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CURRENT STATE AND FEDERAL STORMWATER ISSUES

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I. IMPLEMENTATION OF THE PHASE II STORMWATER PROGRAM

Consistent with the history of court challenges that have followed each new federal stormwater rule, the Phase II Rules were challenged before the Ninth Circuit Court of Appeals in a case entitled *Environmental Defense Center, Inc. v. U.S. EPA*. However, with limited exception, the Ninth Circuit upheld the Phase II Rules in its 2003 decision. The Court found that the U.S. EPA's use of permits for the small municipalities ("MS4s") stormwater regulatory program was within its authority. The Court also rejected the argument by municipal interests that the Phase II Rule compels MS4s to regulate third parties in order to meet the rule's permit requirements. The Court reasoned that the municipalities have the option of not discharging or seeking an alternative permit. The Court also held that the public education and outreach requirements of the Phase II Rules did not violate the First Amendment of the U.S. Constitution.

However, the Ninth Circuit did find that the streamlined general permitting requirements of the Phase II rules were contrary to the express requirements of the Clean Water Act. This provision of the rules provided for the use of a Notice of Intent ("NOI") to be covered by a general permit applicable to MS4s. This permitting procedure is similar to those used for other general permits issued under the Phase I Rules. The Court found that the U.S. EPA must ensure that municipal separate storm sewer systems' requests for coverage under the general permit provisions of the Phase II Rules are subject to the Clean Water Act's public participation requirements. In other words, the MS4 general permit procedure must allow for review by the U.S. EPA or NPDES permit issuing authority of MS4 permit applications and also public notice and hearing prior to determining whether a discharger may be covered by a general permit. These are the same public participation requirements applicable to individual stormwater NPDES permits. The Court's holding has created concerns about how the U.S. EPA will proceed to integrate the new public participation mandate into the existing general permit application process. There is concern that the public notice and hearing requirements will cause delays and added costs to the general permit issuance procedure. The Ninth Circuit's decision also creates uncertainty as to whether the Court's ruling applies to general permits other than just the MS4 general permit that was at issue in this case.

Similarly, in those handful of states where the U.S. EPA retains NPDES permitting authority, there have been challenges to the broad scope of the July 1, 2003 General Permit issued by the U.S. EPA for Phase II small construction sites (*i.e.* >1 acre). The U.S. EPA is taking the position that a Phase II Construction General Permit is required where there is a "potential" for a stormwater discharge during any rainfall event that may affect federally protected waters. Builders and developers are contending that in the absence of evidence that there will be runoff from a given construction site or that potential runoff would reach federally protected waters, the requirement to obtain coverage under the Phase II Construction General

Permit should not apply. The U.S. EPA's position is that any construction site has the potential to discharge stormwater if a rainfall is significant enough and this justifies its broad permitting requirements. The regulated community claims that the U.S. EPA's position unlawfully extends the Clean Water Act's reach to land use activities even in the absence of actual stormwater discharges. The issue may ultimately be decided in the courts. Given these challenges to the small construction sites stormwater permitting requirements and the Ninth Circuit's decision on the public participation requirements applicable to the MS4 general permit, it is perhaps not surprising that the May 30, 2003 Illinois EPA general permit includes a new reopener provision that authorizes the Agency to reopen the permit in the event that the outcome of ongoing litigation regarding the Phase II general permits requires changes.

In Illinois, municipalities have forged ahead with the implementation of the Phase II permitting requirements. In some counties, such as Lake County, municipalities and county representatives worked together to implement the Phase II Rules. Through the leadership of the Lake County Stormwater Management Commission, the individual municipalities, drainage districts and townships in Lake County regulated by the Phase II Rules gain technical assistance and outreach services. This coordinated effort and sharing of resources already has led to satisfying four of the six Phase II program minimum controls. While each regulated entity submits its own NOI and is responsible for implementing its program and tailoring it to its own needs, the coordinated effort at the county level in Illinois has definitely saved time and resources for many of these MS4s.

II. Combined Sewer Overflows

A controversial issue in the area of combined sewer overflows ("CSOs") is the U.S. EPA's proposed Blending Policy, published on November 7, 2003. *See* 68 Fed. Reg. 63042. "Blending" refers to the mixing of fully treated POTW effluent with a portion of the wet weather flow that exceeds the biological treatment capacity of the POTW prior to discharge to the receiving water. POTWs use blending to avoid washout of biological treatment at their plants and/or to avoid damage to these treatment units. Its proponents support the proposed U.S. EPA Blending Policy as a way of providing clarity and uniformity to the question of whether blending can be used without constituting an illegal "bypass" of the POTW's treatment system contrary to the federal bypass regulations. Various U.S. EPA regions throughout the United States have taken different positions on whether blending is an authorized bypass and if so, under what conditions may blending be employed. Blending is controversial because its opponents contend that it allows the discharge of partially treated sewage that can contain pollutants, such as pathogens, into surface waters. Opponents also contend that to continue to allow "blending" simply condones the status quo and allows "dilution" as a means to compliance rather than pushing POTWs to improve their plants' ability to fully treat wet weather flows. In rebuttal, proponents respond that blending to avoid "washouts" of biological treatment systems minimizes the discharge of pathogens that would otherwise be discharged from a "washout" and contend that the resources are simply not available to improve POTWs to the point that they have the capacity to fully treat all wet weather flows.

The blending controversy stems from the 1994 CSO Control Policy, 59 Fed. Reg. 18688 (Apr. 19, 1994). The CSO Control Policy provided guidance for developing site-specific NPDES permit requirements for combined sewer systems to address wet weather CSO discharges from designed overflow points. It set forth nine minimum controls that had to be

adopted in the short-term by POTWs and also required the development of a long-term CSO control plan to comply with the Clean Water Act. In addition, the Wet Weather Water Quality Act of 2000 amended the Clean Water Act, 33 U.S.C. § 1342(q)(1), to require that all NPDES permits issued after December 15, 2000 for municipal combined sewer discharges conform to the CSO Control Policy. The Policy promotes maximizing the flow to POTWs during wet weather events. It also provides that NPDES permits should define the specific wet weather conditions under which CSO-related bypasses are allowed, pursuant to the federal bypass provisions of 40 C.F.R. §122.41(m). The CSO Control Policy further provides that wet weather flows should at least receive primary treatment, and disinfection where necessary, and any other treatment that can be reasonably provided. Secondary treatment can be bypassed where there are “no feasible alternatives.” The Policy explains that “no feasible alternatives” applies to situations where secondary treatment is technically or financially infeasible for greater amounts of wet weather flow. However, it still requires that the final CSO discharge meet secondary treatment requirements. The proposed Blending Policy is intended to provide clarification of when an approved bypass of secondary treatment using the blending approach is allowed.

The proposed Blending Policy sets forth six principles for when blending is not a prohibited bypass. In other words, it explains when an NPDES permit for CSOs may authorize blending as an allowable bypass of the secondary treatment system. The six principles of the proposed Blending Policy include:

1. The discharge must meet secondary treatment standards and applicable water quality standards.
2. The NPDES permit application must specify the treatment scenario used for peak flow management.
3. Primary clarification treatment must be provided.
4. The discharger must operate all treatment units as designed and use the treatment scenario described in the NPDES permit.
5. The discharger must monitor the blended discharge to show compliance with water quality-based effluent standards.
6. The NPDES permit must require proper operation and maintenance of all parts of the collection system.

The U.S. EPA has accepted comments on the proposed Blending Policy but as of this writing, no final policy has been issued. In Illinois, under 35 Ill. Adm. Code § 306.305, which addresses the treatment of overflows and bypasses, blending is allowed. Illinois relies on a concentration limit effective during the wet weather periods for all separate sanitary sewer systems. For combined sewer system, although no numerical limits are applicable, they must meet the requirements of section 306.305 and the U.S. EPA CSO Policy.

III. Total Maximum Daily Loads (“TMDLS”)

In Illinois, the potential impact on stormwater permitting requirements from the development of Total Maximum Daily Loads (“TMDLS”) is still largely unknown. The

development of TMDLs in Illinois is still in its early stages. Very few TMDLs have been approved in Illinois. Further information on the approved and proposed TMDLs in Illinois is available on the IEPA's website at <http://www.epa.state.il.us/water/tmdl/tmdl-reports.html>. Therefore, as we are just beginning to see the potential impact of the development of TMDLs on industrial process wastewater and non-wet weather POTW discharges to receiving waters, it is difficult to predict how the development of TMDLs will impact stormwater discharges.

Based on a 1999 court decision by the Ninth Circuit Court of Appeals in *Defenders of Wildlife v. Browner*, there is a potential that the impact of TMDLs will differ depending upon whether the stormwater discharge is by a municipal or industrial discharger. In *Defenders of Wildlife*, the Ninth Circuit held that municipal stormwater discharges are not required to meet numeric water quality standards. The court rejected the positions advanced by environmental groups and the U.S. EPA. The U.S. EPA had argued that municipal stormwater discharges must comply not only with Section 402(p) of the Clean Water Act, which requires that cities reduce stormwater to the "maximum extent practicable," but also with Section 301(b), which requires compliance with state water quality standards regardless of the technical or economic feasibility of doing so. The court rejected this interpretation of the Clean Water Act, holding that only the Section 402(p) requirement of reducing stormwater discharges to the "maximum extent practicable" applies to municipal discharges. Thus, while the NPDES permitting authority may include numeric limits in municipal stormwater discharges, those limits must remain consistent with the limits of "practicability" under Section 402(p), which encompasses technical and economic feasibility principles. The same is not true of industrial stormwater discharges. Such discharges are separately addressed in Section 402(p), and the language expressly requires compliance with Section 301(b)'s requirements of compliance with state water quality standards without the limitations of the "practicability" standard.

The *Defenders of Wildlife* court decision may provide a legal basis on which to require stricter reductions in stormwater discharges by an industrial discharger than by a municipal discharger under TMDLs developed for a particular receiving water. The municipal dischargers cannot lawfully be pushed to go beyond stormwater pollutant reductions that meet the standard of what is the "maximum extent practicable." Because no such constraints apply to the extent of reductions that may be imposed upon industrial stormwater dischargers to meet TMDL requirements, it is conceivable that industrial and municipal stormwater dischargers to the same receiving water may be treated differently in terms of the applicable NPDES permit limits for a pollutant which is the subject of the TMDL. As water-quality based effluent limitations necessary to meet the TMDL requirements are not constrained by technical feasibility or economic reasonableness standards for industrial stormwater discharges, these dischargers could be made to bear more of the technological and economic burden of attaining compliance with TMDLs. Further, beyond the requirement to meet a numeric limit in a stormwater NPDES permit, industrial dischargers could face additional requirements to prevent their materials from coming in contact with stormwater, if deemed necessary to meet the stricter requirements that a TMDL will impose.

This is certainly not to say that municipal stormwater dischargers will be immune to the potential burdens imposed by TMDLs. While the U.S. EPA's position has been that no additional controls beyond the minimum measures should be imposed on Phase MS4s, it accompanied that statement with the caveat that if a TMDL or watershed study is developed, depending on the results, its position may change. It is possible that the U.S. EPA will use

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NPDES permits to regulate stormwater flow rate and volume or develop better-tailored BMPs that go beyond the minimum control measures where TMDLs support doing so as a means to attain water quality standards. Under the 1996 Stormwater Policy issued by the U.S. EPA (applicable only in non-NPDES delegated states), where significant information exists to develop more specific information than general BMPs, this information may be incorporated into NPDES permits. The U.S. EPA may conclude that a TMDL includes such “more specific information” to support requiring more aggressive BMPs by municipal dischargers. The U.S. EPA has encouraged states to adopt similar policies.