

August 7, 1997

Ms. Carol M. Browner
Administrator
United States Environmental Protection Agency
401 M. Street S.W.
Washington, D.C. 20460

Dear Administrator Browner:

Attached is the Report of the Small Business Advocacy Review Panel convened on July 19, 1997, for EPA's proposed rulemaking to revise the National Pollutant Discharge Elimination System (NPDES) regulations under Clean Water Act Section 402(p)(6). The proposed regulations would address currently unregulated discharges of storm water and provide regulatory relief to industrial facilities where industrial materials and activities are not exposed to storm water. The Panel was convened in accordance with section 609(b) of the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Members of the Panel include Thomas E. Kelly (Chair), EPA's Small Business Advocacy Chairperson; Michael B. Cook, EPA's Office of Water; Jere W. Glover, Chief Counsel for Advocacy, Small Business Administration; and Sally Katzen, Administrator of OMB's Office of Information and Regulatory Affairs. The Panel hereby transmits its Report for your consideration. The Report includes a summary of the comments received from representatives of the small entities that may be affected by this proposed rule and the Panel's findings with regard to certain regulatory flexibility issues. The full Panel Report is enclosed; this letter summarizes its main points.

It is important to note that the Panel's findings and discussion are based on the information available at the time this report was drafted. EPA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process and from public comment on the proposed rule. Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, environmentally sound and consistent with the statute authorizing the proposed rule.

Summary of Small Entity Outreach

The Storm Water Phase II proposed rule would apply to two types of small entities: small governmental jurisdictions and small businesses. The small businesses would include small construction

firms and small industrial facilities. Since 1992, EPA has been conducting extensive outreach to all stakeholders regarding this proposed rule, including small entities. For the past two years, EPA has worked closely with various stakeholders through the Federal Advisory Committee Act process. This outreach has increased the Agency's understanding of the nature of small entities and the challenges they face, and given their representatives an opportunity to actively participate in both the design and details of the draft proposed rule.

Even prior to the FACA meetings, however, EPA had conducted extensive public outreach in anticipation of the significant public interest in storm water regulations. The outreach began in 1992 with a Federal Register notice inviting comment, as well as several public meetings. The details of the Agency's outreach are included in the full Panel Report.

Recently, EPA has had additional contact with representatives of small entities that would be affected by the proposed rule as required by the Regulatory Flexibility Act. On April 10, 1997, EPA notified the SBA Chief Counsel for Advocacy that a Small Business Advocacy Review Panel would likely be required and provided the Chief Counsel with a list of suggested small entity representatives developed during EPA's previous outreach. The Chief Counsel provided EPA with some additional names. The Chief Counsel and EPA subsequently agreed on a final set of 29 small entity representatives and streamlining representatives (representatives of entities for whom the proposed rule may provide regulatory relief) to participate in this outreach. Many of these small entity representatives have been working closely with EPA in developing the proposed rule through the FACA process. A list of representatives is included in the enclosed Panel report.

The full Panel Report summarizes the comments, oral and written, received from each of the small entity representatives and appends their written comments. In light of these comments, the Panel considered the regulatory flexibility issues specified by RFA/ SBREFA and developed the findings and discussion summarized below.

Panel Findings and Discussion

Under the RFA, the Panel is to consider four regulatory flexibility issues related to the potential impact of the rule on small entities: (1) the type and number of small entities to which the rule will apply; (2) record keeping, reporting and other compliance requirements applicable to those small entities; (3) the rule's interaction with other Federal rules; and (4) regulatory alternatives that would minimize the impact on small entities consistent with the stated objectives of the statute authorizing the rule. The Panel's findings and discussion with respect to each of these issues are summarized below.

Type and Number of Affected Small Entities. As indicated above, the types of small entities to which the rule would apply include small governmental jurisdictions that own or operate a municipal separate storm sewer system (MS4) and small businesses. Small businesses include small construction firms and small industrial facilities. Tables 1, 2, 3, and 4 of the Panel report provide ranges that

reasonably indicate, given the available data, the number of small entities that may be affected by the proposed rule. The tables show that approximately 3,000 small government jurisdictions in urbanized areas would be covered by the rule and approximately 18,000 small government jurisdictions outside of urbanized areas could be covered if the NPDES permitting authority determined that they were discharging significant pollutant loadings. The rule may also affect up to 200,000 construction firms, 98% of which are small. EPA estimates, however, that there will be only 122,000 construction starts subject to the rule (i.e., on sites of 1 to 5 acres) by the year 2000, suggesting that not all 200,000 firms in the construction industry will be affected. The Panel also finds that “light” industrial facilities with no actual pollution discharge resulting from stormwater runoff (currently estimated at 40 to 75 percent of the roughly 400,00 such facilities) would incur additional burden by having to fill out a self-certification form to take advantage of the proposed “no exposure” exemption.

Recordkeeping, Reporting, and Other Compliance Requirements. The recordkeeping, reporting, and other compliance requirements associated with the construction component of the proposed rule would be similar to those required of discharges from larger construction sites under existing storm water regulations. However, the best management practice (BMPs) typically implemented for discharges from the newly regulated smaller construction sites would be less sophisticated and less expensive than those implemented for discharges from the larger construction sites already regulated. The proposed rule would provide the NPDES permitting authority with discretion not to require notices of intent (NOIs) in general permits for discharges from the newly regulated construction activities. NOIs are required for discharges from the larger, already regulated construction activities. The recordkeeping, reporting, and other compliance requirements for the municipal component of the proposed rule would be substantially less than those required from municipalities under the existing program for larger municipalities.

Operators of industrial facilities that claim no exposure to storm water would need to file a self-certification form to document their exemption from otherwise applicable permit requirements. An earlier version of the self-certification form would have required a facility to determine whether its discharge causes an “interference” with water quality standards. Small entity commenters believed this requirement would have been excessively burdensome. After discussions at the first meeting of the Panel and later discussions with the Urban Wet Weather FACA Committee, EPA deleted this requirement and substituted a simple question indicating the extent to which actions of the discharger to reduce exposure would increase impervious surface area by one acre or more. The answer to this question along with other information would enable the NPDES permitting authority to determine if the discharge would interfere with the attainment of water quality standards, but the burden of making this determination would not be placed on the facility.

Interaction with Other Federal Rules. The Panel received comments that the proposed rule may conflict with the requirements of the Clean Air Act, the Endangered Species Act, Section 404 of the Clean Water Act as administered jointly by the EPA and the Corps of Engineers, and EPA regulation requirements associated with the Great Lakes Initiative. Municipal representatives indicated

that street sweeping activities designed to reduce pollutants in urban run-off may create “dust” or “soot” that could cause a violation of the National Ambient Air Quality Standards for particulate matter. The Panel requests that the Agency further evaluate in its regulatory flexibility analysis whether this proposed rule would conflict with those federal rules identified by commenters and revise the rule to address such conflicts as appropriate.

Regulatory Alternatives. Also in response to small entity comments, OMB and SBA recommend that the preamble invite public comment on whether municipalities with populations of less than 1,000 located *within* an urbanized area should be exempted from coverage unless the NPDES permitting authority determines that their discharge produces significant adverse water quality impacts. The current draft proposal would treat all Tribes of less than 1,000 and municipalities of less than 10,000 located *outside* an urbanized area in this manner.

The Panel received many comments questioning the need to regulate construction activities that result in the land disturbance of 1 acre up to 5 acres. While the Panel has not thoroughly evaluated the merits of each of these concerns, the Panel recommends that the preamble to the proposed rule invite comments on alternatives to the proposed requirements for regulation of construction sites that result in the disturbance of 1 to 5 acres. The request for comments should include a discussion of concerns expressed by small entity representatives and suggestions they have made for addressing them.

The Panel also received comments from municipal and industrial representatives that requirements for construction activities undertaken by municipalities or industrial facilities and industrial facilities operated by municipalities should be incorporated within their respective permits (provided that the permits detail sediment and erosion controls) to avoid redundancy. The Panel recommends that EPA explore and request comment on this idea in the preamble of the proposed rule. The Panel finds that this option may be appropriate for municipalities or industrial facilities with individually-issued NPDES permits but may be administratively difficult to implement under NPDES general permits. The Panel also supports and encourages efforts to minimize paperwork burden on municipalities, which are ultimately responsible for the success of their storm water plans.

The Panel also received comments that the February 1997 draft of the no exposure provision would prevent facilities that undergo a “temporary operational change” or transportation facilities that provide “non-pollutant generating outdoor maintenance of vehicles” from certifying to no exposure. The Panel requests that EPA examine these comments, discuss

these comments with the Urban Wet Weather Flows Federal Advisory Committee, and revise the no exposure language to allow, to the extent possible, all facilities with no actual discharge of pollutants to make use of the no exposure certification.

Sincerely,

/S/

Thomas E. Kelly, Chair
Small Business Advocacy
Environmental Protection Agency

/S/

Sally Katzen, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

/S/

Jere W. Glover
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/S/

Michael B. Cook, Director
Office of Wastewater Management
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Enclosure