

December 29, 2009

Water Docket
U.S. Environmental Protection Agency
Mail code: 4203M
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**RE: Comments on Proposed Stormwater Management Information Collection Request, EPA ICR No. 2366.01, OMB Control No. 2040-NEW
Docket ID No. EPA-HQ-OW-2009-0817**

Dear Sir or Madam:

On October 30, 2009, the Environmental Protection Agency (“EPA” or “the Agency”) requested comments on its proposed information collection requests concerning stormwater management (“the Proposed ICRs”). *Agency Information Collection Activities; Proposed Collection; Comment Request; Stormwater Management Including Discharges from Newly Developed and Redeveloped Cites*, 74 Fed. Reg. 56,191. The Federal StormWater Association (FSWA) is pleased to submit these comments on the Proposed ICRs.

EPA has proposed three separate ICR questionnaires: (1) to the construction and development industries; (2) to municipal separate storm sewer system (“MS4”) operators; and (3) to state permitting authorities. As explained in greater detail below, FSWA believes that the Proposed ICRs are premature and that EPA must better articulate its statutory authority to develop the stormwater management regulations it has committed to promulgate by November 2012 (the end goal EPA asserts justifies the Proposed ICRs), as well as the Agency’s goals for those regulations. In its current form, the Proposed ICRs lack justification, target improper sources for the information that EPA seeks, and fail to meet the standards necessary for approval by the Office of Management and Budget (“OMB”).

FSWA is a coalition of NPDES regulated point source dischargers and related trade associations, which are or may be directly affected (or which have members that are or may be directly affected) by regulatory decisions made under the Clean Water Act (“CWA” or “the Act”). FSWA members, for purposes of these comments, are as follows: Alcoa, Inc., Alliance of Automobile Manufacturers, American Petroleum Institute, Association of American Railroads, Associated Builders and Contractors, Associated General Contractors of America,

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Inc., General Electric Company, Institute of Scrap Recycling Industries, and National Association of Home Builders. FSWA members also may be submitting individual comments concerning their own industry-specific sector issues.

FSWA member entities (or their members) develop and redevelop sites that could become subject to future regulation resulting from information EPA obtains through the Proposed ICRs. Further, if they are not directly affected, FSWA members are indirectly affected by state and local authorities that regulate development and redevelopment activities potentially affected by the Proposed ICRs. FSWA, therefore, has a direct interest in the matters addressed in the Proposed ICRs, which is why we are filing these comments.

The Paperwork Reduction Act (“PRA”) sets forth certain standards that EPA must satisfy in order to obtain ICR approval from OMB. *See* 44 U.S.C. 3506(c)(3)(A) (Agency certification) and 44 U.S.C. 3508 (OMB determination). Among other things, EPA must demonstrate that any proposed ICR:

- is “necessary” for EPA to perform its function, including that such information have “practical utility;”
- is not unnecessarily duplicative of information otherwise reasonably accessible to the agency;
- reduces to the extent practicable and appropriate the burden on the persons providing the information;
- is written in plain, coherent, and unambiguous terminology and is understandable to those who are to respond; and
- sets forth an effective and efficient statistical survey methodology appropriate to the purpose for which the information is to be collected.

In its *Supporting Statement*, EPA provides little support or information regarding its statutory authority to promulgate stormwater management regulations or why the information it proposes to collect is “necessary” for the Agency to perform that statutory function. The Agency merely cites to CWA Section 402(p). That citation, without further supporting information, is insufficient to allow OMB to assess EPA’s authority to collect information about discharges that currently are not subject to federal regulation.

In fact, FSWA does not believe that EPA has inherent authority under CWA Section 402(p) to regulate all post-construction stormwater discharges, without further Congressional action. Section 402(p) provides EPA with fairly limited authority to regulate stormwater discharges. First, Congress granted EPA the authority to regulate stormwater discharges “associated with industrial activity.” Section 402(p)(2)(B). EPA has defined “associated with industrial activity” to include certain categories of industrial activities. *See* 40 CFR 122.26(b)(14). Presumably, the industrial stormwater program applies to all industrial discharges once an “industrial” site is constructed, including post-construction industrial discharges. However, EPA has never defined the industrial stormwater program to include “post-construction” discharges from all

development or redevelopment sources generally without regard to the nature of on-site activities or operations.

Congress also granted EPA the authority to regulate stormwater discharges from certain 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.¹ As a result, FSWA believes that Congress did not grant EPA the authority 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.

Congress also directed EPA to conduct a study and regulate additional stormwater discharges to the extent necessary to mitigate impacts on water quality (Phase II stormwater regulations).² *See* 33 U.S.C. 1342(p)(5) & (6). EPA expanded the "Phase I" industrial and MS4 stormwater permitting programs through its Phase II regulations, but the changes EPA adopted are wholly unrelated to post-construction stormwater discharges and offer no further justification for the Proposed ICRs.

Recognizing that there might be significant non-industrial or non-MS4 sources of stormwater pollution, Congress provided EPA and authorized states with the authority to "designate" specific sites for stormwater permitting, but only if the Agency makes a site-specific determination that a particular source "contributes to a violation of a water quality standard or is a significant contributor of pollutants" to U.S. waters. Section 402(p)(2)(E), 402(p)(6). Hence, EPA cannot regulate discharges by designation absent a site-specific determination that controls are needed on a specific discharge based on the wasteload allocations of a TMDL, or based on a determination that a specific discharge or category of discharges in a specific geographic area contributes to the violation of a water quality standard or is a significant contributor of pollutants to waters of the U.S. EPA cannot make that determination based on anticipated future discharges. The CWA subjects only actual discharges to regulation, not potential discharges.³ EPA's proposal to regulate areas that are vulnerable to future development is land use control, not the control of discharges of pollutants to waters of the U.S.

Even if EPA were to argue that it can designate classes or categories of stormwater sources that may universally impact water quality (an interpretation with which FSWA does not agree), the Agency has not yet designated post-construction stormwater discharges as requiring permit

¹ Comparing Sections 402(p)(2)(B) with 402(p)(2)(C) and (D) illustrates this point. Had Congress wanted to provide EPA with the same authority over MS4s that it provided over "industrial" discharges, it would have used similar language, such as "associated with," "into" or "through" MS4s, not the more limiting term "from" MS4s. The only federal authority over MS4 influent is the prohibition of non-stormwater discharges *into* MS4s. In contrast, Congress specifically directed EPA to develop a permit program for those discharges of pollutants *from* the MS4. *See* Section 402(p)(3). EPA also provided separate technology requirements for industrial and MS4 discharges, again illustrating its intent to differentiate EPA's authority over those two pollutant sources. *Id.*

² The Phase II stormwater regulations cover construction sites that disturb between one and five acres and designated "urbanized areas." In addition, areas outside the designated "urbanized areas" which meet the Phase II population and density qualifications (population greater than 10,000 people and a population density of 1,000 people per square mile) may be designated by the permitting authority as requiring permit coverage under the Stormwater Phase II regulations. 64 *Fed. Reg.* 68722 (Dec. 8, 1999).

³ *See Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

or provided any information or justification for any such finding. In sum, post-construction stormwater discharges are not associated with industrial activity, are not “from” MS4s, and have not otherwise been designated by EPA pursuant to the Agency’s “designation” authority under Section 402(p). Therefore, they best are categorized as “non-point” or diffuse stormwater discharges not otherwise subject to CWA permitting.⁴

Even if we assume that EPA has authority to regulate post-construction stormwater discharges, the Proposed ICRs fail to satisfy the other PRA prerequisites for OMB approval. In its proposal, EPA seeks approval to issue comprehensive questionnaires to three groups – the construction and development industries, MS4s, and states. For the reasons set forth below, none of these questionnaires should be approved.

The construction industry (*i.e.*, the general contractor) is not an appropriate target for a Proposed ICR, because that industry is not responsible for funding, operating, or maintaining post-construction stormwater controls. 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 must hire and pay a construction contractor to “build” the site, and then must maintain the site for the length of his/her ownership. The construction contractor bears no responsibility other than to build any controls to the owner’s specifications before permanently leaving the site.

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 individual construction contractors is not relevant to whether a property owner can afford to build and maintain post-construction controls. Although the contractor will know how to build various post-construction best management practices (“BMPs”), and their costs, that type of information already is available from a variety of sources within and outside EPA. *See e.g.*, the Center for Watershed Protection website (www.cwp.org) for a compendium of reports and guidance concerning those issues. Because construction contractors are not responsible for post-construction stormwater discharges, and because information concerning the construction of BMPs is readily available elsewhere, it is not necessary to EPA’s function to burden the construction industry with the Industry Questionnaire contained in the Proposed ICRs.

States also are not an appropriate target for a Proposed ICR. EPA authority to request information is found at CWA Section 308. 33 U.S.C. 1318(a). Section 308 provides EPA with broad discretion, but that discretion is not limitless. It authorizes EPA to collect information from the owner or operator of any *point source* to carry out the objectives of the Act. State permitting authorities generally are not owners or operators of such point source discharges, but rather are regulators of those discharges. EPA may have other mechanisms for obtaining relevant information from authorized states, but CWA Section 308 does not provide EPA with such authority. Therefore, the State Questionnaire should not be approved as part of the Proposed ICRs.

⁴ *See also*, EPA Memorandum by Wayland and Hanlon, *Establishing Total maximum Daily Load Wasteload Allocations for Stormwater Sources and NPDES Permit Requirements Based on WLAs*, (Nov. 22, 2002) (Stormwater discharges that are not currently subject to Phase I or Phase II of the NPDES stormwater program are not required to obtain NPDES permits because they are “analogous to nonpoint sources.”)

Although MS4s are point source dischargers subject to CWA Section 308 authority, EPA has not provided sufficient justification for issuing questionnaires to municipalities in light of EPA's limited authority to regulate discharges *from* and not *into* those systems. As a result, the MS4 Questionnaire should not be approved as part of the Proposed ICRs.

EPA may wish to obtain information from current land-owners that have previously implemented post-construction stormwater controls. Those entities, however, are beyond the scope of EPA's authority. As explained in more detail above, FSWA believes that post-construction stormwater discharges should be considered non-point source discharges that are not regulated under the Act. Hence, their owners or operators are not subject to CWA Section 308.

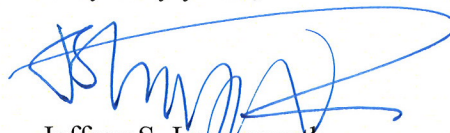
Because EPA has not adequately justified the Proposed ICRs, FSWA is not including extensive comments concerning EPA's grossly underestimated burden projections. However, should EPA revise the Proposed ICRs to justify future information collection, OMB should ensure that EPA properly assesses and calculates the burdens on the ICR recipients. Historically, EPA has significantly underestimated the burden associated with Section 308 ICRs.

In the interim, EPA should better articulate the goals of its potential stormwater regulation, its authority over owners and operators of such sites, and its needs for additional information. Once the Agency identifies appropriate target entities for information collection, EPA should sit down with those entities to discuss how best to obtain the necessary information, as well as the most efficient method for obtaining that information. Perhaps, EPA's planned "listening sessions" (*see* 74 Fed. Reg. 68,617, Dec. 28, 2009) regarding stormwater issues is an appropriate start, but EPA should synthesize the information it obtains from those sessions and further justify its authority to obtain other information it seeks prior to asking OMB for ICR approval.

In conclusion, EPA should withdraw the Proposed ICRs concerning post-construction stormwater discharges. FSWA suggests that the Agency convene a meeting of potentially affected stakeholders to discuss EPA's stormwater program and how best to move that program forward to ensure that U.S. waters are adequately protected. FSWA would enthusiastically participate in such a meeting, providing the Agency with its members' broad experience and insight on stormwater issues, including how EPA should address the October 2008 National Academies of Science stormwater report.

FSWA appreciates the opportunity to comment on the Proposed ICR. Please contact me if you have any questions.

Very truly yours,



Jeffrey S. Longworth
FSWA Coordinator

cc: FSWA Members