1717 Pennsylvania Ave. N.W.
Suite 500
Washington, D.C. 20006-4623
202-289-1313
202-289-1330 (Fax)

www.btlaw.com

Jeffrey S. Longsworth
(202) 408-6918
jeffrey.longsworth@btlaw.com

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# Post-Construction Stormwater White Paper For the Coalition of Real Estate (CORE) Associations

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On October 30, 2009, the U.S. Environmental Protection Agency (EPA) began developing new stormwater discharge regulations under the National Pollutant Discharge Elimination System (NPDES) for newly constructed and re-constructed properties. EPA's intent 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.

Over the following four years, EPA issued Information Collection Requests to developers and other "target" groups, requested comments through various Federal Register notices, and pursued all of the regulatory procedures expected to inform a new regulatory scheme targeting newly and redeveloped properties. EPA had agreed with environmental groups through unrelated settlement agreements to promulgate final post-construction regulations no later than June 2013; however, it missed that deadline and in early 2014, EPA announced that it was "reallocating" resources away from the post-construction rulemaking effort. While no further action has occurred, EPA also has not announced that it will abandon its rulemaking efforts. In fact, EPA has attempted to impose similar post-construction mandates through its municipal stormwater permit program on a case-by-case basis.

This memorandum provides a comprehensive overview of EPA's NPDES stormwater permitting program and legal impediments to EPA's strategy either to directly regulate the amounts of impervious surface or stormwater flow characteristics (absent pollutant discharges) of runoff from otherwise currently unregulated properties, or to indirectly regulate such discharges through the Agency's municipal stormwater permitting powers.

pollutants ultimately being discharged from the MS4 system.[5] Finally, EPA followed the CWA Section 402(p)(5)-(6) process Congress has set forth to expand the original stormwater permit program. EPA's Phase II rule expanded EPA's construction and MS4 permit programs. *See* 64 Fed. Reg. 68,722 (Dec. 8, 1999).

### C. NPDES Permit Requirements and Development Considerations.

#### 1. Technology- and Water Quality-Based Effluent Limitations

The CWA and NPDES permitting program utilizes a two-part approach to developing permit conditions and requirements. Part 1 is a technology-based assessment of the industrial or construction activity generating a regulated discharge. Permit-writers are assisted in their technology-based assessment by certain "effluent limitations guidelines" (ELGs), through which EPA establishes nationally applicable minimum standards within specific industry categories to help ensure national uniformity. Once established, this "best available technology economically achievable" (BAT) standard replaces a permit-writer's "best professional judgment" (BPJ); the standard that must be applied in the absence of previously established ELG technology-based effluent limits.

The second part of the NPDES permit analysis is water quality-based. Water quality-based effluent limitations (WQBELs) are site-specific determinations that account for the current quality of the actual receiving water and a state's "use" classification for that water.[6] State or national criteria may be applied in the absence of site-specific data.[7] NPDES permit-writers are required to include WQBELs for situations in which a discharger has the reasonable potential to cause or contribute to an exceedance of a water quality standard. 33 U.S.C. § 1251(a)(3).

In sum, ELGs set the permitting floor by establishing nationally-applicable BAT. In the absence of an ELG, a permit-writer uses BPJ. Water quality issues then are addressed on a permit-specific basis, as necessary and appropriate to protect designated uses, if the technology-based standards are deemed insufficient to protect such uses.

But while EPA's BAT effluent limitations requirements apply directly to industrial and construction stormwater discharges, MS4s are subject to a different

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[5] Note that industrial and construction sites that discharge into a regulated MS4 are required to obtain a NPDES industrial stormwater permit as if they discharge directly into a water of the U.S. However, in addition, sites discharging into a regulated MS4 may also have to meet additional requirements or obligations established by the MS4 for all sites that discharge into the MS4 (simions M-1u8per quality-baoned i

planning requirements that EPA is otherwise attempting to force upon them. What is evident, however, is that the CWA does not appear to support EPA's top-down federal efforts to mandate pre-development hydrology standards for new or re-developed properties.