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EPA Docket Center
U.S. Environmental Protection Agency
Water Docket
Mailcode 28221T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Docket ID No. EPA-HQ-OW-2009-0817
Agency Information Collection Activities; Proposed Collection; Comment Request; Stormwater Management Including Discharges From Developed Sites Questionnaires

Dear Sir or Madam:

The Associated General Contractors of America (AGC) appreciates the opportunity to provide the following comments on the U.S. Environmental Protection Agency's (EPA) proposed information collection request regarding stormwater management, including runoff from newly developed and re-developed construction sites, as published in the May 10, 2010, *Federal Register* (75 Fed. Reg. 25,852). According to EPA, it is proposing several data collection activities aimed at gathering stakeholder feedback that will be used to inform and guide a new stormwater runoff rulemaking.

Founded in 1918, AGC is a full-service national trade Association that works with and through a network of 96 state and local chapters throughout the United States. AGC represents more than 33,000 companies, including more than 7,500 of America's leading general construction contractors, 12,500 specialty contractors, and 13,000 material suppliers and service providers to the construction industry. While AGC members are rarely engaged in the construction of single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include office and other buildings, schools, shopping centers, multi-family housing projects, industrial plants, airports, highways, bridges, ports, public transit systems, railroad lines, dams and other flood control facilities, underground utilities, pipelines, water and wastewater treatment facilities, tunnels, mining operations, and military and defense facilities. AGC members also prepare sites and install utilities in advance of, and in preparation for, the construction of single family homes.

Thousands of AGC members currently have and will seek coverage under a general permit for the discharge of construction stormwater runoff. AGC members are required to comply with the National Pollutant Discharge Elimination System (NPDES) permitting process and they would

be directly affected by any national rulemaking to further strengthen the stormwater program. Specifically, AGC members are hired by site owners/developers to build and redevelop sites that could become subject to future regulation resulting from the stakeholder input EPA seeks to gather via this proposed information collection request (ICR). Further, if AGC members are not directly affected by the new stormwater rules, they would be indirectly affected by state and local authorities that regulate development and redevelopment activities potentially affected by any future expansion of EPA stormwater regulations.

AGC previously submitted comments on EPA's first ICR concerning stormwater management (74 Fed. Reg. 56,191), including discharges from newly developed and redeveloped sites, that included an "Industry Questionnaire" specifically targeting general contractors and others involved in the construction and development process.¹ AGC appreciates that EPA appropriately recognized that it would not get any useful information from general contractors – and that it has revised its questionnaires accordingly. However, AGC continues to question whether or not EPA has the legal authority and justification for proceeding with its intended November 2012 post-construction regulations and whether an ICR at this time is warranted (for that proposal), in advance of EPA setting forth a justification and meeting its obligations under the Clean Water Act (CWA).

I. Legal Analysis

Before point source stormwater discharges from previously developed land could, in theory, become subject to a stormwater permitting program, EPA must first meet the standards for "designating" such land for permitting set forth by Congress in the CWA. Congress set forth EPA's authority to create a regulatory permit program for specific categories of stormwater discharges. *See Section 402(p)(1)-(4)*. Congress also set forth a mechanism authorizing EPA to "study" classes of stormwater discharges not designated by Congress or otherwise subject to the stormwater permitting program, and to report back to Congress regarding the results of any such studies. *See Section 402(p)(5)*. In addition, Congress set forth a specific process for EPA for developing stormwater regulations for newly designated and currently unregulated stormwater discharges. *See Section 402(p)(6)*.

The statutory scheme is clear on its face; Congress set as a condition precedent to any new designation and subsequent regulatory program that EPA conduct a study pursuant to Section 402(p)(5) and submit it to Congress before proceeding with a specific process for such new regulations set forth in Section 402(p)(6).

EPA has not complied with its Congressional mandates here and cannot justify regulating developed land without first meeting the conditions precedent set forth by Congress. Until EPA has fulfilled these statutory requirements, EPA has no basis for pursuing the ICR pursuant to CWA Section 308.

¹ AGC incorporates by reference its comments filed on December 29, 2009.

But even if EPA complies with Congressional mandates and conducts a study, the fact remains that developed land, generally, does not meet the definition of point source discharge to waters of the U.S. and it has not been designated for any regulatory program by EPA through the process set forth by Congress.

EPA's information gathering authority pursuant to the Clean Water Act (CWA) Section 308(a), 33 U.S.C. § 1318(a), is limited to "the owner and operator of any point source." EPA asserts that nearly every piece of developed property in the U.S. is a point source. (Supporting Statement at 17). This position is not supported by the plain language of the statute or by case law.

Under the CWA, the term "point source" is defined as "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). But impervious surfaces on developed land such as roofs, parking lots, and roads are not point sources. In fact, EPA previously has specifically determined that some roads are non-point sources. *See* 40 CFR § 122.27(b) (excluding forest roads from the definition of silviculture point 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).

Some developed properties will collect and then release stormwater at the edge of the property into a municipal separate storm sewer system (MS4). Congress also granted EPA the authority to regulate stormwater discharges from certain municipal separate storm sewer systems (MS4s). *See* Section 402(p)(2)(C) and (D). However, it specifically limited EPA's authority over such MS4s to the discharges *from* the MS4 system. This implies that Congress left locally-governed MS4s with the responsibility to limit or control the discharges *into* their systems in order to meet any restrictions EPA ultimately places on the discharges *from* those systems.² As a result, AGC believes that Congress did not grant EPA the authority to determine how MS4 operators should control indirect stormwater discharges into their systems, as long as the MS4s meet the applicable permitting requirements for their own discharges. Likewise, EPA has no authority to regulate the property itself, as the source of that runoff.

As the D.C. Circuit stated in *NRDC v. EPA*, 859 F.2d 156, 169-70 (D.C. Cir. 1988):

EPA can properly take only those actions authorized by the CWA – allowing, prohibiting, or conditioning the pollutant discharge. And, contrary to EPA's assumption, ***the CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants. Thus, just as EPA lacks authority to ban construction of new sources***

² Congress specifically directed EPA to develop a permit program for those discharges of pollutants *from* MS4s. *See* Section 402(p)(3).

pending permit issuance, so the agency is powerless to impose permit conditions unrelated to the discharge itself. (emphasis added)³

In sum, CWA Section 308 provides EPA with the authority to collect information from point source discharges to waters of the U.S., or other indirect discharges identified by Congress or EPA through a process set forth by Congress. Developed land, generally, does not meet the definition of point source discharge to waters of the U.S. and it has not been designated for any regulatory program by EPA through the process set forth by Congress. Thus, EPA cannot use Section 308 information collection procedures to indiscriminately send questionnaires to unregulated entities, even if its ultimate purpose is to try to craft a permitting program for such entities.

II. General Comments

In carrying out its commitment to strengthen the national stormwater program (i.e., propose and take final action on its new stormwater rules by Nov. 2012), AGC recognizes that EPA is particularly focused on further restricting stormwater discharges from newly developed and redeveloped construction sites. AGC encouraged its membership to participate in the “listening sessions” that EPA held earlier this year to learn more about – and to provide input on – EPA’s preliminary rulemaking considerations. AGC of America helped to coordinate the construction industry’s key messages, which are again summarized in today’s comments—

1. The construction contractor’s role in real estate development;
2. The construction contractor’s role in post-construction stormwater management;
3. Post-construction stormwater management does not fit in the current NPDES Construction General Permit program;
4. Existing regulatory programs adequately control post-construction discharges; and
5. Post-construction discharges are best addressed by local authorities.

The Construction Contractor’s Role in Real Estate Development

It is important for EPA to understand the construction contractor’s role in real estate development so that the Agency does not inadvertently blame contractors for environmental problems not of their making, or expect more environmental improvement than contractors can deliver.

General contractors (who build office buildings, hospitals, schools, highways, bridges, pipelines, power plants or other public or private infrastructure) are typically limited to implementing decisions that others have made. In fact, they are contractually bound to meet the exact specifications that others write. Within their direct control lie the means and methods of construction, but not the entire range of decisions related to real estate development.

³See also *American Iron and Steel Inst. v. EPA*, 155 F.3d 979, 996 (D.C. Cir. 1997) (“The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a “point source”; it is not authorized to regulate the pollutant levels in a facility’s internal waste stream.”);

General contractors are not real estate developers, or land use planners, or otherwise involved in deciding what to build, or where to build it.

Likewise, general contractors are not architects or other design professionals that determine how structures will appear, or how they will perform.

The General Contractor's Role in Post-Construction Stormwater Management

General contractors are not responsible for designing, financing, operating, or maintaining post-construction stormwater controls.

During the active phase of construction, the general contractor typically obtains and ensures compliance with the construction (stormwater) general permit program. However, general contractors do not have “control” over the permanent BMPs (or best management practices) that are the focus of EPA’s current rulemaking efforts.

If post-construction stormwater controls are mandated for a site, the owner of that site must ensure that such controls are included in site design and construction plans. The owner hires a construction contractor to “build” the site, and then the owner maintains the site for the length of his/her ownership. The construction contractor bears no responsibility other than to build any post-construction stormwater controls to the owner’s specifications before completing the project (and leaving the site permanently).

The costs of post-construction controls would be included in the overall costs of site construction, and would be paid for by the owner. The financial status of general construction contractors is not relevant to whether a property owner can afford to build and maintain post-construction controls.

Post-Construction Stormwater Management Does Not Fit in the Current NPDES Construction General Permit Program

It would be a fundamentally flawed approach to include design or performance standards to control stormwater discharges from developed sites as part of the current NPDES Construction General Permit program.

The existing construction (stormwater) general permit program applies only to the “active” construction phase of development activity. As already stated, during the active phase of construction, the general contractor typically obtains and ensures compliance with the construction (stormwater) general permit program. Contractors receive detailed instructions through a site-specific stormwater pollution prevention plan on the temporary and permanent BMPs to install. Permanent BMPs require ongoing maintenance and inspections long after the construction activities have stopped and site stabilization has occurred (thereby authorizing the site “operator” to terminate his/her permit coverage). General contractors inspect and maintain the temporary BMPs while they are authorized by the permit to do so. They do not inspect or

maintain the permanent stormwater controls because they leave the site once their job is complete and their authority ends. Currently, MS4s often inherit, own, or maintain these permanent BMPs upon completion of the construction project. Taking this authority away from the local stormwater receiving entity (MS4) will cause massive planning problems and unintended consequences throughout all parts of the public and private building industry. Contractors should continue to do what they do best and construct those controls according to the specifications they are given.

Existing Regulatory Programs Adequately Control Post-Construction Discharges

Project owners/developers already must consider long-term stormwater management in the planning and design phase of a project, provide incentives (or mandates) for low impact development, require long-term monitoring and maintenance for stormwater facilities, and otherwise address post-construction stormwater management.

The EPA's NPDES program directs municipalities to control stormwater discharges both during construction and post construction. In addition, many local governments have asserted primary responsibility over regulating all aspects of construction activities through locally-derived jurisdictional powers. Municipalities and counties across the country are using local zoning, erosion and sedimentation (E&S), and stormwater management ordinances to require owners/developers to install stormwater retention/detention ponds, infiltration devices, and other measures to control stormwater discharges during and following construction. Given that existing EPA regulations already direct the municipalities to address post-construction stormwater runoff, and the fact that many local governments are adding new requirements – or have had post-construction stormwater requirements on the books for years – it is unclear why the Agency is starting anew.

While MS4s are still working to fully implementing their stormwater control programs, it seems that additional or new requirements are unnecessary.

Post-Construction Discharges Are Best Addressed by Local Authorities

State and local authorities are in a better position to identify the best practices and techniques to control any erosion or sedimentation that might result from storm water runoff from the developed sites within their borders. EPA should preserve the role that states and localities have traditionally played. States and local authorities should lead the regulation of land and water use, not the federal government.

Currently, local regulatory agencies generally dictate to developers the installation of needed stormwater controls, based on the MS4s overall stormwater management plans. The federal government should not become a comprehensive nationwide land use planner, preempting state and local authorities. The best way to protect the environment is to allow state and local authorities to tailor the details to state and local conditions, and not to impose a rigid and inflexible federal standard.

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AGC appreciates the opportunity to comment on the proposed ICR. Thank you for taking our concerns into account. If you have any questions, please contact me at pilconis@agc.org or (703) 837-5332.

Sincerely,

A handwritten signature in black ink that reads "Leah Pilconis". The signature is fluid and cursive, with "Leah" on top and "Pilconis" below it.

Leah F. Pilconis
Senior Environmental Advisor to AGC of America

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