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October 2, 2015

Greg Schaner

Attorney Adviser, Water Permits Division

U.S. EPA, Office of Water

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Via Electronic Mail: [Schaner.Greg@epa.gov](mailto:Schaner.Greg@epa.gov)

Dear Greg,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to engage with EPA as the Agency works to develop modifications to the Phase II municipal separate storm sewer system (MS4) program (referred to by the Agency as the MS4 Remand Rule) in response to the Ninth Circuit's 2003 *Environmental Defense Center (EDC) v. EPA* ruling and subsequent 2014 petition. According to the August 2015 settlement agreement, EPA intends to release a draft version of the rule for public comment in December 2015, and the Agency will be working to finalize the draft rule over the next few months. NACWA submits these initial comments for EPA's consideration as the Agency completes its work on the draft proposal.

As the leading national advocacy organization for municipal stormwater utilities, NACWA appreciates the outreach EPA has conducted to MS4s, states, and other stakeholders regarding the rulemaking process. Many of the comments included in this letter are similar to suggestions NACWA has previously made to EPA over the past few months, reflecting feedback from our utility members and our state and regional stormwater association colleagues. However, we wanted to provide a summary of our current thinking regarding the potential outcomes as EPA moves into its final development phase. This comment letter will provide some general thoughts on the process, as well as comments on specific areas that we understand EPA is reviewing for inclusion in the rule. We appreciate and thank EPA for its consideration.

It is NACWA's understanding that there are essentially three different options under consideration by EPA for the rule proposal. Option 1 would require permitting authorities to more clearly define permit requirements that establish what actions are necessary (including associated deadlines and frequencies) to meet the Clean Water Act's "maximum extent practicable" (MEP) standard. Option 2 would include requirements for permitting authority review and public notice of "notices of intent"

(NOIs) from small MS4s for coverage under general Phase II permits, providing the opportunity for the public to request a hearing (if necessary) on individual NOIs. Option 3 would essentially be a hybrid of the first two options, allowing states to choose which approach they believe is best.

NACWA will not be in a position to formally comment or endorse any particular option until all options are outlined in the actual rule proposal. However, based on the information we have received from EPA to date and feedback from the MS4 community, we believe Option 1 is worthy of additional consideration. Such an approach, as NACWA understands it, would maintain sufficient flexibility around the MEP concept – a critically important issue for NACWA. As EPA moves forward, it is essential that it focuses its efforts on making the mandated changes to the Phase II program without making other substantive changes to the current Phase II regulations or imposing additional burdens on the municipal stormwater community. Option 1 would provide for such an approach, as long as it is also structured to meet the requirements of the 2003 *EDC* case remand.

Regardless of which option is ultimately selected, the EPA's proposal should take into consideration the following factors.

First, any option EPA proposes should have a narrow, procedural focus. It should be as narrowly targeted as possible to comply with the remand requirements from the *EDC* decision, and should not pursue any broader changes to the Phase II or Phase I stormwater programs. This includes addressing issues beyond the scope of the remand, such as specific post-construction standards. While NACWA believes post-construction onsite retention standards may be appropriate in certain circumstances, we do not believe this rulemaking is the right place to address those issues. At the same time, it is critical the rulemaking meets the court's remand requirements and not result in additional litigation for falling short of the court's instructions. Given the amount of attention and scrutiny that municipal stormwater programs and regulations are already under around the nation, it is vital that this rule be legally defensible.

Second, EPA should not attempt to define what qualifies as MEP for Phase II permits in the rule. An effort by EPA to provide a strict definition of MEP in a national rulemaking would be legally suspect and open to legal challenge. Instead, EPA should seek to provide sufficient flexibility in the rule so that permitting authorities, municipal permittees, and interested stakeholders can have additional dialogues about what requirements constitute MEP on a case-by-case basis.

Third, EPA must recognize the practical realities facing the Phase II program. It is widely acknowledged that the Phase II program is lagging behind its large MS4 sister program. Though the small MS4 program was issued 16 years ago, it still suffers from a lack of funding and staff resources. The Phase II General Permit used by most states is a way to permit thousands of small communities and ensure they undergo stormwater planning. It should not become so unwieldy and cumbersome that it only serves to further delay program implementation. Many Phase II communities lack the ability to generate significant revenue or fund dedicated staff positions, so it is essential that the general permit remain an administratively viable tool without unnecessary paper work or impracticable public and notice comment procedures. Resource-strapped Phase II programs should spend money on improving water quality, not on more administrative processes.

## NACWA Pre-proposal Comments on Phase II Remand Rule

October 2, 2015

Page 3 of 3

NACWA looks forward to working closely with EPA over the next year as the MS4 Remand Rule progresses to ensure that the perspective of municipal stormwater utilities is represented. NACWA also looks forward to working with other stakeholders during the rulemaking, including the states and the environmental activist community, to try and craft reasonable solutions that are acceptable to multiple constituencies and that advance our common vision of reducing water quality impairment from stormwater runoff.

NACWA again appreciates the opportunity to provide these comments. Please do not hesitate to contact me at 202/533-1839 or [bmannon@nacwa.org](mailto:bmannon@nacwa.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Mannion', followed by a horizontal line.

Brenna Mannion

Director of Regulatory Affairs and Outreach