POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, et al.,	:	
Appellants,	:	
	:	**PCHB NOS. 07-021, 07-026, 07-027**
v.	:	**07-028, 07-029, 07-030**
	:	**07-037, and**
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	:	**PCHB NOS. 07-22, 07-23, 07-31**
Respondent	:	
CITY OF SEATTLE, et al.,	:	
Intervenors	:	

JOINT AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES ON SPECIAL CONDITION S4

The National Association of Clean Water Agencies (NACWA) and the National Association of Flood and Stormwater Management Agencies (NAFSMA) (collectively the "*Amici*") submit this Brief in support of the dispositive motions on Special Condition S4 filed by the municipal permittees participating as Appellants and Intervenors in the above-captioned Phase I and Phase II stormwater permit appeals. In accordance with the Board's order dated January 9, 2008, the *Amici* have confined their arguments in this brief to the federal law aspects of the legal issues identified for consideration at the Condition S4 Hearing in the Board's Third Prehearing Orders dated December 11, 2007.

The *Amici* sought leave to submit this brief not only because they are involved in the administration of stormwater utilities and the implementation of stormwater management programs mandated by § 402(p) of the Clean Water Act ("CWA"), 33 U.S.C. 1342(p), and have

played an active role in the development of U.S. EPA's stormwater regulatory program since its inception in 1990, but also because the question of what federal law requires of municipal separate storm system ("MS4") permittees and what the "maximum extent practicable" ("MEP") standard really means have been the subject of conflicting interpretations in various state and federal tribunals over the past two decades. The *Amici* are particularly concerned to ensure that the intent of Congress in fashioning the separate and distinct standard of compliance for MS4 discharges is not undermined in the course of such litigation around the country.[1]

I. CONGRESS DID NOT INTEND THAT MS4 PERMITS SHOULD MANDATE STRICT COMPLIANCE WITH STATE WATER QUALITY STANDARDS.

The 1987 amendments to the CWA Act created a new and separate standard requiring municipal stormwater permits to include controls to reduce pollutants to the "maximum extent practicable," in place of the requirements that apply under the Act to all other types of discharges. In order to understand the place of the MEP standard in the statutory scheme, it is necessary to review the basic types of effluent limitations established prior to 1987. Section 301 of the CWA, as originally enacted in the Federal Water Pollution Control Act Amendments of 1972, established two distinct types of controls on point source discharges to waters of the United States, requiring both "technology-based" and "water quality-based" effluent limitations. The first type of controls involves a "series of progressively more demanding technology-based standards," applicable to different categories of dischargers and subject to different statutory deadlines. *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). Each of these standards involves some consideration of economic and technical feasibility.

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[1] The question whether MS4 discharges are required to comply with state water quality standards, TMDLs and/or numeric effluent limitations has been the subject of protracted litigation in state and federal administrative and judicial tribunals in Arizona, California, Alaska, Oregon, Minnesota, Vermont, North Carolina, and Washington D.C. The conclusions reached in these proceedings have varied significantly. For purposes of these appeals, as explained below, the *Amici* maintain that the Ninth Circuit Court of Appeals has clearly articulated the controlling precedent with regard to what federal law requires.

Section 301(b)(1)(C) of the Act requires that discharges must also achieve "any more stringent limitation" necessary to meet water quality standards established pursuant to state law. In contrast with technology-based standards, such water quality-based limitations must be achieved without regard to feasibility or cost. *See Ackels v. U.S. EPA*, 7 F.3d 862, 865 (9th Cir. 1993). The legislative history of the 1972 Act made it clear that § 301(b)(1)(C) requires whatever level of effluent control is needed to implement water quality standards, "without regard to the limits of practicability." S. Rep. No. 92-414, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3710.

The new standard for municipal stormwater discharges established by the 1987 CWA amendments must be understood in the context of this statutory framework. Congress explicitly stated in CWA § 402(p)(3) that *industrial* stormwater discharges would continue to be subject to all applicable requirements of § 301, including both technology-based and water quality-based effluent limitations. Municipal stormwater discharges, on the other hand, were only required to reduce the level of pollutants to the "maximum extent practicable." Congress was fully aware of the Act's prior legislative history and the significance of the term "practicable" as it had previously been used in other sections of the statute. *See United States v. Hanousek*, No. 97-30185, 1999 U.S. App. LEXIS 4585, at *7 (9th Cir. Mar. 19, 1999) ("Congress is presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted").

When it created this new a separate standard for municipal stormwater discharges, Congress was aware that the appropriate means of regulating stormwater point sources had been a difficult and contentious issue ever since the CWA was enacted in 1972. Because of the unique nature of stormwater runoff, which varies tremendously in terms of the frequency, magnitude and duration of flows and the amount and types of pollutants it contains, EPA had attempted to regulate such discharges differently from other point sources. EPA recognized that such discharges were ill-suited to the traditional end-of-pipe controls that are applied to industrial point

sources and publicly-owned treatment works. Due to the intermittent, variable and unpredictable nature of municipal stormwater flows, the Agency believed that the problems caused by such discharges were better managed through local controls such as the imposition of specific management practices to prevent pollutants from entering the runoff. *See* 55 Fed. Reg. 49416, 49419 (Dec. 7, 1988).

EPA's first stormwater regulations, promulgated in 1973, took the approach of exempting any stormwater runoff that was not contaminated by industrial or commercial activity. 38 Fed. Reg. 13530 (May 22, 1973). Those rules were challenged by NRDC, and the D.C. Circuit agreed that EPA did not have the authority to exempt any point source discharges from regulation under the National Pollutant Discharge Elimination ("NPDES") program. *NRDC v. Train*, 396 F.Supp. 1393 (D.D.C. 1975), *aff'd sub nom. NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

In response to that decision, EPA published new stormwater regulations in 1976 that substantially increased the number of stormwater discharges subject to NPDES permit requirements. 41 Fed. Reg. 11307 (March 18, 1976). After those rules had been revised in 1979, and again in 1980, they were challenged in several courts by a number of major trade associations and environmental groups. Eventually, all of those petitions for review were consolidated in the D.C. Circuit Court of Appeals. *NRDC v. EPA*, 673 F.2d 392 (D.C. Cir. 1980).

After two years of negotiations, EPA entered into a settlement that required it to promulgate an entirely new regulation intended to strike a balance between environmental concerns and the practical limitations of issuing individual permits for millions of stormwater point sources. *See* 47 Fed. Reg. 52073 (Nov. 18, 1982). The main focus of the proposal was to limit the definition of stormwater "point source" and to reduce the application requirements for stormwater permits.

The final rule published in 1984 distinguished between two types of storm water discharges. Those sources located at an industrial plant would be subject to normal permitting requirements, while other sources would be subject to simplified application requirements. 49

Fed. Reg. 37998 (Sept. 26, 1984). These rules generated a large number of post-promulgation comments, and once again lawsuits were filed. Revisions were proposed in 1985. 50 Fed. Reg. 9362 (Mar. 7, 1985). After 132 comments were received, EPA reopened the comment period, and suggested the use of group applications as an alternative to requiring individual NPDES permit applications. 50 Fed. Reg. 32548 (Aug. 12, 1985).

It was against this backdrop of regulatory confusion and continuous litigation over the legal requirements for stormwater discharge permits that Congress began to consider changes to the law. Ultimately, these deliberations culminated in the 1987 CWA amendments, which provided relief from applicable permit deadlines and created an entirely new standard of controls for municipal stormwater discharges.

Legislative efforts leading to the Water Quality Act of 1987, P.L. 100-4, actually began with hearings in the Second Session of the 97th Congress in 1982. Further activity occurred in the 98th Congress (1983-84), and bills introduced at that time were the basis for the final legislation enacted in the 99th and 100th Congresses. During the First Session of the 99th Congress, the Senate and House each passed bills (S. 1128 and H.R. 8) which were then referred to conference. Although each of these bills contained provisions dealing with stormwater, the exemption for municipal storm sewers was added during the conference committee sessions and embodied in the final bill, S. 1128, reported by the conferees in October 1986. The first discussion of the new permit requirements for municipal stormwater discharges therefore appears in the Conference Report on S. 1128, H. Rep. No. 99-1004, 99th Cong. 2d Sess. (1986), and in the subsequent floor debate that occurred during October of 1986.

The final bill was passed unanimously by both houses, but vetoed on Nov. 6, 1986 after Congress had adjourned. The 100th Congress moved quickly to pass identical legislation in January 1987 (H.R. 1). This bill was vetoed again on Jan. 30, 1987, but the veto was overridden and the bill was enacted as P.L. 100-4. Additional debate relating to the final bill occurred in both houses during January and February of 1987.

The legislative history relating to § 402(p) is not extensive, but it is clear. The provision reflects a legislative compromise, forged in the conference committee, that created a partial exemption for MS4s from normal permitting requirements. This exemption provided relief from the general requirements of the Act relating both to the deadlines for issuing permits and to the nature of the controls to be imposed. In the debate on the original version of the bill, on October 16, 1986, Sen. Stafford explained the conference committee's rationale for creating a phased approach for the imposition of controls on municipal discharges:

> Mr. President, I would like to explain to my colleagues why a little more time is needed to develop a comprehensive municipal storm sewer program. These permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees:
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> > These are not permits in the normal sense we expect them to be. These are actual programs. These are permits that go far beyond the normal permits we would issue for an industry because they in effect are programs for stormwater management that we would be writing into these permits.

132 Cong. Rec. 32381 (1986) (remarks of Sen. Stafford), *reprinted in* 2 *A Legislative History of the Water Quality Act of 1987* (Committee Print compiled for the Senate Committee on Environment and Public Works), 617-18 (1988) (emphasis added) [hereinafter *Legis. Hist.*].

Other passages in the legislative history demonstrate the intention of Congress to create a new and separate control standard for municipal stormwater discharges. For example, during the Senate debate prior to re-enactment of the bill on January 14, 1987, Sen. Durenberger provided an extensive explanation of the stormwater provisions in the bill and the special treatment afforded to municipal sources:

> The Federal Water Pollution Control Act of 1972 required all point sources, including storm water dischargers, to apply for NPDES permits within 180 days of enactment. Despite this clear directive, EPA has failed to require most storm water point sources to apply for permits which would control the pollutants in their discharge.
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> The conference bill therefore includes provisions which address industrial, municipal, and other storm water point sources. I participated in the development of this provision because I believe that it is critical for the Environmental Protection Agency to begin addressing this serious environmental problem.

> The bill establishes priorities, deadlines, and permit requirements for storm water point sources. It affords municipal and nonindustrial dischargers some relief from the 1972 permit application requirements.
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> . . . . .
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> A permit for a municipal separate storm sewer . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the storm water discharge.

133 Cong. Rec. 1279-80 (1987) (remarks of Sen. Durenberger) (emphasis added), *reprinted in* 1 *Legis. Hist.*, *supra*, at 391. During the House debate on January 8, 1987, Rep. Roe explained that:

> Another important provision concerns management and control of municipal and industrial storm water discharges. The bill establishes a mechanism to address the major problems associated with discharges from storm sewers through a permitting procedure and the development and implementation of management practices, control technologies, and design and engineering methods.

133 Cong. Rec. 1006 (1987) (remarks of Rep. Roe), *reprinted in* 1 *Legis. Hist.*, *supra*, at 559. Each of these statements by sponsors of the 1987 amendments make it clear that all of the "controls" required by the Act for MS4 discharges are governed by the MEP standard, including both the "management practices" explicitly described and any "other provisions" that EPA determines to be appropriate for the control of pollutants in MS4 discharges.

II. THE NINTH CIRCUIT HAS CONFIRMED IN A SERIES OF DECISIONS THAT MEP IS THE ONLY STANDARD APPLICABLE TO MS4 DISCHARGES

The Ninth Circuit Court of Appeals has ruled on three separate occasions that MEP is the only standard that applies to MS4 discharges. In *Natural Resources Defense Council, Inc. v. U.S. EPA*, 966 F.2d 1292 (9th Cir. 1992) ("*NRDC*"), the court was presented with a challenge to EPA's implementing regulations for "Phase I" of the stormwater permit program, including the Agency's decision not to require minimum criteria or performance standards for municipal stormwater discharges. In ruling against the petitioners, the court summarized the law as follows:

> Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge.*

966 F.2d at 1308. In response to the Petitioner's objection that the Phase I regulation contained no minimum criteria or performance standards for MS4 discharges, the Court concluded that Congress gave EPA the discretion to determine what controls are necessary:

> *Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements.* . . . NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. Congress could have written a statute requiring stricter standards, and it did not.

Id. (emphasis added).

Seven years later, in *Defenders of Wildlife v. Browner*, 197 F.3d 1035 (9th Cir. 1999), several environmental groups objected to the MS4 permits issued to five Arizona municipalities, arguing that they must contain numeric limitations to ensure strict compliance with state water quality standards as required by CWA § 301(b)(1)(C). The Court disagreed, holding that the text of CWA § 402(p)(3)(B), the structure of the Act as a whole, and the Court's own precedent "all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with" § 301(b)(1)(C). 191 F.3d at 1166. In response to Petitioner's argument that the statute was ambiguous, the Court reasoned that "Congress' choice to require industrial storm-water discharges to comply with [CWA § 301], but not to include the same requirement for municipal discharges, must be given effect." The Court concluded that § 402(p)(3)(B) "replaces" the requirements of § 301 with the MEP standard for MS4 discharges, and that it creates a "lesser standard" than § 301 imposes on other types of discharges. *Id.* at 1165. If § 301 continued to apply to MS4 discharges, the Court reasoned, the "more stringent" requirements of that section would always control. *Id.* at 1166. The requirement to control pollutants to the "maximum extent *practicable*" is a "lesser standard" than the water quality-based effluent limitations imposed by § 301(b)(1)(C), because water quality standards must be met "without regard to the limits of practicability." *Id.* at 1163, citing *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990) and *Ackels v. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993).

The court also observed, in *dicta*, that the MEP standard gives EPA the discretion to

include "such other provisions as the Administrator determines appropriate for the control of pollutants," and thus allows the "discretion" to require strict compliance with water quality standards. 191 F.3d at 1166. However, that discretion is necessarily confined by the limits of practicability imposed by the first clause of § 402(p)(3)(B)(iii). In other words, EPA may require an MS4 permittee to comply with water quality standards, or it may prohibit any exceedance of those standards, only if such a provision is "practicable."[2]

With regard to the permits at issue in these appeals, the Department of Ecology ("Ecology") has stated that it originally intended to hold new discharges to a higher standard than existing discharges: existing discharges were to meet the MEP standard by implementing the Stormwater Management Program ("SWMP") plus any Total Maximum Daily Load ("TMDL") requirements, while new discharges were to not to cause or contribute to a violation of water quality standards ("WQS"). After receiving comments on the draft permit, Ecology decided to remove the distinction between new and existing discharges, and final Condition S4.A of the permits now prohibits any discharge that would violate any WQS, including toxicant standards, sediment criteria, and dilution zone criteria. Condition S4.B of the permit "does not authorize" a violation of the state's surface water, ground water or sediment management standards. *See* "NPDES General Permit Fact Sheet for Small Municipal Separate Storm Sewers in Western Washington" (March 24, 2006) at 28-29 ["Fact Sheet"].[3] It appears that Ecology based this requirement, in part, on a misreading of the *dicta* in *Defenders*. In summarizing the Ninth

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[2] The Ninth Circuit's decision in *Defenders* was followed by the U.S. District Court in Minnesota in *Mississippi River Revival, Inc. v. City of St. Paul*, 2002 U.S. Dist. LEXIS 25384 (N.D. Minn. 2002). In that case, several environmental groups brought a citizens suit against the City of St. Paul alleging, *inter alia*, that the city had violated its permit, the CWA, and U.S. EPA's permit regulations by causing or contributing to exceedances of state water quality standards for fecal coliform, mercury and phosphorus. Citing *Defenders*, the court ruled that "[w]hile CWA requires permits to contain conditions that ensure that water quality standards are met, the CWA specifically exempts municipal storm water permittees from that requirement."

[3] Identical discussions appear in the Eastern Washington Phase II Fact Sheet (March 22, 2006), at 22-23, and in the Phase I Fact Sheet for Large MS4s (March 22, 2006), at 25-26.

Circuit's opinion at page 30 of the Fact Sheet, Ecology suggests that:

> Although the Clean Water Act does not require municipal storm sewer discharges to comply strictly with [33] U.S.C. § 1311(b)(1(C), [33] U.S.C. § 1342(p)(3(B)(iii) states "[p]ermits for discharges from municipal storm sewers . . . shall require . . . such other provisions as the Administrator . . . determines appropriate for the control of such pollutants" (emphasis added) [*sic*].
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> This provision gives the Ecology discretion to determine whether strict compliance with [33] U.S.C. § 1311(b)(1)(C) is appropriate. In these permits Ecology has adopted an interim BMP based approach towards meeting the goals of the Clean Water Act and eventual compliance with water quality standards.

Fact Sheet at 30.[4] By omitting the portions of the language from CWA § 402(p)(3)(B)(iii) indicated by the ellipses in its quotation, Ecology erroneously concludes that the "maximum extent practicable" standard in the first clause of § 402(p)(3)(B)(iii) does not act as a limitation on each of the controls specified in the remainder of the sentence. However, as explained above, the final clause gives the Administrator (and delegated state permitting agencies) the discretion to include "other provisions" in MS4 permits only to the extent that such provisions are "practicable."[5]

Ecology's reliance on U.S. EPA's "Interim Permitting" policy to support its misreading of what federal law requires is similarly misplaced. What that policy states is that, "where adequate information exists," U.S. EPA may incorporate more specific conditions or limitations to meet water quality standards "as necessary and appropriate." U.S. EPA, "Interim Permitting Approach for Water-Quality Based Effluent Limits in Storm Water Permits" (Sept. 1, 1996), quoted in Fact

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[4] *Accord* Eastern Washington Phase II Fact Sheet at 24; Phase I Fact Sheet at 26.

[5] A California state appeals court similarly misconstrued the Ninth Circuit's final *dicta* in *Defenders* by suggesting that it was consistent with the view that Congress intended to give EPA the authority to impose standards "stricter than" MEP. *Building Industry Ass'n of San Diego County v. State Water Resources Control Board*, 124 Cal. App. 4th 866, 886 (4th Dist. 2004). The Ninth Circuit did not say this. It responded to the Intervenors' contention that EPA may not require strict compliance with WQS, through numerical limits or otherwise, and concluded that EPA had the discretion to determine what pollution controls are appropriate and to require either strict compliance or less than strict compliance with WQS. The court did not suggest that such controls could go beyond the limits of practicability.

Sheet at 30-31.[6] The use of such conditions only "as necessary and appropriate" is fully consistent with the statutory requirement in CWA § 402(p)(3(B)(iii) that such conditions must be "practicable."[7] In the permits at issue in these appeals, Ecology has made no demonstration that "adequate information exists" to determine that MS4 discharges can achieve strict compliance with WQS, or that the prohibition against any violation of WQS set forth in Condition S4.A is "necessary and appropriate."

The Ninth Circuit returned again to the issue of municipal stormwater regulation in *Environmental Defense Center v. EPA*, 319 F.3d 398 (9th Cir. 2003), *vacated, rehearing denied by, and amended opinion issued at* 344 F.3d 832 (9th Cir. 2003) ("*EDC*"), in which the court considered three consolidated appeals of U.S. EPA's "Phase II" stormwater regulation on twenty-two constitutional, statutory, and procedural grounds. Although it remanded certain procedural aspects of the rule concerning its general permitting scheme, the court was not directly called upon to interpret the MEP standard or to consider the applicability of water quality standards to MS4 discharges. Unfortunately, the original opinion issued by the court on January 14, 2003 included seriously misleading *dicta* which suggested that all MS4 permits must insure compliance *not only* with the MEP standard but *also* with all other requirements of the Act. The *Amici* herein (joined by the National League of Cities and the National Association of Counties) filed a brief in support of U.S. EPA's subsequent petition for rehearing, asking the court to correct this *dicta* and conform its opinion to the controlling precedent established by the court in *Defenders* and *NRDC*.

The *Amici* argued, specifically, that the offending *dicta* in the original opinion (which is quoted at length below) appeared to assume, first, that MS4 discharges are subject to the "general

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[6] Eastern Washington Phase II Fact Sheet at 24; Phase I Fact Sheet at 26-27.

[7] In its discussion of the "Interim Permitting" policy in the preamble to its Phase II stormwater permit regulations, U.S. EPA explains that the imposition of any "additional requirements" for small MS4s "should be guided by its equitable share based on a variety of considerations, such as *cost effectiveness*, proportionate contribution of pollutants, and *ability to reasonably achieve* wasteload reductions." 64 Fed. Reg. 68722, 68753 (Dec. 8, 1999). Financial and technical feasibility are the two factors that must be considered in order to determine what is "practicable."

effluent limitations" of the CWA; and, second, that the MEP standard is something beyond, or in addition to, those general effluent limitations. The *Amici* pointed out that both of these assumptions were inconsistent with the plain language of the statute and in direct conflict with the court's prior decisions, in *NRDC* and *Defenders*, that the MEP standard *replaced* the general effluent limitations of the Act with a new and separate standard for MS4 discharges, and that this standard is *less stringent* than the requirements for strict compliance with water quality-based and technology-based effluent limitations imposed on other types of discharges.

The *Amici* also pointed out that the court's analysis of the Phase II rules themselves contributed to this confusion, because it suggested that that the general NPDES permit regulations in 40 C.F.R. § 122.44 mandated compliance by MS4 discharges with all effluent standards and limitations promulgated under the CWA. The *Amici* explained that this analysis ignored the opening sentence of § 122.44, which states that "each NPDES permit shall include conditions meeting the following requirements *when applicable*." Many of the requirements in § 122.44 *do not apply* to MS4 permits, including the requirement to comply with technology-based effluent limitations and standards promulgated under CWA § 301 (§ 122.44(a)); to comply with other effluent limitations and standards under CWA §§ 301, 302, 307,[8] 318 and 405 (§ 122.44(b)); to achieve water quality standards (§ 122.44(d)); and to comply with technology-based controls for toxic pollutants (§ 122.44(e)). By way of contrast, § 122.44(k) does apply to MS4 discharges. In fact, this section was amended when the final Phase II regulations were adopted (shortly after the court's decision in *Defenders*),[9] to create a specific subparagraph covering the use of Best

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[8] The original opinion also erred in stating that MS4 general permits must contain provisions requiring compliance with CWA § 307(a), 33 U.S.C. 1317(a). The general mandate that other NPDES permits must comply with § 307 stems from the requirements in CWA § 402(a), which were replaced by the MEP standard for MS4 permits in § 402(p).

[9] This amendment, which was not in the proposed rule, 63 Fed. Reg. 1536, 1641 (January 9, 1998), appears to have been added in response to the ruling in *Defenders* affirming the use of BMPs as appropriate effluent limitations for MS4 discharges. EPA noted in the preamble to the amendment that BMPs were already authorized under § 122.44(k)(3), but that it was adding the

Management Practices ("BMPs") to achieve compliance with the MEP standard for MS4s. The new § 122.44(k)(2) explicitly provided that BMPs shall be included in a permit when "authorized under section 402(p) of the CWA for the control of storm water discharges." *See* 64 Fed. Reg. 68722, 68847 (Dec. 8, 1999). Section 122.44(k) was further amended in 2000 to include a lengthy "Note" identifying the detailed guidance documents prepared by U.S. EPA to assist the regulated community in developing and implementing BMPs for storm water discharges. *See* 65 Fed. Reg. 30886, 30894 (May 15, 2000).

On September 15, 2003, although court issued an order denying all of the parties' petitions for rehearing and for rehearing *en banc*, it simultaneously vacated its original opinion and issued an amended opinion that corrected all of the errors identified by the *Amici* and reaffirmed its earlier rulings that MEP is the only standard that MS4 discharges are required to meet. The precise effect of the amended opinion is illustrated below by setting forth the disputed portions of the court's original decision in redlined format showing how they were revised in the final decision:

> The Phase II general permitting scheme differs from the traditional general permitting model. The Clean Water Act requires EPA ~~not only~~ to ensure that operators of small MS4s ~~comply with the general effluent limitations of the Clean Water Act, but also that operators of small MS4s~~ "reduce the discharge of pollutants to the maximum extent practicable."
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> . . . . .
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> Because a Phase II NOI ~~not only conveys assent to the broad effluent limitations of the Clean Water Act, but also~~ establishes what the discharger will do to reduce discharges to the "maximum extent practicable," the Phase II NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime.

319 F.3d at 424 *compared with* 344 F.3d at 853.

> Phase II general permits ~~do~~ will likely impose requirements that ensure that operators of small MS4s comply with many of the ~~effluent~~ standards of the Clean Water Act. Thus, general permits issued under Phase II will ordinarily contain numerous substantive requirements, just as did the permits issued under Phase I. See 40 C.F.R. §§ 123.35 & 123.35(a) ("§ 123.35 As the NPDES

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new paragraph to clarify that requirements to implement BMPs developed pursuant to CWA § 402(p) are appropriate permit conditions. 64 Fed. Reg. at 68764-65.

Permitting Authority for regulated small MS4s, what is my role? (a) You must comply with the requirements for all NPDES permitting authorities under Parts 122, 123, 124 and 125 of this chapter."); see also 40 C.F.R. § 122.28 (outlining requirements for NPDES authorities issuing general permits). ~~In particular, each general permit must contain provisions to require compliance with § 307(a) of the Clean Water Act, 33 U.S.C. § 1317(a), which sets the effluent limitations that are the core of the NPDES program. See 40 C.F.R. § 122.44(b)(1) ("If any applicable toxic effluent standard or prohibition . . . is promulgated under section 307(a) of [the Clean Water Act] for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit. . . .").~~

~~Every~~And every operator of a small MS4 who files an NOI under Phase II "must comply with other applicable NPDES permit requirements, standards, and conditions established in the . . . general permit." See 40 C.F.R. §§ 122.34 & 122.34(f). ~~Specifically, every operator of a small MS4 who files a Notice of Intent under Phase II must comply with the effluent standards and limitations promulgated under the Clean Water Act. See 40 C.F.R. § 122.34(f) (mandating compliance with the requirements, standards and conditions "developed consistent with the provisions of §§ 122.41 through 122.49"); see also 40 C.F.R. § 122.44 (mandating compliance with the effluent standards and limitations promulgated under the Clean Water Act).~~

319 F.3d at 426-7 *compared with* 344 F.3d at 854-55.

The Ninth Circuit's extensive revisions to its final decision in *EDC* are set forth at length herein because, as recently as March of last year, another state administrative appeals board in North Carolina, in its final decision on an MS4 permit appeal brought by several environmental groups arguing that such permits must require compliance with state water quality standards, mistakenly relied upon the *original*, vacated opinion in *EDC* and suggested, erroneously, that MEP actually goes "beyond" and requires "more" than compliance with state WQS or numeric effluent limitations required to meet such standards. *North Carolina Wildlife Federation, et al. v. North Carolina Department of Environment and Natural Resources*, Nos. 05 EHR 2055 & 06 EHR 0164 (N.C. Environmental Management Commission, Division of Water Quality, March 7, 2007) at 31.[10] However, as the Ninth Circuit's amended opinion in *EDC* makes clear, together with its earlier decisions in *NRDC* and *Defeneders*, MEP is the only standard with which MS4 discharges must comply, and it is less stringent than the requirements for strict compliance with

[10]The decision is posted at: http://h2o.enr.state.nc.us/su/documents/FinalAgencyDecision.pdf.

water quality-based and technology-based effluent limitations that the CWA imposes on other types of discharges.

CONCLUSION

To the extent that Ecology relied upon a misconception of what federal law requires in making its determination that Condition S4 should mandate strict compliance with state water quality standards, that decision was unreasonable and the permits at issue in these appeals should be revised. As currently written, Condition S4.A in each permit states that any discharge which would violate any state water quality standard is "prohibited," and that such discharges are "violations" of the permit. Similarly, Condition S4.B states that the permit "does not authorize" a violation of state water quality standards. Condition S4.F sets forth a list of actions that are required in response to such "violations." Each of these provisions goes beyond what federal law requires for the control of MS4 discharges. Pursuant to federal law, the permits can and should authorize any MS4 discharge that is in compliance with the MEP standard. In other words, if an MS4 permittee is controlling pollutants to the maximum extent practicable by implementing the BMPs required by the Stormwater Management Plan described in Condition S5, it is in compliance with its permit and with the applicable requirements of the CWA – regardless of whether or not the discharge achieves strict compliance with water quality standards. Documented exceedances of those standards may trigger they type of requirements to implement additional BMPs that are listed in condition S5, but they need not necessarily be defined as "violations" of the permit or the CWA. Failure to implement the SWMP required by Condition S5, or the additional controls required by Condition S4.F, would be violations of the permit, and could be enforced by state or federal authorities or citizen suits without the prohibitions currently set forth in Conditions S4.A and S4.B.

Strictly speaking, exceedances of water quality standards are just that – "exceedances," not "violations." Failure to comply with the requirements of the CWA or of an NPDES permit are "violations," but WQS exceedances are not, unless strict compliance with such standards is

mandated in the permit. Based on federal law, the permitting agency may write the permit in such a manner that WQS exceedances are used as a trigger for additional controls, but it cannot require strict compliance with WQS or define all exceedances as "violations" unless it is practicable for the MS4 to achieve such compliance.

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Respectfully submitted,

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