized above and in the attached prior comments submitted by FSWA, EPA's program expansion faces some significant legal hurdles. Specifically, Congress, in CWA Section 402(p)(5), set forth a process for EPA to follow 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 with 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 report submitted to Congress.

EPA has not yet submitted a report to Congress to expand the existing stormwater program. While it has conducted and collected research materials and funded the NRC Report, EPA has not clearly identified the basis for any future report to Congress. As stated above, the NRC Report itself is subject to debate and cannot on its own be cited as a definitive analysis of specific dischargers that need to be added to the current stormwater regulatory program. Arguably, much of the NRC Report would require modifications to the Clean Water Act itself prior to being implemented.

In addition, it is virtually impossible to comment, as a SER, on the possible expansion of the existing stormwater permit program when the key component underlying and enabling that expansion – the report to Congress summarizing EPA's findings on different types of dischargers – has not been drafted or its possible contents communicated to the SERs. EPA told the SERs that it would not finalize a report to Congress until, perhaps, July 2011; only a month or two prior to proposing the new regulations that would impact the expanded universe of regulated entities.

In light of the above, FSWA suggest that EPA bifurcate its PCSR rulemaking into a two stage process. The first stage should be dedicated to the Agency's attempt to expand the existing stormwater permitting program. Until EPA identifies the universe of entities that may become subject to additional regulatory controls, it is difficult to identify how any standard could be crafted in an efficient manner and applied nationally.

Finally, FSWA asserts that EPA may not need to pursue a national expansion of the stormwater program at all. State and local authorities currently possess the ability to designate entities not currently subject to the NPDES stormwater permit program if those specific entities are impacting water quality as a result of their stormwater discharges. EPA's regional offices also have asserted that they have limited authority to designate classes of dischargers within certain watersheds for additional stormwater permitting obligations. For example, EPA Region 1 has proposed a permit program to regulate discharges from certain impervious surfaces within a Massachusetts watershed for permitting requirements. *See* Notice of Availability of Draft National Pollutant Elimination System (NPDES) General Permits for Small Municipal Separate Storm Sewer Systems (MS4); 75 Fed. Reg. 67,960 (November 4, 2010). Therefore, EPA, state, and local authorities are not powerless to address certain types of discharges, today, that impact water quality. Arguably, based on these developments, no regulatory changes are needed to meet the crux of the NRC Report recommendations to divest national authority to regional or local permitting authorities.

B. Next, EPA Desires to Set Post-Construction National Standards for the Expanded Universe of Dischargers.

Once EPA has identified and expanded the universe of regulated properties under the NPDES stormwater program, then it can assess whether it must apply a national standard to that expanded universe to achieve its desired end results. Again, EPA has provided a number of

potential schemes that it could pursue to develop such a standard, but it has not provided enough specificity at this time to comment on the potential impacts on a particular small business.

EPA also recognizes that any future standard must include exceptions for unique site-specific characteristics. In some cases, EPA recognizes that a one-size-fits-all approach may actually discourage the type of green infrastructure and smart growth development it favors. On the other hand, EPA recognizes that western water rights or other existing regulatory programs might conflict with a national discharge standard. Unfortunately, the more deeply EPA discusses or analyzes the issues, the more and more exceptions it seems to need. Hence, EPA faces difficult decisions and the realization that the exceptions may overwhelm or consume the benefits of setting a national standard to start. Until EPA provides more specific information, it is hard for SERs to provide appropriate input and feedback.

The Small Business Administration has developed an initial list of “conditions that make national standards inefficient, impractical, and/or illogical.” That list includes the following:

- **Climatic variables**
 - Annual precipitation (rainfall/snowfall)
 - Precipitation patterns
 - Temperature
 - Climate change may increase the size and frequency of storms in some areas of the nation
- **Geologic variables**
 - Bedrock depth/groundwater depth (near-surface vs. deep)
 - Soil type/permeability/soil moisture content
 - Land slope
 - Contaminated soils
 - Contaminated groundwater
 - Soil stability (e.g. will infiltration compromise structural integrity of buildings)
- **Land cover variables**
 - Native vegetation types
 - Existing structures
- **Geographic variables**
 - Population density
 - Land values
 - Financial and operational capabilities between large and small municipalities
- **Site design variables**
 - Design may preclude the use of soil amendments, plantings of vegetation or other options to infiltrate and evapotranspirate runoff
 - Water harvesting and use may not be practical or possible because the volume of water used for irrigation, toilet flushing, industrial make-up water, wash-waters, etc. are not significant enough to warrant the design and use of water harvesting and use systems
 - Open space - site may be too small to accommodate infiltration practices adequately
 - Underground facilities or utilities

- **Receiving water variability**
 - Size of receiving water body
 - Water quality conditions
 - Retention and/or use of stormwater onsite may have a significant adverse effect on the down gradient water balance of surface waters, ground waters or receiving watershed ecological processes
- **Conflicts with State/Local Laws**
 - Building codes
 - Plumbing codes
 - Zoning codes
 - Health codes
 - Curbing requirements for streets and parking lot landscaped islands
 - Minimum street width requirements
 - Grading requirements that prohibit ponding of stormwater
 - Rooftop solar power requirements
 - State/local land use policy addresses the balanced consideration of multiple public purposes (health, safety, transportation, recreation, education, environmental, economic, etc.)
 - In some western states, on-site retention requirements may be in conflict with water rights law.

Further, EPA has not provided any detailed information on costs or benefits of any future PCSR. Providing input, as a SER without such detailed information, provides EPA with little or no marginal benefit in assessing the potential impacts of, what truly represents, EPA's hypothetical or theoretical rulemaking. Nevertheless, other SERs have focused extensively on analyzing local post-construction stormwater programs, green infrastructure-related issues, and the potential impacts of a wide range of possible regulatory programs on small businesses.

If EPA truly values small entity input for this regulation, it will adopt many of the approaches set forth in these and related SER comments, and set forth a more logical and step-wise approach to post construction stormwater requirements that undoubtedly would require more time to develop than allowed by EPA's self-imposed November 2012 deadline.

CONCLUSION

FSWA appreciates the opportunity to serve as a SER during the PCSR rulemaking development. Unlike prior SBREFA panel efforts that FSWA representatives have observed or participated in, the current panel review and information dissemination for this rulemaking presents (at least in some cases) insurmountable obstacles to providing specific input on the potential impacts of national post-construction stormwater standards on small businesses. FSWA has suggested various alternative approaches to making this process truly meaningful, including bifurcating EPA's rulemaking into two parts; one to expand the regulatory universe if EPA deems such a move necessary, and next to set national post-construction standards, if necessary and appropriate.

If you have any questions or need additional information regarding issues presented in these comments, please contact FSWA's SER representative, Jeffrey Longworth. FSWA reserves the right to expand upon or provide additional input during this rulemaking process, recognizing that EPA's deadline for SER input is today, January 5, 2011. Nevertheless, FSWA encourages EPA to develop new and revised data/analyses and to share those data/analyses with SERs during an ongoing dialogue during the length of this rulemaking process.

Submitted respectfully,

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cc: Kevin Bromberg, SBA
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