

MEMO – WEF’s Current Understanding of the Stormwater Rulemaking

Date: November 8, 2012

Background on Stormwater Program

The U.S. Environmental Protection Agency (EPA) is expected to release a proposed rule to update the NPDES stormwater program. The existing stormwater program has not been updated since the promulgation of Phase II in 1999. WEF staff and members have been meeting with the EPA stormwater team consistently to provide input on the proposed rule on behalf of WEF and to receive updates on the status and the expected framework and details of the rule. We have compiled an overview of our current understanding of the status and details of the proposed rule for your review in preparation for the development of WEF consensus comments on this significant regulatory update.

Status of Proposed Rule

EPA has stated that the proposed rule will be published on June 10, 2013 with a final rule published on December 10, 2014. These dates have changed several times, which is most likely due to the complexity of the cost/benefit analysis required during the rulemaking process. While these dates have slipped in the past, we are confident that the current dates provided are meaningful, especially considering the re-election of President Obama, which provides certainty on the movement of this regulatory action.

EPA is still working on the economic analysis and alternative selection, to be completed soon, and will be presenting these alternatives to management at a series of internal briefings. The proposed rule will then be sent to the Office of Management and Budget (OMB) with a 90-day review period expected. There is also an expected 90-day public comment period associated with the release of the proposed rule.

Technical Aspects of the Proposed Rule

EPA has identified seven areas of the stormwater program to be updated. These areas are discussed below along with a brief overview on each topic

1. **Expansion of MS4 areas/situations and programs:** Several options have been discussed, including expansions of area using standard watershed boundaries or expansions to include entire (instead of portions of) jurisdictions. Due to continued growth in the ex-urban areas (i.e., areas beyond suburban areas), there is an option to target “urban cluster” areas outside of regulated boundaries, which will depend upon population density and site. The intent of targeting these urban cluster areas is to capture those significant development activities that have occurred beyond the regulatory reach of past programmatic boundaries that, however, have significant impacts on water quality of receiving waters.

There has been discussions about expanding the requirements in MS4 programs, with a special focus on monitoring requirements and long-term goals to reduce impacts of development within, and downstream of, a regulated area.

2. **Establishment of a new development performance standard:** Past and current federal stormwater programs have relied on technology-based standards; however, the new program will likely have a requirement to capture and retain a volume based upon percentile exceedence (i.e., the 90% percentile storm). In many parts of the country, this translates to a change in stormwater management paradigm from capture, detain and release to capture and retain through infiltration or rainwater harvesting. Also, this new standard will establish a treatment volume that exceeds current standards for a number of states.

It should be noted that this new standard could be applicable to all development sites across the country, whether the site is located inside or outside of an MS4 area, that cross a certain size threshold (1-5 acres, most likely). There are outstanding questions for these situations, such as, who will oversee the regulatory efforts for these areas outside of MS4 boundaries? One option suggested by EPA is that these sites might be tied to the Construction General Permit, which is similar in structure, as it applies to all sites above a certain size threshold. For these situations, states generally administer these programs, so it might be reasonable to transfer these sites to a similar post-construction program after the Notice of Termination is granted for each site, including the project/permit number used for tracking purposes.

3. **Establishment of a redevelopment performance standard:** The proposed rule will also include a new national standard for redevelopment activities. It is expected that this standard will be similar to the new development standard in framework, but less stringent, to provide more flexibility for urban infill, redevelopment and revitalization. For example, if the new development standard is on-site retention of the 90th-percentile storm, it is expected that the redevelopment standard would be to capture the 85th-percentile storm. To further incent redevelopment, EPA will propose that credits on stormwater will be given to redevelopment projects that incorporate smart growth, LEED, or other development frameworks that place a strong emphasis on high-density, walkable, livable communities that are tied to public transportation systems.
4. **Retrofit requirements for some areas:** Many urban areas developed stormwater programs several decades ago under a different stormwater treatment paradigm. To address this, EPA will likely require some urban areas to develop retrofit plans that describe their current stormwater management systems and program and detail how they plan to upgrade this dated infrastructure. A variety of options have been proposed by EPA for these plans, including the establishment of long-term goals underpinned by specifics as laid out in their NPDES permit in 5-year cycles. This mix of long- and short-term frameworks is aimed to provide a clear overall direction for stormwater programs, yet include adaptive management aspects of the program to allow flexibility on how the overall goals are reached, with the understanding that technologies, practices and approaches will change over time.

It should be noted that EPA has been clear that this provision is likely to not be highly prescriptive (percentage removal of impervious cover, for instance), and has also pointed out that approximately one-third of Phase I communities already have a retrofit program of some kind. It is envisioned that retrofits would be integrated into other capital improvement programs that municipalities are already engaged in, such as roadway improvements or public park enhancements. Also, EPA has noted that this requirement would be for large communities that discharge to impaired waters – but it should also be noted that close to 90 percent of large municipalities discharge to impaired waters, most of which impaired to due urban stormwater impacts. This is important to point out, because MS4 permits require that the permittee include TMDL-specific actions, so this urban retrofit requirement may be redundant, and therefore, may not be included in the proposed rulemaking.

5. **Regulations guiding transportation systems:** Currently, state departments of transportation and municipalities that control roadways hold NPDES permits that regulate stormwater flows off of transportation systems in the same manner as all other types of project sites. Roadways may cross multiple jurisdictions as well as differing watersheds with changing characteristics. Also, the impacts from linear systems on the public differ from traditional development projects, as these projects often impact a variety of stakeholders in multiples municipalities and areas. It is expected that EPA will recognize the unique nature of transportation systems in the stormwater program by establishing “TS4” regulatory categories (Transportation Separate Storm Sewer Systems) that will likely have the same, or similar, performance standards, but may have different minimum control standards for public involvement among others.

6. **Special provisions for critical water bodies:** Chesapeake Bay, located in the Mid-Atlantic region of the East Coast, has become significantly degraded due to stormwater flows. This Bay is the largest estuary in the U.S. and has the largest land-to-water ratio (14:1) of any coastal water body in the world, which makes it highly susceptible to pollutants that are tied to the landscape, such as stormwater runoff. It is likely that EPA will include provisions that increased standards or regulatory requirements will be included in the stormwater rulemaking for the Chesapeake Bay watershed. It is unlikely that other sensitive water bodies will be included in the rulemaking.
7. **Inclusion of combined sewer systems:** Currently, the stormwater program addresses separate sewer systems; however, in many communities where combined sewer systems comprise a portion of their overall sewer network, the entire jurisdiction, regardless of combined or separate, is included in the stormwater program. The belief is that this has been done out of a need for uniformity and simplicity in enforcing codes and standards related to stormwater. With this in mind, EPA may likely request feedback on the inclusion of combined systems into stormwater programs.
8. **Other issues:** EPA is still working to finalize several other aspects of the rule, including the implementation timeframe of the rule, equivalency of existing programs, and how other programs, such as TMDLs, will be tied into the new requirement. Also, there has been consideration of removing the Phase I/Phase II titles associated with the stormwater program in order to provide more flexibility on how programs for large communities (>100,000) are structured compared to small to mid-sized communities (<100,000).

WEF Actions to Prepare for Proposed Rule Release

The WEF Government Affairs Committee Stormwater Workgroup will lead the development of WEF comments. Other groups providing support are the WEF Stormwater Committee and Member Associations Stormwater Committees. Other groups, such as the WEF Watershed Management and Collection Systems Committees (among others) as well as similar groups at the MA level will be asked to provide comment as well.