

September 29, 2015

Mr. Greg Schaner
Construction Stormwater Program
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Via U.S. Mail & E-mail (schaner.greg@epa.gov)

Re: Small MS4 Rulemaking: Pre-proposal comments from environmental organizations

Dear Mr. Schaner:

Stormwater is one of the most persistent and significant sources of pollution in our nation's waterways. As stormwater runoff flows over the ground, it accumulates chemicals, sediment, pathogens, nutrients, debris, and other contaminants that adversely affect water quality and cause impairments to inland and coastal waters nationwide. Therefore, EPA's forthcoming revisions to the "Phase II" stormwater regulations for "small municipal separate storm sewer systems" (small MS4s) provide a critical opportunity to improve water quality nationwide.

The basis for this rulemaking is the 2003 U.S. Court of Appeals for the Ninth Circuit's decision *Environmental Defense Center v. EPA*. In that ruling, the court held that several aspects of EPA's original Phase II Rule violated the Clean Water Act for a number of reasons. In particular, the court ruled that the regulations authorized issuance of general permits that fail to ensure small MS4s reduce pollutant discharges to the maximum extent practicable (MEP). Pursuant to the Ninth Circuit's 2003 Order and Opinion remanding the rule, and that court's September 14, 2015 order (in Case No. 14-80184) establishing a deadline for EPA to revise the Phase II Rule consistent with the 2003 remand, EPA must revise the small MS4 permitting regulations to either: 1) conform to the "traditional general permitting model," in which a general permit identifies the technology-based requirements and other discharge limitations necessary to meet the requirements of the Act, or 2) ensure that individualized Stormwater Management Programs designed by regulated parties will be subject to public participation requirements as well as "meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable."¹

On behalf of the twenty-four undersigned organizations – including the petitioners in *EDC v. EPA* – we offer in this letter our recommendations for EPA's consideration as the agency develops the proposed rulemaking for publication later this year.

In sum, we urge EPA to propose specific regulatory language that incorporates the following approach or, at a minimum, solicit public comment on options that include this approach:

¹ *Env'tl. Def. Center, Inc. v. United States Env'tl. Prot. Agency*, 344 F.3d 832, 856 (9th Cir. 2003).

- Establish meaningful substantive requirements for all small MS4 permits. The rules should:
 - Require that permit terms impose clear obligations on the permittee specifying the pollution control measures that must be implemented.
 - Require that permits include clear quantitative performance standards and specific deadlines for compliance with each obligation imposed on the permittee.
 - Apply the new rules to all types of effluent limitations in small MS4 permits, not only effluent limitations implementing the MEP standard.
 - For each minimum control measure, define a “floor” of specific performance standards and obligations that all permitting authorities must include as part of a permit’s specification of the MEP.
 - For the “post-construction” minimum control measure, the EPA-defined MEP “floor” should include an on-site retention standard for both new development and redevelopment.
 - Require permitting authorities to determine whether MEP includes any more stringent pollution control obligations beyond the “floor” provided in the rules.
 - Require permitting authorities to also determine whether any additional effluent limitations are necessary to protect water quality and to satisfy the appropriate water quality requirements of the Clean Water Act.
 - The rule’s preamble should state that effluent limitations deemed necessary by the permitting authority, whether or not they exceed EPA’s MEP “floor,” are effluent limitations imposed pursuant to the permitting authority’s obligations under the federal Clean Water Act.
 - The preamble should state that EPA regional offices are empowered to object to proposed permits that meet EPA’s MEP “floor” where stronger permit terms are necessary to satisfy the MEP standard or to protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act.
- Where necessary to establish effective water quality-based effluent limitations, allow a “hybrid” approach, whereby permittees are able to propose compliance plans, but with strong procedural safeguards. The rule should:
 - Require permittee-developed plans to be reviewed in the same manner as permit applications.
 - Specify that plans will be approved only if the permitting authority determines that the plan imposes obligations stringent enough to meet applicable legal standards.
 - Require that approved plans become enforceable under the permit.
 - Require that approved plans include quantitative performance standards, specific deadlines, and other specific terms as necessary to ensure that permittees can be held accountable for any non-compliance.

We provide additional detail on these recommendations below.

Establish Meaningful Substantive Requirements for All Small MS4 Permits

There are essentially three potential options for the rulemaking: 1) requiring that MS4 general permits follow the traditional model used for general permits, in which the permit, rather than a Stormwater Management Program developed by a permittee, establishes the specific, binding effluent limitations that satisfy applicable legal standards for stormwater pollution control; 2) defining procedural requirements for how permitting authorities must review permittees' Notices of Intent and Stormwater Management Programs; or 3) a hybrid option, in which states can choose between the other options, or can use elements of both within the same permit.

Regardless of the option selected, EPA must ensure that the new rules apply to all types of effluent limitations in small MS4 general permits, not merely to those effluent limitations intended to meet the Clean Water Act's "maximum extent practicable" standard. Such an approach is critical, as the Act's prohibition of any "self-regulatory" scheme – e.g., the Act's requirements that permit terms must ensure the permittee's compliance with applicable legal standards – pertains equally to all effluent limitations, whether technology-based or water-quality-based.²

With respect to the three potential options, we strongly prefer the first option, except (as explained further below) in instances where the needs of a particular water body require water quality based effluent limitations tailored to particular dischargers.

We believe the first option provides the best opportunity to ensure that small MS4s will, in fact, be held accountable for implementing such pollution control measures as are necessary to satisfy applicable Clean Water Act standards.

Building on the principles in EPA's 2010 "MS4 Permit Improvement Guide," EPA's rules should mandate that permit terms shall (a) impose clear, specific, measurable, and enforceable obligations on the permittee specifying the pollution control measures that must be implemented; and (b) include clear quantitative performance standards and specific deadlines for compliance with each obligation imposed on the permittee.³ To avoid uncertainty and debates about whether proposed permit terms are sufficiently specific, or are rather unlawfully "self-regulatory," the rules and the explanatory preamble must be crystal clear and detailed about what sorts of permit provisions do and do not meet these standards.

Moreover, to make the first option truly effective, EPA's rules must not only establish general principles about the contents of small MS4 general permits, but need to establish minimum substantive requirements for the technology-based effluent limitations that all small MS4 permits must include. We believe anything short of such specificity is likely to lead to inconsistent and frequently inadequate protections around the country.

² See, e.g., *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 498-99 (2d Cir. 2005) (citing 33 U.S.C. §§ 1342(a)(2), (b)).

³ EPA, MS4 Improvement Guide (2010), available at http://water.epa.gov/polwaste/npdes/stormwater/upload/ms4permit_improvement_guide.pdf.

For each minimum control measure, EPA's rules should define a "floor" of specific performance standards and obligations that permitting authorities must include as part of a permit's specification of the MEP. Establishing such a "floor" for the MEP would ensure that all permit terms meet the aforementioned specificity requirements; it would also create a level playing field so that all small MS4s are using a core set of the most widely-accepted pollution control practices, and that residents of all fifty states can expect a robust level of protection for their cherished local waterbodies.

As to the "post-construction" minimum control measure, in particular, the EPA-defined MEP "floor" should include an on-site retention standard for both new development and redevelopment. This approach is both the most effective means of controlling stormwater pollution from developed areas⁴ and is indisputably "practicable" throughout the country, as it has been applied in communities throughout the country.⁵ Further, the establishment of such a national performance standard received widespread support from states, utilities, and environmental organizations when EPA was previously considering updates to its national stormwater regulations. In a joint letter to EPA, a diverse group of organizations from these sectors wrote that "including new development and redevelopment standards for on-site retention is an important element of the proposed rule and will help to provide much needed reductions in the permanent discharges created by development, both in 'greenfield' undeveloped locations and urban infill settings."⁶

Critically, however, EPA's rules must also be clear that the "floor" is not all that the Clean Water Act demands. First, with regard to the MEP standard, the rules should specifically mandate that the permitting authority determine whether, based on the best current scientific understanding of stormwater management and the best practices in use in other jurisdictions at the time of permit issuance, the MEP includes any more stringent pollution control obligations beyond the "floor" provided in the rules. The rules should specify that the permitting authority's administrative record supporting the permit must identify more stringent potential permit terms that were considered and explain why each one was included in the permit or, if it was not included, why it was determined not to be more effective than the EPA-defined "floor" or determined not to be practicable. Second, the rules should be clear that permitting authorities must also determine whether any additional effluent limitations are necessary "to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act" – critical objectives in the existing Phase II MS4 rules that co-exist with, but are not co-extensive with, the MEP standard.

Consistent with this approach, the rule's preamble should unambiguously state that effluent limitations deemed necessary by the permitting authority to meet the MEP standard or "to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act," whether or not they exceed EPA's MEP "floor," are effluent limitations imposed

⁴ See, e.g., National Research Council, *Urban Stormwater Management in the United States* (2009).

⁵ See, e.g., EPA, *Post-Construction Performance Standards and Water Quality-Based Requirements: A Compendium of Permitting Approaches* (2014), *available at* http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_ms4_compendium.pdf.

⁶ Joint letter from NRDC, American Rivers, Association of State and Interstate Water Pollution Control Administrators, National Association of Clean Water Agencies, and Water Environment Federation to EPA (July 8, 2011), *available at* http://w.weftec.org/PostStormwater_ConstructionLtr_070811).

pursuant to the permitting authority's obligations under the federal Clean Water Act, not in excess of those requirements. Likewise, the preamble should make clear that EPA regional offices are empowered to object to proposed permits that meet EPA's MEP "floor," if the available evidence shows that more stringent standards are necessary to satisfy the MEP standard, or are necessary "to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act."

Where Necessary to Address Water Quality-Based Effluent Limitations, Allow a "Hybrid" Approach With Strong Procedural Safeguards

In some instances, the needs of a particular water body require that the permitting authority develop water quality-based effluent limitations tailored to particular MS4 dischargers. A common example involves obligations to meet water quality standards in impaired waters: MS4 permits sometimes direct permittees to develop TMDL implementation plans that identify the measures the permittee will implement to achieve required wasteload allocations (WLAs) or, in the absence of applicable WLAs, plans to reduce pollutant loads sufficiently to ensure compliance with water quality standards. We believe this is an appropriate use of the "hybrid" approach (the third option above), provided that strict procedural safeguards are established to ensure that permitting authorities do not create an unlawful "self-regulatory" scheme.

Specifically, for such cases, EPA's new rules should require that permittee-developed plans shall be reviewed in the same manner as a request for a non-minor permit modification, pursuant to the permitting procedures in EPA and state NPDES permitting regulations. These requirements include public notice by the permitting authority; a period for public comment to the permitting authority; EPA review and opportunity for EPA objection; an opportunity for a public hearing before the permitting authority; and approval by the permitting authority, with or without modifications to the permittee's proposed plan. Further, the new rules should provide that a plan can be approved only if the permitting authority determines, based on an adequate administrative record, that the plan imposes obligations stringent enough to meet applicable legal standards. The rules should require that permits include terms stating that, upon approval, the plan becomes enforceable under the permit.

Additionally, for this review process to be meaningful and effective, the rules should require that a full proposed plan (not merely a summary of one, such as a Notice of Intent) must be submitted for review. The rules should provide that, to be approvable, plans must (a) impose clear, specific, measurable, and enforceable obligations on the permittee specifying the pollution control measures that must be implemented; and (b) include clear quantitative performance standards and specific deadlines for compliance with each obligation imposed on the permittee. The rules should also require that the permit must specify the required elements of an approvable plan and the standard by which the adequacy of the plan will be judged.

* * * * *

We strongly urge EPA, in the notice of proposed rulemaking to be published this December, to solicit comments on options including those set forth in this letter. Moreover, we urge EPA to propose specific regulatory language that incorporates these recommendations.

Thank you for your consideration of our comments. We look forward to continued engagement with EPA as the agency proceeds with this critical rulemaking. Please contact Larry Levine of NRDC (llevine@nrdc.org; 212-727-4548) with any questions.

Sincerely,

Helen Henderson
Atlantic Coast Program Manager
American Littoral Society

Gary Belan
Senior Director, Clean Water Supply
Program
American Rivers

Rachel Conn
Executive Director
Amigos Bravos

Beth K. Stewart
Executive Director
Cahaba River Society

Kim Coble
Vice President
Chesapeake Bay Foundation

Michael Helbing
Staff Attorney
Citizens for Pennsylvania's Future
(PennFuture)

Cindy Zipf
Executive Director
Clean Ocean Action

Jennifer Peters
Water Programs Director
Clean Water Action

Roger Reynolds
Legal Director
Connecticut Fund for the Environment
Save the Sound

Chris Killian
Clean Water Program Director
Conservation Law Foundation

John Rumpler
Senior Attorney
Environment America

Maggie Hall
Staff Attorney
Environmental Defense Center

Eileen Fielding
Executive Director
Farmington River Watershed Association

Matt Rota
Senior Policy Director
Gulf Restoration Network

Indra Frank, MD, MPH
Environmental Health Director
Hoosier Environmental Council

Ric Lawson
Watershed Planner
Huron River Watershed Council

Cheryl Nenn
Riverkeeper
Milwaukee Riverkeeper

Lawrence Levine
Senior attorney
Natural Resources Defense Council

Noemi de la Puente
Executive Director
New Jersey Environmental Lobby

Andrea Leshak
Staff Attorney
NY/NJ Baykeeper
Hackensack Riverkeeper

Katherine Baer
Director of Science and Policy
River Network

Margaret Miner
Executive Director
Rivers Alliance of Connecticut

Sarah Stokes
Staff Attorney
Southern Environmental Law Center

Michael L. Pisauo, Jr.
Policy Director
Stony Brook-Millstone Watershed
Association