

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

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.

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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.

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.

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)).

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 evaluatio

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.

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 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 specifitq

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

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

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.

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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FSWA Members