Nos. 00-70014; 0070734; and 00-70822

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENVIRONMENTAL DEFENSE CENTER, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Agency Action by the
United States Environmental Protection Agency

BRIEF OF THE THE NATIONAL LEAGUE OF CITIES, THE AMERICAN PUBLIC WORKS ASSOCIATION, THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, AND THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EPA'S PETITION FOR REHEARING

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INTRODUCTION

The National League of Cities, the American Public Works Association, the Association of Metropolitan Sewerage Agencies, and the National Association of Flood and Stormwater Management Agencies (collectively, the "*amici*") support the position of the U.S. Environmental Protection Agency ("EPA") in its Petition for Rehearing urging the Court to reconsider its conclusion that the Phase II general permit program violates the Clean Water Act because each Notice of Intent for coverage by a general permit will not be reviewed by a permitting authority and will not be subject to public participation requirements.

In addition to the points raised by EPA in its Petition for Rehearing, the *amici* are particularly concerned that the reasoning by which the panel majority reached this conclusion is in direct conflict with the plain language of the Clean Water Act ("CWA") and with this Court's previous decisions in *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292 (9th Cir. 1992) ("*NRDC*") and *Defenders of Wildlife v.Browner*, 197 F.3d 1035 (9th Cir. 1999) ("*Defenders*").

Representatives of each of the *amicus* groups were active participants in the Federal Advisory Committee Act Storm Water Phase II Subcommittee that worked with EPA from 1995 through 1998 to develop the final Phase II regulations for small municipal separate storm sewer systems ("MS4s") at issue in this case. Collectively, the groups participated as *amici curiae* in *Defenders*, and believe it is

essential to safeguard the precedent established in that decision. The National Association of Flood and Stormwater Management Agencies also participated as an Intervenor in *NRDC*, which is similarly called in question by the decision in this case.

ARGUMENT

I. The Majority Opinion Conflicts with the Plain Language Of Clean Water Act § 402(p) and with this Court's Prior Decisions

In section II.B of the majority opinion, the Court begins its analysis of the general permit program with the proposition that:

> 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."

Slip op. at 611 (emphasis added). The Court goes on to state that:

> . . . 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" . . . .

Id. at 612 (emphasis added).

These statements assume, first, that MS4 discharges are subject to the "general effluent limitations" of the CWA; and, second, that the MEP standard is something beyond, or in addition to, those general effluent limitations. Both of these assumptions are false, because they are inconsistent with the plain language of the statute and in direct conflict with prior decisions by this Court. As this

Court has ruled on two previous occasions, the "maximum extent practicable" standard ("MEP"), which was created by the 1987 amendments to the CWA, actually *replaced* the general effluent limitations of the Act with a new and separate standard for MS4 discharges. Moreover, this new standard is *less stringent* than the requirements for strict compliance with water quality-based and technology-based effluent limitations which the CWA imposes other types of discharges.

In *NRDC*, the Petitioner argued that EPA's Phase I storm water regulations failed to establish substantive controls for MS4 discharges required by the 1987 CWA amendments. The Court disagreed with Petitioner's interpretation of the amendments, stating that:

> 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 storm water dischargers but prescribed new controls for municipal storm water discharge.*

966 F.2d at 1308 (emphasis added). 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).

In *Defenders*, Petitioners objected to the MS4 permits issued to several 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 this Court's 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).[1]

Consistent with this Court's prior decisions in *NRDC* and *Defenders*, the only standard with which MS4 discharges must comply is the MEP standard created by CWA § 402(p). This separate standard for MS4 discharges created an exception to the general rule in § 402(a), which states that other types of discharges must meet all applicable requirements of CWA §§ 301, 302, 306, 307, 308 and 403. Moreover, CWA § 402(p)(6) does not even require EPA to utilize NPDES permits for Phase II of the municipal stormwater program. Instead, it directs EPA to develop a "comprehensive program" to regulate Phase II sources, and specifies that the program "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." As EPA observed in the preamble to the final Phase II regulations, Congress provided the Agency with "broad discretion" to establish a comprehensive program that either includes or does not include the use of NPDES permits. *See* 64 Fed. Reg. 68722, 68741 (Dec. 8, 1999). This broad discretion certainly comprehends the authority to determine what particular substantive and procedural requirements are

[1] The court 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," including the discretion to require compliance with water quality standards. 191 F.3d at 1166. However, that discretion is still confined by the limits of practicability imposed by the first clause of § 402(p)(3)(B)(iii).

appropriate for the Phase II MS4 general permit program, as EPA has done in the regulations at issue in this case.

Because Congress "did not mandate a minimum standards approach" for the regulation of MS4 discharges in CWA § 402(p)(3), and because CWA § 402(p)(6) requires nothing more than a "comprehensive program" including "appropriate" requirements for Phase II MS4 discharges, the majority's conclusion that the Phase II general permit program promulgated by EPA violates the requirements of the CWA should be reconsidered.

II. The Majority's Reading of the Phase II Regulations Is Inconsistent with the Clean Water Act and this Court's Precedent

The majority's analysis of the requirements contained in the Phase II regulations themselves is also in conflict with the statute and this court's prior decisions, for the reasons explained above. EPA's final Phase II regulations do not, and indeed cannot, impose any more stringent standard on MS4 discharges than the MEP standard authorized by the statute. In the Phase II regulations, EPA elected to define MEP in terms of the six minimum control measures that must be implemented within the framework of the Phase II permit program. 64 Fed. Reg. at 68754. Thus, the framework for the small MS4 permits described in the rule "provides EPA's interpretation of the standard and how it should be applied." *Id.* EPA envisioned application of the MEP standard as an "iterative process" that would be carried out over successive permit terms. *Id.*

The majority opinion correctly observes that the Phase II regulations, at 40 C.F.R. § 122.34(f), mandate compliance with requirements, standards and conditions developed "consistent with" the provisions of the general NPDES permit regulations in 40 C.F.R. §§ 122.41 through 122.49. Slip op. at 613. However, the opinion then suggests that 40 C.F.R. § 122.44 mandates compliance by MS4 discharges with all effluent standards and limitations promulgated under the CWA. This analysis ignores 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,[2] 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

[2] The majority opinion also errs 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).

after this Court's decision in *Defenders*),[3] to create a specific subparagraph covering the use of Best 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).

Thus, the majority opinion misconstrues the final Phase II regulations when it suggests that these regulations require Phase II MS4 permits to comply with all CWA effluent limitations or with portions of the general NPDES permit regulations that are not applicable to municipal stormwater permits.

[3] 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 Court's decision 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 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.

CONCLUSION

Some of the specific elements in the Court's analysis questioned above may be regarded as *dicta*, but because they are part of the *ratio decidendi* for the court's holding that the Phase II MS4 general permit program violates the CWA, the *amici* are concerned that this analysis may undercut or even reverse the precedent established by this Court's prior decisions in *NRDC* and *Defenders*. Both of those cases have been relied upon by other courts and administrative tribunals for the proposition that the CWA does not require MS4 discharges to comply with water quality standards. *See, e.g. Mississippi River Revival, Inc. v. City of St. Paul,* No. 01-1887, slip op. at 13-16 (D. Minn. Dec. 2, 2002), 2002 U.S. Dist LEXIS 25384, *15-*19; *In re: Storm Water Discharge Permit for the Municipal Separate Storm Sewer System of Anchorage, Alaska*, NPDES Appeal No. 99-1, slip op. at 7 n.10 (U.S. EPA, Env. Appeals Board Nov. 23, 1999); *In the Matter of Building Industry Association of San Diego County et al.*, Order WQ 2001-15, slip op. at 6-8 (Calif. SWRCB Nov. 15, 2001), 2001 Cal. ENV LEXIS 16, *10-*14. The *amici* therefore urge the Court to grant EPA's petition for rehearing or, in the alternative, to amend its opinion to conform with the Court's prior decisions and with the plain language of CWA §402(p).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 29(d) and Ninth Circuit Rule 32-1, the attached *Amici Curiae* Brief in Support of Respondent EPA's Petition for Rehearing is proportionally spaced, has a typeface of 14 points or more and contains 2166 words (excluding the table of contents, table of authorities, this certificate of compliance and the certificate of service).

March 7, 2003

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Charles R. McElwee II

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2003, two true and correct copies of the foregoing *Amici Curiae* Brief in Support of Respondent EPA's Petition for Rehearing were served by first-class mail, postage prepaid, upon the following parties:

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APPENDIX