

No. 14-80184

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL
RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES
DEFENSE COUNCIL, INC.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

JOINT MOTION FOR ENTRY OF ORDER

Petitioners Environmental Defense Center (“EDC”) and Natural Resources Defense Council (“NRDC”), and Respondent United States Environmental Protection Agency (“EPA”) jointly move the Court to enter the concurrently filed Proposed Order, which resolves the merits of this case. The parties have reached a settlement agreement that they believe leads to a fair and efficient resolution of this case. That agreement requires the parties to move the Court to enter the Proposed Order and gives Petitioners the right to

withdraw from the settlement agreement if the Court does not enter the order within 45 days. Furthermore, EPA's response in this case is due on August 28, 2015. Accordingly, the parties respectfully request that the Court enter the Proposed Order as soon as possible.

BACKGROUND

This proceeding is on a petition for writ of mandamus brought by Petitioners EDC and NRDC in connection with the Court's order in *Environmental Defense Center, Inc. v. United States Environmental Protection Agency* ("*EDC v. EPA*"), 344 F.3d 832 (9th Cir. 2003). In *EDC v. EPA*, the Court vacated and remanded to EPA certain aspects of the "Phase II" stormwater rule, promulgated pursuant to section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p). Under that section, Congress required EPA to regulate stormwater discharges associated with industrial activity and "large" municipal separate storm sewer systems ("MS4s") (those serving populations of more than 250,000) by 1989, and to regulate stormwater discharges from "medium" MS4s (those serving populations between 100,000 and 250,000) by 1991. *Id.* § 1342(p)(2), (4). Congress also required EPA to conduct a study to identify unregulated stormwater discharges and the nature and extent of pollutants in such discharges, and to designate sources to be regulated to protect water

quality based on the study and in consultation with state and local officials by October 1, 1993. *Id.* § 1342(p)(5)-(6).

In 1990, EPA issued regulations regarding National Pollutant Elimination Discharge System (“NPDES”) permit requirements for stormwater discharges associated with industrial activity, and from large and medium MS4s, as the “Phase I” stormwater regulations. 55 Fed. Reg. 47,990 (Nov. 16, 1990). EPA issued the “Phase II” stormwater regulations on December 8, 1999. 64 Fed. Reg. 68,722 (Dec. 8, 1999). The Phase II rule expanded the NPDES permit program to include discharges from smaller MS4s in urbanized areas and construction sites that disturb between one and five acres of land. Among other things, the Phase II rule allowed permitting authorities to issue “general permit[s]” for small MS4 stormwater discharges, and included requirements for regulated MS4s submitting a “Notice of Intent” (“NOI”) to be regulated under the general permit. 40 C.F.R. § 122.33(b). The Phase II rule did not address whether or how stormwater discharges related to forest roads should be regulated pursuant to Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6).

A number of petitions for review of the Phase II regulations were filed, including three consolidated before this Court in *EDC v. EPA*. The Court rendered a decision on September 15, 2003, denying the petitions with

certain exceptions. 344 F.3d at 840. The Court granted the petition filed by EDC and NRDC, stating:

We conclude that the EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore remand these aspects of the Small MS4 General Permit option so that EPA may take appropriate action to comply with the Clean Water Act. We also remand so that EPA may consider in an appropriate proceeding the Environmental Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads.

Id. at 879. Specifically, on the MS4 issue, the Court held:

In sum, we conclude that EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and EPA's failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore vacate those portions of the Phase II Rule that address these procedural issues relating to the issuance of NOIs under the Small MS4 General Permit option, and remand so that EPA may take appropriate action to comply with the Clean Water Act.

Id. at 858. On the forest roads issue, the Court held:

[W]e remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.

Id. at 863.

While EPA has issued guidance regarding the effect of the Court's 2003 decision with respect to MS4 general permits and recommendations for implementing that portion of the decision, it has not yet proposed or finalized revised regulations on remand relating to small MS4 general permits. Certain states with approved NPDES permit programs have adopted procedures regarding coverage under general permits for small MS4 stormwater discharges based upon those portions of the Phase II rule vacated by the Court in *EDC v. EPA*. EPA also has not yet made a formal determination regarding whether forest road stormwater discharges are required to be regulated pursuant to Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6).

On December 18, 2014, EDC and NRDC filed the Petition for a Writ of Mandamus in this case. ECF No. 1-2. Petitioners asked the Court to order the following: (1) that EPA issue a proposed rule regarding the MS4 portion of the remand within six months, and issue a final rule within six months of the proposal; (2) that EPA immediately revise the Phase II rule to direct permitting authorities to comply with the *EDC v. EPA* decision pending further rulemaking; (3) that EPA issue a judicially reviewable decision within six months on whether it will regulate forest roads under section 402(p)(6); and (4) that if EPA decides to regulate forest roads, it be required to propose a rule

to implement that decision within one year after the decision and to issue a final rule within a year after the proposal. ECF No. 1-2 at 21-22.

On April 15, 2015, the Court ordered EPA to file a response to the Petition by May 13, 2015. ECF No. 11 at 2. Based upon settlement negotiations then in progress, the parties filed, and the Court granted, various motions extending the deadline for EPA's response until August 28, 2015. *See* ECF Nos. 17, 19, 24, 26.

ARGUMENT

The parties respectfully request that the Court enter the Proposed Order, which resolves the merits of this case. On August 26, 2015, the parties signed a settlement agreement that requires EPA to meet certain deadlines for compliance with the Court's 2003 order in *EDC v. EPA*. The settlement agreement, which is attached to this motion as Exhibit 1, provides that the parties will jointly move the Court to issue the Proposed Order. Exhibit 1 ¶ 6. Petitioners have the right to withdraw from the settlement agreement if the Court denies this motion or does not rule on the motion within 45 days. *Id.* ¶ 7. Additionally, EPA's response to the Petition is due on August 28, 2015. ECF No. 26. Therefore, the parties ask that the Court enter the Proposed Order as soon as possible to relieve EPA from its briefing deadline and to provide certainty to the parties.

The terms of the settlement agreement are just, and the entry of the Proposed Order will allow this Court to resolve this case in an efficient manner. The Court's 2003 order in *EDC v. EPA* remanded two aspects of the rule to EPA: those relating to small MS4 general permits (the "MS4 Issues"), and those relating to whether the Clean Water Act requires that stormwater discharges from forest roads be regulated (the "Forest Road Issue"). 344 F.3d at 858, 863, 879; *see also* Proposed Order ¶ 1. The Proposed Order sets deadlines for EPA to act on both of these issues. First, it requires EPA to issue a proposed rule on the MS4 Issues by December 17, 2015, and a final rule on the MS4 Issues by November 17, 2016. Proposed Order ¶¶ 2, 3. Second, it requires EPA to issue, by May 26, 2016, a determination to comply with the Court's order regarding the Forest Road Issue. *Id.* ¶ 4. It is appropriate for the Court to enter a deadline for a delayed rulemaking. *See In re Pesticide Action Network N. Am.*, No. 14-72794, 2015 WL 4718867, at *5 (9th Cir. Aug. 10, 2015); *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 833 (D.C. Cir. 2012); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008).

The Proposed Order also requires EPA to regularly inform the Court of the status of this case. EPA must notify the Court within five business days of taking the actions described above. Proposed Order ¶¶ 2, 3, 4. Furthermore, EPA must file reports on the status of its compliance with the order every 120

days. *Id.* ¶ 5. The Proposed Order allows the parties to extend these deadlines by agreement. *Id.* ¶ 6. In the event that the parties cannot agree to the terms of a requested extension, the Proposed Order allows a party, after meeting and conferring, to move this Court for relief. *Id.*

Finally, the Proposed Order provides that the Court will retain jurisdiction over this case until EPA complies with the deadlines in the order and to hear any motion for litigation costs, including attorneys' fees, filed by Petitioners within 90 days of entry of the order. *Id.* ¶ 7.

CONCLUSION

The parties believe the Proposed Order sets forth a fair and efficient procedure for resolving this action. Therefore, the parties respectfully request that the Court enter the Proposed Order as soon as possible.

Respectfully submitted,

FOR PETITIONERS:

Dated: August 26, 2015

/s/ Jaclyn H. Prange
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Dated: August 26, 2015

/s/ Margaret Morgan Hall
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FOR RESPONDENT EPA:

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources
Division

Dated: August 26, 2015

By: /s/ Daniel Pinkston
Senior Trial Attorney
Environmental Defense Section
Environment and Natural Resources
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 26, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jaclyn H. Prange

EXHIBIT 1

(Settlement Agreement)

No. 14-80184

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IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES
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U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into by Environmental Defense Center (“EDC”) and Natural Resources Defense Council (“NRDC”), Petitioners in *In re Environmental Defense Center, et al. v. U.S. Environmental Protection Agency*, No. 14-80184 (9th Cir.) (“*In re EDC & NRDC*”), and the United States Environmental Protection Agency (“EPA”), Respondent in *In re EDC & NRDC*, and is intended to resolve the “Petition for

Writ of Mandamus” (“Mandamus Pet.”) filed by EDC and NRDC on December 18, 2014.

RECITALS

A. Pursuant to section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a), “the discharge of any pollutant by any person shall be unlawful” except in compliance with, among other provisions, CWA section 402, 33 U.S.C. § 1342.

B. “Municipal and industrial stormwater discharges” are regulated pursuant to Section 402(p) of the Clean Water Act (“CWA”), 33 U.S.C. § 1342(p).

C. The term “municipal separate storm sewer” is defined as follows:

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the [Clean Water Act] that discharges to waters of the United States;

(ii) Designated or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

40 C.F.R. § 122.26(b)(8).

D. Congress required EPA to regulate stormwater discharges associated with industrial activity and “large” municipal separate storm sewer systems (“MS4s”) (those serving populations of more than 250,000) by 1989, and to regulate stormwater discharges from “medium” MS4s (those serving populations between 100,000 and 250,000) by 1991. 33 U.S.C. § 1342(p)(4). In 1990, EPA issued regulations regarding National Pollutant Elimination Discharge System (“NPDES”) permit requirements for stormwater discharges “associated with industrial activity,” and from large and medium MS4s, as the “Phase I” stormwater regulations. 55 Fed. Reg. 47,990 (Nov. 16, 1990).

E. Congress required EPA to conduct a study to identify unregulated stormwater discharges and the nature and extent of pollutants in such discharges, and to designate sources to be regulated to protect water quality based on the study and in consultation with State and local officials by October 1, 1993. 33 U.S.C. § 1342(p)(5)-(6). EPA issued the “Phase II” stormwater regulations on December 8, 1999.

64 Fed. Reg. 68,722. The Phase II rule expanded the permit program to include discharges from smaller MS4s in urbanized areas and construction sites that disturb between one and five acres of land. Among other things, the Phase II rule allowed permitting authorities to issue “general permits” for small MS4 stormwater discharges, and included requirements for regulated MS4s submitting a “notice of intent” (“NOI”) to be regulated under the general permit. 40 C.F.R. § 122.33(b). The Phase II rule did not address whether or how stormwater discharges related to forest roads should be regulated pursuant to CWA section 402(p)(6), 33 U.S.C. § 1342(p)(6).

F. A number of petitions for review of the Phase II regulations were filed, including three consolidated before the Ninth Circuit Court of Appeals in *Environmental Defense Center, Inc. v. United States Environmental Protection Agency* (Nos. 00-70014, 00-70734, and 00-70822) (“*EDC v. EPA*”). The Court rendered a decision on September 15, 2003, 344 F.3d 832, denying the petitions with certain exceptions. The Court granted the petition filed by EDC and NRDC, stating that

We conclude that the EPA’s failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water

Act. We therefore remand these aspects of the Small MS4 General Permit option so that EPA may take appropriate action to comply with the Clean Water Act. We also remand so that EPA may consider in an appropriate proceeding the Environmental Petitioners' contention that 402(p)(6) requires EPA to regulate forest roads.

344 F.3d at 879. Specifically, on the MS4 issue, the Court held:

In sum, we conclude that EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and EPA's failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore vacate those portions of the Phase II Rule that address these procedural issues relating to the issuance of NOIs under the Small MS4 General Permit option, and remand so that EPA may take appropriate action to comply with the Clean Water Act.

Id. at 858. On the forest roads issue, the Court held:

[W]e remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.

Id. at 863.

G. While EPA has issued guidance regarding the effect of the Court's 2003 decision with respect to MS4 general permits and recommendations for implementing that portion of the decision, it has not yet proposed or finalized revised regulations on remand relating to small MS4 general permits. Certain

States with approved NPDES permit programs have adopted procedures regarding coverage under general permits for small MS4 stormwater discharges based upon those portions of the Phase II rule vacated by the Court in *EDC v. EPA*.

H. EPA has not yet made a formal determination regarding whether forest road stormwater discharges are required to be regulated pursuant to CWA section 402(p)(6), 33 U.S.C. § 1342(p)(6). In November 2015, EPA intends to publish a notice in the Federal Register seeking public comment and additional information on the effectiveness of existing federal and State regulatory and non-regulatory programs as well as private third-party certification programs.

I. On December 18, 2014, EDC and NRDC filed the Petition for a Writ of Mandamus. They seek the issuance of a writ of mandamus, and request the Court to order the following: (1) that EPA issue a proposed rule regarding the MS4 portion of the remand within six months, and issue a final rule within six months of the proposal; (2) that EPA immediately revise the Phase II rule to direct permitting authorities to comply with the *EDC* decision pending further rulemaking; (3) that EPA issue a judicially reviewable decision within six months on whether it will regulate forest roads under section 402(p)(6); and (4) that if EPA decides to regulate forest roads, it be required to propose a rule

to implement that decision within one year after the decision and to issue a final rule within a year after the proposal. Mandamus Pet. at 20-22.

J. Through this Agreement, the Parties wish to resolve the issues presented in the Petition for Writ of Mandamus. The Parties have negotiated this Agreement in good faith. If approved and implemented as set forth herein, and upon entry by the Court of an order in the form attached as Exhibit A, this Agreement will resolve all issues presented in the Petition for Writ of Mandamus.

AGREEMENT

1. For the purposes of this Agreement, the term “MS4 Issues” shall mean those matters identified by the Court in the *EDC v. EPA* opinion as grounds for its vacating and remanding portions of the Phase II rule relating to MS4 general permits, and “Forest Roads Issue” shall mean the Court’s direction that EPA consider and decide in an appropriate proceeding that allows for judicial review whether CWA section 402(p)(6), 33 U.S.C. § 1342(p)(6), requires that stormwater discharges from forest roads be regulated.

2. MS4 Issues

a. On or before December 17, 2015, EPA shall sign for publication in the Federal Register a notice of proposed rulemaking to

respond to the Court's vacatur and remand regarding the MS4 Issues. EPA shall promptly transmit the notice of proposed rulemaking to the Office of the Federal Register, and shall notify the Court of the signature within five business days of the date of signature.

b. On or before November 17, 2016, EPA shall sign for publication a final rule regarding the MS4 Issues, to fully comply with the Court's vacatur and remand regarding the MS4 Issues. EPA shall promptly transmit the final rule to the Office of the Federal Register for publication, and shall notify the Court of the signature within five business days of the date of signature.

3. Forest Roads Issue

On or before May 26, 2016, EPA shall sign for publication a notice setting forth EPA's determination as to whether stormwater discharges from forest roads are required to be regulated pursuant to Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6), to fully comply with the Court's remand regarding the Forest Road Issue. EPA shall promptly transmit the determination to the Office for the Federal Register for publication, and shall notify the Court of the signature within five business days of the date of signature.

4. No later than 120 days from the date of entry of the order described at Paragraph 6, and at 120-day intervals thereafter, EPA shall file in the Court reports on the status of EPA's progress towards compliance with the order and implementation of the actions in paragraphs 2 and 3.

5. The Parties to this Agreement may extend the dates set forth in Paragraphs 2 through 4, or otherwise modify this Agreement, by written stipulation executed by counsel for the Parties and filed with the Court. Neither EDC nor NRDC shall unreasonably refuse to consent to one extension of no more than seven calendar days for each deadline. In the event that the parties cannot agree to the terms of a requested extension, any party may, after meeting and conferring, move the Court for relief.

6. No later than five business days from the date that the last Party to this Agreement executes the Agreement, the Parties will jointly move the Court to issue an order that requires EPA to meet each of the deadlines set out in Paragraphs 2 through 4 and retains jurisdiction over the case to enforce that order. In addition, the Parties will request that the order also contain a provision providing that the Parties may extend the date set forth in the Court's order pursuant to Paragraph 5 of this Agreement. A copy of the order that the Parties will jointly move the Court to issue is attached as Exhibit A to this agreement.

7. EDC and NRDC shall have the right to withdraw from this Agreement and reinstate their Petition for Writ of Mandamus if (a) the Court denies the joint motion filed in accordance with Paragraph 6, or (b) does not rule on the joint motion within 45 days of the filing of the joint motion.

8. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the United States or any of its departments or agencies obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, or in violation of any other statute, law, or regulation. In the event of a shutdown of EPA due to a lack of appropriated funds, the deadlines set forth in Paragraph 2 through 4 will be extended by one day for each day the shutdown continues.

9. Nothing in the terms of this Agreement shall be construed to limit or modify any discretion accorded to EPA by the Clean Water Act or by general principles of administrative law in taking the actions referred to in Paragraphs 2 and 3 above. EPA's obligation to perform the actions specified in Paragraphs 2 and 3 of this Agreement, by the dates specified therein, does not constitute a limitation or modification of EPA's discretion within the meaning of this Paragraph. Nothing in this Agreement is intended to limit or modify the *EDC v. EPA* Court's opinion.

10. Except as expressly provided in this Agreement, none of the Parties hereto waives or relinquishes any legal rights, claims, or defenses they may have in this proceeding.

11. All notices and other communications required to be given in this Agreement shall be provided to the following:

For EDC:

Margaret Morgan Hall
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For NRDC:

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For EPA:

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Daniel Pinkston
U.S. Department of Justice
daniel.pinkston@usdoj.gov
(303) 844-1804

Any notice or other communication required to be given pursuant to this Agreement may be made by electronic mail.

12. EDC and NRDC reserve the right to apply for an award of costs of litigation, including attorneys' fees, with regard to the Petition for Writ of Mandamus and enforcement of any order the Court enters pursuant to Paragraph 6, and EPA reserves all of its defenses to such claim. The Parties also agree that any deadline imposed by Ninth Circuit Rule 39-1.6 or any other provision of law for fees and costs incurred up to the date of the order entered pursuant to Paragraph 6 is extended until 90 days after the entry of that order; the Parties will move the Court to include this extension in its order.

13. The undersigned hereby certify that they are duly authorized to bind the Party on whose behalf this Agreement is executed to the terms of this Agreement.

14. This Agreement shall be deemed effective as of the date the last signatory to the Agreement executes the Agreement.

15. This Agreement may be signed in counterparts, and/or/by electronic signature, and such signature shall be given full force and effect.

COUNSEL FOR EDC:

Dated: 8/26/2015



MARGARET MORGAN HALL
BRIAN P. SEGEE

COUNSEL FOR NRDC:

Dated: 8/26/2015



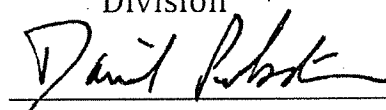
JACLYN H. PRANGE
MICHAEL E. WALL

COUNSEL FOR EPA:

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources
Division

Dated: 8/26/2015

By:



DANIEL PINKSTON
Senior Trial Attorney
Environmental Defense Section
Environment and Natural Resources
Division
U.S. Department of Justice

EXHIBIT A

(Proposed Order)

No. 14-80184

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL
RESOURCES DEFENSE COUNCIL, INC.

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Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

[PROPOSED] ORDER

Upon consideration of the parties' joint motion for entry of order, it is
ORDERED that the motion be granted. It is further **ORDERED** that:

- (1) For the purposes of this Order, the term "MS4 Issues" shall mean those matters identified by the Court in its 2003 opinion in *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency* (*EDC v. EPA*), 344 F.3d 832 (9th Cir. 2003), as grounds for vacating and remanding portions of the Phase II rule relating to

- municipal separate storm sewer system (MS4) general permits. 344 F.3d at 832, 858, 879. “Forest Road Issue” shall mean the Court’s direction in *EDC v. EPA* that the U.S. Environmental Protection Agency (EPA) consider and decide in an appropriate proceeding that allows for judicial review whether Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6), requires that stormwater discharges from forest roads be regulated. 344 F.3d at 863, 879.
- (2) On or before December 17, 2015, EPA shall sign for publication in the Federal Register a notice of proposed rulemaking to respond to the Court’s vacatur and remand regarding the MS4 Issues. EPA shall promptly transmit the notice of proposed rulemaking to the Office of the Federal Register, and shall notify the Court of the signature within five business days of the date of signature.
- (3) On or before November 17, 2016, EPA shall sign for publication a final rule regarding the MS4 Issues, to fully comply with the Court’s vacatur and remand regarding the MS4 Issues. EPA shall promptly transmit the final rule to the Office of the Federal Register for publication, and shall notify the Court of the signature within five business days of the date of signature.

- (4) On or before May 26, 2016, EPA shall sign for publication a notice setting forth EPA's determination as to whether stormwater discharges from forest roads are required to be regulated pursuant to Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6), to fully comply with the Court's remand regarding the Forest Road Issue. EPA shall promptly transmit the determination to the Office for the Federal Register for publication, and shall notify the Court of the signature within five business days of the date of signature.
- (5) No later than 120 days from the date of this Order, and at 120-day intervals thereafter, EPA shall file in this Court reports on the status of EPA's progress towards compliance with this Order and implementation of the actions in paragraphs 2 through 4.
- (6) The parties may extend the deadlines set forth in paragraphs 2 through 5 by written stipulation executed by counsel for the parties and filed with the Court. Neither EDC nor NRDC shall unreasonably refuse to consent to one extension of each deadline of no more than seven calendar days. In the event that the parties cannot agree to the terms of a requested extension, any party may, after meeting and conferring, move this Court for relief.

- (7) The Court shall retain jurisdiction over this case to enforce this Order until EPA complies with the deadlines in paragraphs 2 through 5, and to hear any motion for litigation costs, including attorneys' fees, by EDC and/or NRDC. Any deadline imposed by Ninth Circuit Rule 39-1.6, or by any other rule or provision of law, for seeking fees and costs is extended until 90 days after the entry of this Order.

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[PROPOSED] ORDER

Upon consideration of the parties' joint motion for entry of order, it is
ORDERED that the motion be granted. It is further **ORDERED** that:

- (1) For the purposes of this Order, the term "MS4 Issues" shall mean those matters identified by the Court in its 2003 opinion in *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency* (*EDC v. EPA*), 344 F.3d 832 (9th Cir. 2003), as grounds for vacating and remanding portions of the Phase II rule relating to

- municipal separate storm sewer system (MS4) general permits. 344 F.3d at 832, 858, 879. “Forest Road Issue” shall mean the Court’s direction in *EDC v. EPA* that the U.S. Environmental Protection Agency (EPA) consider and decide in an appropriate proceeding that allows for judicial review whether Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6), requires that stormwater discharges from forest roads be regulated. 344 F.3d at 863, 879.
- (2) On or before December 17, 2015, EPA shall sign for publication in the Federal Register a notice of proposed rulemaking to respond to the Court’s vacatur and remand regarding the MS4 Issues. EPA shall promptly transmit the notice of proposed rulemaking to the Office of the Federal Register, and shall notify the Court of the signature within five business days of the date of signature.
- (3) On or before November 17, 2016, EPA shall sign for publication a final rule regarding the MS4 Issues, to fully comply with the Court’s vacatur and remand regarding the MS4 Issues. EPA shall promptly transmit the final rule to the Office of the Federal Register for publication, and shall notify the Court of the signature within five business days of the date of signature.

- (4) On or before May 26, 2016, EPA shall sign for publication a notice setting forth EPA's determination as to whether stormwater discharges from forest roads are required to be regulated pursuant to Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6), to fully comply with the Court's remand regarding the Forest Road Issue. EPA shall promptly transmit the determination to the Office for the Federal Register for publication, and shall notify the Court of the signature within five business days of the date of signature.
- (5) No later than 120 days from the date of this Order, and at 120-day intervals thereafter, EPA shall file in this Court reports on the status of EPA's progress towards compliance with this Order and implementation of the actions in paragraphs 2 through 4.
- (6) The parties may extend the deadlines set forth in paragraphs 2 through 5 by written stipulation executed by counsel for the parties and filed with the Court. Neither EDC nor NRDC shall unreasonably refuse to consent to one extension of each deadline of no more than seven calendar days. In the event that the parties cannot agree to the terms of a requested extension, any party may, after meeting and conferring, move this Court for relief.

- (7) The Court shall retain jurisdiction over this case to enforce this Order until EPA complies with the deadlines in paragraphs 2 through 5, and to hear any motion for litigation costs, including attorneys' fees, by EDC and/or NRDC. Any deadline imposed by Ninth Circuit Rule 39-1.6, or by any other rule or provision of law, for seeking fees and costs is extended until 90 days after the entry of this Order.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 26, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jaclyn H. Prange