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 U.S. Environmental Protection Agency (EPA) requested comment on its proposed information collection request (ICR) concerning stormwater management, including discharges from newly developed and redeveloped sites. 74 Fed. Reg. 56,191. EPA plans to disseminate three separate questionnaires—one to owners, operators, developers, and general contractors of newly developed and redeveloped sites; one to municipal separate storm sewer system (MS4) owners and operators; and one to state permitting authorities—to collect detailed information about stormwater control practices, local regulations, and baseline financial information. The Associated General Contractors of America (AGC) appreciates the opportunity to submit these comments on the proposed ICR that EPA has titled “Industry Questionnaire,” which would affect general contractors.

Founded in 1918, AGC is a full-service national trade Association that works with and through a network of 96 state and local chapters throughout the United States. AGC represents more than 33,000 companies, including more than 7,500 of America’s leading general construction contractors, 12,500 specialty contractors, and 13,000 material suppliers and service providers to the construction industry. While AGC members are rarely engaged in the construction of single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include office and other buildings, schools, shopping centers, multi-family housing projects, industrial plants, airports, highways, bridges, ports, public transit systems, railroad lines, dams and other flood control facilities, underground utilities, pipelines, water and wastewater treatment facilities, tunnels, mining operations, and military and defense facilities. AGC members also prepare sites and install utilities in advance of, and in preparation for, the construction of single family homes.

The proposed Industry Questionnaire would require certain general contractors (i.e., those who are selected by EPA to complete it) to provide detailed technical information for up to 10 projects completed in 2009, including project type/size, stormwater management controls and associated costs, discharge permit forms, as well as company-wide financial information spanning the last five years. Construction companies would have to spend significant time, energy, and money to complete the survey.
As explained in detail in the comments below, AGC believes the proposed ICR is premature and unauthorized by law, as it presumes regulatory authority that does not exist; overly burdensome and misdirected, as it misapprehends the role that contractor’s play in the real estate development process; and ineffective in gathering data EPA believes it requires.

I. Legal Analysis

As a threshold matter, AGC believes that the proposed ICR is premature and that EPA must better articulate its statutory authority to develop the first-time national stormwater management regulations it has committed to promulgate by November 2012 (and which the proposed ICR is intended to support), as well as the Agency’s goals for those regulations. In its current form, the proposed ICR lacks justification, fails to meet the standards necessary for approval by the Office of Management and Budget (OMB), and targets improper sources for the information that EPA seeks.

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 Clean Water Act (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, AGC 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 municipal separate storm sewer systems (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. As a result, AGC believes that Congress did not grant EPA the authority to 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.

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” other sites for regulation, but only if the Agency specifically determines 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). Logically, this provision demands a case-by-case assessment and determination, which EPA has not yet made. However, 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 AGC does not agree), the Agency has not yet designated post-construction stormwater discharges as requiring permit 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). Hence, they best are categorized as “non-point” or diffuse stormwater discharges not otherwise subject to CWA permitting. AGC maintains that EPA does not currently have the authority to regulate all post-construction stormwater discharges and, therefore, it is not “necessary” for EPA to collect information about such discharges, as it would have no direct function or “practical utility.”

Nonetheless, even if we assume that EPA has authority to regulate post-construction stormwater discharges, the proposed ICR still fails to satisfy the other PRA prerequisites for OMB approval, as described below.

The vast majority of general contractors who might be presented with this survey would be overly burdened in their efforts to complete it. AGC members’ estimated cost and time calculations far exceed the EPA’s preliminary estimates of 53 hours per response. According to AGC members, the information requested would have to be gathered or generated mostly through multiple outside, third-party sources.

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1 Comparing Sections 402(p)(2)(B) with 402(p)(2)(C) and (D) illustrates this point. Had Congress intended 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, rather than the more limiting term “from” MS4s. In addition, Congress set forth the only federal authority over MS4 influent by prohibiting non-stormwater discharges into MS4s. It did not provide EPA with expanded authority over other discharges into MS4s by, for example, allowing EPA to designate certain stormwater discharges into MS4s that the Agency could regulate itself. Rather, Congress specifically directed EPA to develop a permit program for those discharges of pollutants from MS4s. See Section 402(p)(3). In addition, EPA has promulgated separate technology requirements for direct industrial discharges and MS4 discharges, illustrating the Agency’s awareness that its authority over direct industrial discharges is distinct—and actually differs—from its authority to regulate MS4 discharges. Id.

2 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.”)
(see below for time estimates). What is more, the required efforts would exponentially increase for companies that operate in more than one location.

Simply stated, the construction industry (i.e., general contractors) is not an appropriate target for the proposed ICR, because that industry is not responsible for designing, financing, 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 general 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.

In addition, for the most part, general contractors would not be able to provide specific design details on the permanent stormwater controls that were used on past projects. Such information may be proprietary to the owner and/or the general contractor may lack the authority to require the holders of this information to produce same. AGC estimates it would take at least three weeks (120 to 150 hours) for company personnel to connect with numerous design engineer firms and other individuals to evaluate the potential to secure the information that EPA is contemplating.

Because construction contractors are not responsible for designing, financing or maintaining 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.3

II. AGC Recommendations

Thousands of the Association’s members currently have and will seek coverage under a general permit for the discharge of construction stormwater runoff. AGC members are required to comply with the National Pollutant Discharge Elimination System (NPDES) permitting process and they would be directly affected by any national rulemaking to strengthen the stormwater program.

The public frequently misapprehends the construction contractor’s role in real estate development, and may therefore blame such contractors for environmental problems not of their making, or expect more environmental improvement than contractors can deliver. A significant number of the builders of individual family homes are also real estate developers. The same is not, however, true of the constructors of office buildings, hospitals, schools, highways, bridges, pipelines, power plants or other public or

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3 Interestingly, the cost data and design drawings that GCs could provide (with any accuracy) has been expressly excluded from the information that the EPA is seeking. See footnote on page 2 of the survey supporting document at http://www.epa.gov/npdes/pubs/survey_sup.pdf, which states: “EPA is not collecting data on erosion control activities or stormwater management activities during the active construction phase through this questionnaire.”
private infrastructure. With rare exceptions, such constructors are not real estate developers, or land use planners, or otherwise involved in deciding what to build, or where to build it. Nor are they the architects or other design professionals that determine how structures will appear, or how they will perform. Construction contractors are typically limited to implementing public and private decisions that others have made. Indeed, they are contractually bound to meet specifications that others write. Within their direct control lie the means and methods of construction, but not the entire range of decisions related to real estate development.

AGC recognizes that CWA Section 308 provides EPA with broad discretion to collect information from the owner or operator of any point source to carry out the objectives of the Act. 33 U.S.C. 1318(a). But AGC points out that this discretion is not limitless. Although contractors are point source dischargers subject to CWA Section 308 authority, EPA has not provided sufficient justification for issuing the proposed ICR to general contractors. For all of the reasons outlined in the section above, the Industry Questionnaire should not be approved as part of the proposed ICR.

In the alternative, if EPA moves ahead with the Industry Questionnaire, AGC strongly urges EPA to breaks up the questionnaire to best represent the different parties to the construction and development process. To this end, 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. Unless EPA acts accordingly, the Agency will ultimately collect an abundance of detailed general contractor financial information (Section B) along with a lot of incomplete project information (Section C) and no way to correlate the two. Accordingly, the majority of the cost data EPA is asking for via this survey will remain incomplete or (even worse) be potentially misleading and/or result in a very costly undertaking for those general contractors who attempt to satisfy the request. AGC predicts that EPA will have much difficulty trying to decipher the information it collects from general contractors, and it will cost the Agency time and money to sort it all out.

As currently written, most AGC members have indicated that 60 days would not provide adequate time to complete the Industry Questionnaire. AGC suggests that a deadline of 120 days would be more reasonable.

III. Section-by-Section Comments

The survey is presented in four sections covering the following topic areas (AGC of America comments follow each section heading).

➢ Section A: General Information

Page 11: A-4, 1. EPA has opted to group together all owner/developers and general/lead contractors into one category for purposes of completing the survey. As stated above, it would be more appropriate to distinguish between these two entities and prepare separate questions for each group, thereby eliciting much more valuable, and on-point information.

Page 11: A-4, 2. AGC does not understand the following definition: “Not a pipeline or other utility related activity where the original land cover was replaced at the end of the project”. It would seems that all
below ground pipe / utility projects would have original land cover replaced at the end of the project – even above ground pipelines would have land cover restored / stabilized after construction. This definition is unclear.

- **Section B: Firm Financial Information**

In general, the financial condition of a general contractor has nothing to do with the installation of permanent best management practices (BMPs) because the design is almost always controlled by the project owner or municipality and the cost is ultimately born by the end user. As such, the financial information from a general contractor (GC) would serve no obvious purpose because the GC will never be paying out-of-pocket for the permanent BMPs. Therefore, EPA should eliminate Section B of the survey for general contractors.

Specifically, permanent BMPs are designed at the beginning of the planning and budgeting process based on local municipal requirements; contractor profit or loss is determined at the end of a project. There is no connection. Extra GC profit at the end of a project does not mean that additional permanent water quality BMPs can suddenly be added.

Significantly, the financial condition of a general contractor has absolutely nothing to do with his ability to control stormwater discharges from newly developed and redeveloped land. There are contracting processes in place (across the country) that allow bidders to spread the costs associated with meeting certain regulations to the various contract bid items when preparing bids/proposals. How much a company is worth or how much work they've had recently would make no difference to the bidding process. The cost of installing permanent BMPs would become part of the contractors bid and ultimately be an additional cost to the owner of the project.

In the alternative, EPA should consider scaling back the amount of financial information that the Agency is collecting from general contractors. For example, for B-10 to B-13, EPA could request percentages instead of total values, which would significantly reduce the reporting burden on individual companies. In addition, EPA could require contractors to produce financial information for only the same “up to 10 projects” that the Agency is targeting under Section C.

On a different note, several AGC members commented that it is unclear in this section EPA is asking for financial information from a company’s site-specific location, from its district office, or from an entire corporation. This is an important distinction because a district in a very large company may perform civil and infrastructure work all over the states and it would be difficult to pull these numbers together. Similarly, the corporation may be active in more than one country and it man not be possible to pull together financial information from outside the United States.

**Page 17: B-13.** What is the definition of “full time equivalent”?

- **Section C: Project Level Information for Owners/General Contractors**

**Page 18: C-3.** The following question triggers the need to provide additional project information: “Was your establishment the “owner/general contractor for any project…” As currently worded, it is unclear if
EPA means the owner “and” general contractor or the owner “or” general contractor. Some GCs who receive the survey may answer “no” to Question C-3 because they do not “own” any project, and so they will skip to Section D. If, however, EPA means to say “or” general contractor, then those same survey GC recipients would be expected to fill out Section C of the survey.

Page 19: C-5. To clarify the applicability of the survey, EPA should either include/preclude NOCs. Specifically, in California, Caltrans uses Notices of Construction (NOCs) instead of Notices of Intent (NOIs). Other states may have a similar set-up.

Page 19: C-6. This is information that EPA can already get from the states, and does not have any impact on the purpose of the questionnaire, and should not be a requirement. Moreover, companies are only required to keep the NOI for three years from project completion. This questionnaire is going back five years, so data may not be available.

Page 19-26: C-8, C-25.

The GC permit holder often has very little influence or information regarding the design of the permanent BMPs. Permanent BMP planning is usually done at the very beginning of the planning and zoning approval process. AGC members can have trouble even getting the proprietary permanent BMP design information from Civil Engineers for inclusion in a SWPPP.4

Furthermore, the owner/developer will often separate out the site development (permanent BMPs included) and landscaping work from the vertical construction and contract it separately. A large percentage of GCs won’t have access to that information or they will only be able to provide partial information that the EPA will not be able to correlate with anything. The only reliable place to get complete, meaningful project information regarding the actual cost of the projects or the permanent water quality BMPs is solely from the owner/developer.

Almost all of the questions in Section C, requiring project-specific information on “up to 10 projects,” would be best answered by the owner/developer (see below). Most of the information requested is not even available to a contractor (such as design time & design calculations) and may be proprietary to the Owner. Contractors also will not have the authority to require the holders of this information to produce same. It would be very difficult, if not impossible, to gather this detailed information for 10 past projects.

AGC members estimate that Section C alone (for all 10 projects) would take approximately three (3) weeks to complete because the GC would have to go back to each project’s civil engineering firm/design engineer to get nearly all of the technical information that EPA is requesting [such as soil type (C-12), percolation rates (C-13) and numeric post construction performance standards (C-16)] and that firm would most likely charge the GC for the services of completing the forms. Just chasing down possibly 10 different civil engineering firms would be a challenge in itself. Most projects would have different engineers even it was the same design firm. AGC member also pointed out that many engineers have lost jobs or moved to different companies in the past three years. In addition, some of the information requested is not available from the project drawings.

4 EPA’s SWPPP preparation guidance document recognizes this information gap as noted on page 13: “The topic of designing, installing, and maintaining permanent or post-construction stormwater controls, although a requirement, is beyond the scope of this SWPPP guide.”
More specifically—

- **C-8**: Phase Duration – GC’s usually are not privy to land acquisition, land [site] development and design phasing information. [NOTE: Does EPA mean “Site Development,” which is a more commonly-recognized term by industry? It comes after design and is only partially completed prior to building construction. Is the Agency looking to elicit information on the actual time spent? “Site development” would comprise the entire time of construction from the first earth disturbing activity until final stabilization (i.e., paving, landscaping, and grassing).]

- **C-9, C-10 & C-11**: Most of this information is more readily accessible to the design engineer for a project. It is not always placed on the construction plans, which are the only documents available to the contractor. It may or may not be included in some of the project permits. (C-10 most likely to be on each site plan sheet for the SWPPP.)

- **C-12**: Information not likely to be available to the contractor, depending on the project. But the contractor may be able to find the information through any NRCS office.

- **C-13**: This a design issue – and because large projects can have widely varying sites with very different percolation rates, EPA should consider asking for the average rate of the most common pervious areas at the site.

- **C-14, 15**: MS4 information: Public information, but would require GC to do research.

- **C-16**: This is a design issue.

- **C-17**: Unless the contractor is involved in a design/build project where the designer and contractor are working closely together, this would not generally happen, unless there is a specific intent to determine cost up front – do not believe these things were commonly done 2005 – 2009.

- **C-20**: If the practices were designed and placed on the plans, they would most likely have been implemented. This is most likely a design issue.

- **C-21**: Contractor would not have access to this information or decision process.

- **C-22**: Contractor does not have this information.

- **C-24**: May be significantly proprietary according to device and where the location might be within the US.

- **C-25**: Assuming you mean “Fill out one worksheet (see pages 27-51) for each applicable stormwater system component indicated in C-23….” Again most of this information is applicable to the owner/designer.

- **C-30**: May not be available and raw land cost may not be something the general contractor would have available information to verify.

**Pages 27-51.** Cost worksheets for the following “post construction stormwater control system components”—

- Detention basins
- Curbs and Gutters/Storm Sewers
- Catch Basins
- Swales
- Constructed Wetlands
- Underground Detention
- Underground Infiltration
- Manufactured Devices
- Tree Boxes
- Green Roofs
• Bioretention
• Infiltration basins/trenches/dry wells
• Permeable pavement

According to AGC members, general contractors would need to seek assistance from their project engineers to complete the technical portions of these worksheets, such as detention/retention basin design capacity, curb and gutter runoff design and flow rate capacities and design storm depths. This would be a cost burden to those who have not completely retained this information (especially for a project completed in 2005 through 2008), or for those who do not understand or know where to find such information, even for more recent projects.

It is also worth noting that costs for installation of stormwater controls may be difficult to separate from total project costs, because separate accounts are not usually established for stormwater controls. The detailed cost breakout requested on EPA’s proposed Industry Questionnaire are most likely not the same sort of cost breakout that would typically be included on a contractor’s invoices.

Also, the Industry Questionnaire does not include an individual worksheet or line item for “non-structural BMPs” such as operation and maintenance costs associated with site inspections, recordkeeping and paperwork required by the NPDES and state permits after the construction has started. In most cases, this is an outside and subcontract burden on the owner/operator or contractor.

Pages 27-51. General comments—

• Capital Costs: The contractor would not know engineering and overhead costs, land cost or value and most likely would not know “other capital costs”.
• Active Construction Usage: Also, please define terms in “Active Construction Usage” … “was this unit installed as a part of the runoff controls during construction.”
• Design Basis: Contractor would not know this information and generally would not have access
• Technical Specifications: Contractor would not know this, except perhaps for pond acres.
• Operation and Maintenance Costs: There is no way for a contractor to know how much it costs to operate and maintain such a system, what types of maintenance are required, etc.

Pages 53: C-27 to C-33. Financial Information section—

Much of this information would have to be provided by the owner and most owners would be unwilling to share that information with GC. Many AGC members indicated that they would not want to even ask for it as many past clients are potential future clients and putting them through this could jeopardize future work.

Page 53: C-30.

• Land Acquisition phase: Contractor does not generally have access to this information.
• Land Development phase: Contractor would likely have information as to development costs for actual construction; however, not for impact analysis, interest or other financing costs (for the project owner). They would only have information for their own costs. Impact analysis is a part of design, not development.
• Project Construction: some permitting costs (in FL) are paid by the owner / developer and not by the contractor, so he may not have access to all of this information. Those are generally for the
stormwater management systems (Environmental Resource Permits) as that permit affects ultimate design of the management system. Building permits and NPDES permits are obtained just prior to construction and so are generally paid by the contractor.

- Completion, Sale, etc. – Contractor would not have access to this information.

**Page 55: C-31.** Contractor does not have access to this information, except for their own portion of the work (e.g., construction phase).

- Miscellaneous Comments

  **Page 3:** When to Complete the Questionnaire – “No later than one week of the due date” should read “no later than one week prior to the due date” if that is your intended deadline. “Of” is not the correct word to use in this sentence.

  **Page 6:** last bullet, last sentence – awkward wording.

  **Page 8:** Green roofs: modify to “… are vegetated and reduce runoff from the rooftop by absorbing and filtering some stormwater and slowing stormwater flow into roof drains.”

  **Page 8:** Industrial: modify to “designed for industrial purposes such as factories and other manufacturing” (i.e., concrete and asphalt plants are not factories).

  **Page 8:** MS4 – modify to: “… designed or used to collect or convey and treat stormwater…”

AGC appreciates the opportunity to comment on the proposed ICR. Thank you for taking our concerns into account. If you have any questions, please contact me at pilconisl@agc.org or (703) 837-5332.

Sincerely,

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