



TALKING POINTS

Post-Construction Stormwater Issues

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EPA lacks authority to mandate stormwater retention or regulate the flow of stormwater.

The U.S. Environmental Protection Agency (EPA) in 2009 began developing new stormwater discharge regulations under the National Pollutant Discharge Elimination System (NPDES) for newly constructed and re-constructed properties. EPA's goal 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. In early 2014, EPA announced that it was "reallocating" resources away from the post-construction rulemaking effort, but EPA has attempted to impose post-construction mandates through its municipal stormwater (MS4) permit program on a case-by-case basis. It should not be allowed to continue any post-construction stormwater program expansion without a formal rulemaking.

Similarly, in instances where EPA has authorized states the authority to administer their own NPDES permit programs, those state permitting authorities face similar legal hurdles under the CWA if/when they would attempt – through the imposition of post-construction mandates in MS4-issued permits – to regulate the amount of impervious surface at a developed site or the stormwater "flow, velocity, or volume" leaving such a site.

Efforts by EPA or state permitting authorities¹ to regulate impervious surfaces or stormwater flow are not authorized by the CWA or NPDES permit program for the following reasons:

- The CWA, through the NPDES permit program, limits the *discharge* of *pollutants* from *point sources* into waters of the U.S. 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).
- Flow is not a pollutant as defined by the CWA, *Virginia Department of Transportation v. U.S. Environmental Protection Agency*, 2013 U.S. Dist. LEXIS 981 (E.D.Va. Jan. 3, 2013).
- Impervious surfaces are not point sources as defined by the CWA; they do not channelize water, but instead, sheet flow that travels across impervious surfaces is considered non-point runoff, which cannot be regulated under the NPDES stormwater permitting program ("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.")).

¹ State NPDES permitting authorities may take action to pass their own state laws (going beyond the authority granted under the CWA) that would allow strict stormwater retention-based limits.

- CWA Section 402(p) established a limited stormwater permit program for discharges “associated with industrial activity” (which includes certain active construction site discharges) and certain sized MS4s...all other stormwater discharges were exempted by Section 402(p)(1). Post-construction discharges are not associated with industrial activity as defined by EPA 40 CFR § 122.26(b)(14) – (15).
- Congress limited EPA’s authority over MS4s (and any power EPA delegates to state environmental agencies to regulate the storm sewer systems within their borders) 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) – Congress did not authorize EPA to regulate discharges into MS4s other than to prohibit “non-stormwater discharges.” 33 U.S.C. § 1342(p)(3)(B).
- Congress provided EPA with a mechanism to expand the stormwater permit program by first studying unregulated stormwater discharges and then establish “procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.” *Id.* §1342(p)(5) – (6). EPA must submit its study as a “Report to Congress” before promulgating new regulations. EPA successfully expanded the stormwater program using this methodology in 1999.
- EPA has not followed the methodology set forth in the above bullet in any attempt to expand the current program to include post-construction stormwater flows, and it should be prohibited from any regulatory attempts until such process has been completed.
- EPA has attempted to use its NPDES permitting authority to demand post-construction stormwater controls in various MS4 permits it has attempted to force on MS4 operators, including in Albuquerque, NM, its proposed small MS4 permit for New Hampshire, and in at least two Defense Department bases that were appealed to the EPA Environmental Appeals Board. Such efforts should be rejected and prohibited until EPA pursues a formal rulemaking.
- EPA’s history of attempting to establish numeric standards for highly variable stormwater permits is fraught with controversy and litigation, most notably represented by its Construction & Development Effluent Limitations Guidelines rulemakings and withdrawn attempt to issue stormwater/TMDL guidance in 2010 to support such efforts. Stormwater permitting has historically relied upon non-numeric best management practices, not numeric limits and EPA has no authority to attempt to require stormwater retention based on a given storm size (*i.e.*, retain the 85th percentile of the 25-year storm event).
- EPA first identified in 1999 a reasonable process for assessing post-construction stormwater discharges for possible future regulation, including data gathering, studies, review of two cycles of MS4 permits, additional research, etc. EPA did not follow that path and only started its national rulemaking after corresponding with environmental groups and inserting an obligation to conduct a national rulemaking into the Chesapeake Bay TMDL litigation settlement. But after missing all of the deadlines it established for itself, EPA now has abandoned the national rulemaking due to staffing and resource constraints.