

**NATIONAL LEAGUE OF CITIES
NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
CSO PARTNERSHIP
WEST VIRGINIA MUNICIPAL LEAGUE
VIRGINIA MUNICIPAL LEAGUE**

August 18, 2005

Garrison D. Miller
Mail Code 3WP13
Office of Watersheds, MD/DC/VA Branch
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2-29

**Re: Public Notice No. GM 34 Dated 7/21/05
Proposed Amendment No. 1 to NPDES Permit No. DC0000221**

Dear Mr. Miller:

The following comments are submitted on behalf of the National League of Cities (NLC), the National Association of Flood and Stormwater Management Agencies (NAFSMA), the National Association of Clean Water Agencies (formerly the Association of Metropolitan Sewerage Agencies) (NACWA), the CSO Partnership, the West Virginia Municipal League (“WVML”), and the Virginia Municipal League (“VML”) (collectively, the “Municipal Coalition”). The Coalition’s comments are set forth below by reference to the specific sections of the proposed Amendment to which they apply.

Part I.C. Limitations to Coverage

Part I.C.2 of the proposed Amendment would state that all discharges of pollutants “to or from” the MS4 that cause or contribute to the exceedance of water quality standards are “prohibited.” The existing permit states that all “other” discharges (i.e., those not listed in Part C.1) “to” the MS4 “are prohibited and not authorized by the permit.” The existing language should be retained. In the alternative, if the proposed language changes are made, the prohibition against discharges “from” the MS4 should be qualified by stating that such discharges are prohibited “to the maximum extent practicable.” This qualification is necessary to comply with the requirements of Clean Water Act § 402(p)(3)(B)(iii), which states that permits for discharges from municipal storm sewers “shall require controls to reduce the discharge of pollutants to the maximum extent practicable.” As explained at greater length in the Municipal Coalition’s Motion for Leave to Intervene in Support of the Permit, filed on November 9, 2004 in the pending appeal of the permit that is the subject of this Amendment, In the Matter of: Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES Permit No. DC 0000221, NPDES Appeal No. 04-10 (E.A.B., Petition for Review filed

September 20, 2004), the Ninth Circuit Court of Appeals has ruled categorically that the 1987 amendments to the Clean Water Act established a new and separate standard for municipal stormwater discharges, and that the Act does not require such discharges to comply with § 301(b)(1)(C) (which requires discharges to achieve any limitations necessary to meet state water quality standards) or with other provisions of the Act that ordinarily apply to other types of NPDES permits. *Defenders of Wildlife v. Browner*, 191 F.3d 1167 (9th Cir. 1999). Instead, the Ninth Circuit held that MS4 permits are required only to reduce the discharge of pollutants to the “maximum extent practicable” (“MEP”), which is a “lesser standard” than § 301 imposes on other types of discharges. Although the court observed, in *dicta*, that the MEP standard allows EPA the “discretion” to require compliance with water quality standards, 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 only direct an MS4 permittee to comply with water quality standards “to the maximum extent practicable.”

The Ninth Circuit’s holding in *Defenders* has been acknowledged by EPA’s Environmental Appeals Board in *In re: Storm Water Discharge Permit for the Municipal Separate Storm Sewer System of Anchorage, Alaska*, NPDES Appeal No. 99-1 (E.A.B. Nov. 23, 1999), at 7 n.10 and *In re: City of Irving, Texas Municipal Separate Storm Sewer System*, 10 E.A.D. 111, 118-19 (E.A.B. 2001). The Ninth Circuit’s decision has also been relied upon by other courts and administrative tribunals for the proposition that the CWA does not require MS4 discharges to comply with state water quality standards. See, e.g. *Mississippi River Revival, Inc. v. Minnesota Pollution Control Agency*, No. C1-01-23 (Minn. App. July 31, 2001), 2001 Minn. App. LEXIS 855, *13-*15; *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 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 Ninth Circuit itself recently reaffirmed its holding that the MEP standard is the only standard applicable to MS4 discharges, in *Environmental Defense Center v. EPA*, 319 F.3d 398 (9th Cir. 2003).

Part I.D. Effluent Limits

Part I.D.2 (“WQBEL Effluent Limit”) of the proposed Amendment requires the permittee to implement the controls, BMPs, and any other activities necessary to reduce pollutants as set forth in the permit, including the narrative prohibition set forth in Part I.C of the permit. If Part I.C is not retained as set forth in the existing permit, or qualified by the “maximum extent practicable” limitation discussed above, then this section must be modified to require implementation “to the maximum extent practicable” for the reasons set forth above.

Part I.D.3 (“Effluent Limits Consistent with TMDL WLA”) of the proposed Amendment would require the permittee to submit and implement implementation plans specific to the Anacostia River TMDL WLAs and Rock Creek TMDLL WLAs in accordance with the schedule set forth in Part II.A Table 1 of the permit. The existing permit, in contrast, stated that unless and until the permit was modified, EPA had determined that the controls specified in the permittee’s upgraded SWMP (dated October 19, 2002) were appropriate effluent limits consistent with the TMDL WLAs specifically described and discussed in the Fact Sheet for the existing permit. The Fact Sheet for the existing permit, consistent with § 402(p)(3)(B)(iii) of the

Clean Water Act, made findings that such controls were “practicable” under the facts and circumstances of this particular permit. The proposed Amendment unlawfully requires implementation of any controls necessary to meet additional TMDL WLAs, without any supporting record or finding by EPA that such controls are “practicable.” For this reason, the proposed Amendment must be revised to state that the permittee shall implement the referenced controls (both to meet the narrative prohibition in Part I.C, and the WLAs for the Anacostia River and Rock Creek TMDLs) “to the maximum extent practicable.” TMDLs, which are established under CWA § 303(d), are not self-implementing, but are enforced only by incorporating water quality-based effluent limitations in NPDES permits through the authority of CWA § 301(b)(1)(C). Because § 301(b)(1)(C) does not apply to MS4 permits, as the Ninth Circuit and other courts and administrative tribunals have ruled, the requirement to ensure compliance with TMDLs can be no more stringent than the requirement to meet water quality standards in the first instance.


Part IX.B. Other Applicable Provisions

Similar to the proposed Amendment to Part I.D.3 discussed above, the proposed Amendment to Part IX.B (“TMDL WLA Implementation Plans and Compliance Monitoring”) would require the permittee to “further submit implementation plans to reduce discharges consistent with” any applicable EPA-approved TMDL WLAs. The TMDL Implementation Plan shall consist of documenting all previous and ongoing efforts at achieving the reductions identified in the TMDL WLA and “demonstrating additional controls sufficient to achieve those reductions.” Each of these requirements (to submit implementation plans, and to demonstrate additional controls) must be qualified “to the maximum extent practicable,” for the reasons set forth above.

Conclusion

The Municipal Coalition appreciates this opportunity to submit the foregoing comments on the proposed Amendment. In addition, the undersigned representatives of the Coalition are available to answer any questions or provide any clarifications that may be helpful to EPA in taking final action on the permit.

Respectfully submitted,


DAVID W. BURCHMORE
Squire, Sanders & Dempsey L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
Telephone: (216) 479-8500

ROBERT J. SANER
General Counsel for National Association of Flood
and Stormwater Management Agencies
Powers, Pyles, Sutter & Verville, P.C.
1875 Eye Street N.W.
Washington, DC 20006
Telephone: (202) 466-6550

ALEXANDRA DAPOLITO DUNN
General Counsel, Association of Metropolitan
Sewerage Agencies
1816 Jefferson Place, NW
Washington, DC 20036
Telephone: (202) 533-1803

F. PAUL CALAMITA
AquaLaw, PLC
801 E. Main Street
Suite 1002
Richmond, VA 23219
Telephone: (804) 716-9021