LAW OFFICE OF
DAVID A. LUDDER
A Professional Limited Liability Company

January 6, 2011

Delivered via Electronic Mail

ADEM Hearing Officer
hearing.officer@adem.state.al.us
Office of General Counsel
Alabama Department of Environmental Management
Montgomery, Alabama

Re: **Draft Statewide General NPDES Permit ALR100000 (Construction Stormwater General Permit)**

Dear Hearing Officer:

These comments are submitted in response to the General NPDES Notice dated November 16, 2010 and Notice of Public Hearing dated November 23, 2010 related to Statewide General NPDES Permit ALR100000 - Construction Stormwater General Permit (hereinafter, "CSGP"). Such permit is intended to prevent and minimize the discharge of pollutants to waters from construction activities.

Construction Best Management Practices Plan (CBMPP) Review

The draft CSGP provides that "[e]ach construction site must develop and implement a Construction Best Management Practices Plan (CBMPP), designed to minimize the discharge of pollutants to the maximum extent practicable to protect water quality and to satisfy the appropriate water quality requirements of the Clean Water Act." NPDES Permit Rationale. *See also* CSGP at Part III. D. 1. CBMPPs describe the controls, practices, devices, and measures that will be implemented and maintained at the construction site to prevent and minimize the discharge of pollutants consistent with the effluent limitation guidelines at 40 C.F.R. Part 450. *See e.g.*, NPDES Permit Rationale. The draft CSGP requires that all permittees properly implement and regularly maintain the controls, practices, devices, and measures specified in the CBMPP. CSGP at Part III. D. 2. Permittees of "priority" construction sites (those discharging to waters listed as impaired for turbidity, siltation, or sedimentation on the EPA-approved 303(d) list; waters for which a TMDL has been finalized or approved by EPA for turbidity, siltation, or sedimentation; waters assigned the Outstanding Alabama Water use classification; waters assigned the Outstanding National Resource Water designation; and waters designated as a critical habitat by the U.S. Fish & Wildlife Service pursuant to 16 U.S.C. §1533) must submit their CBMPPs to ADEM with their notice of intent to be covered by the CSGP. CSGP at Part II. C. 1. (f); Part IV. T., and may not commence construction until ADEM acknowledges receipt of a complete and technically adequate CBMPP. CSGP at Part II. F. 3. All others are granted coverage under the CSGP immediately upon submission of a complete and timely Notice of Intent (NOI) to be covered by the CSGP, CSGP at Part III. D. 4. d.,

9150 McDougal Court ◆ Tallahassee ◆ Florida 32312-4208 ◆ Telephone 850-386-5671
Facsimile 206-426-6847 ◆ Email DavidALudder@enviro-lawyer.com ◆ Web www.enviro-lawyer.com

but need not submit their CBMPPs to ADEM for review prior to obtaining coverage under the CSGP. CSGP at Part II. F. 1.

In *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2nd Cir. 2005), the Waterkeeper Alliance and others challenged a regulation promulgated by EPA under the Clean Water Act to abate and control the discharge of water pollutants from concentrated animal feeding operations (CAFOs). The Waterkeeper Alliance and others claimed that the EPA regulation created an "impermissible self-regulatory permitting regime."

The CAFO regulation promulgated by EPA provided for regulation of CAFO activities by general permit to prevent and minimize the discharge of pollutants to waters. Specifically, the regulation required that CAFO permittees develop and implement nutrient management plans. However, the regulation did not require that CAFO permittees submit the nutrient management plans to EPA (or State NPDES permitting authority) for review. The Court explained:

> The Clean Water Act demands regulation in fact, not only in principle. Under the Act, permits authorizing the discharge of pollutants may issue only where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards. Section 1342(a)(1) of Title 33 provides, for example, that when the EPA is, itself, issuing NPDES permits, the EPA may issue a permit for the discharge of any pollutant or combination of pollutants "upon condition that such discharge will meet ... all applicable requirements [including the effluent limitations statutorily required by 33 U.S.C. § 1311]." The Act further provides that the EPA "shall prescribe conditions for such permits *to assure compliance with* [all applicable requirements, including effluent limitations]." 33 U.S.C. § 1342(a)(2) (emphasis added). Similarly, 33 U.S.C. § 1342(b) allows states to distribute NPDES permits only where, *inter alia*, the state permitting programs "*apply, and insure compliance with*, any applicable [effluent limitations and standards]." 33 U.S.C. § 1342(b) (emphasis added).

Id. at 499 (footnote omitted). Accordingly, the Court in *Waterkeeper Alliance, Inc.* held that "[b]y failing to provide for permitting authority review of the nutrient management plans, the CAFO Rule plainly violates [the commandments of the Clean Water Act] and is otherwise arbitrary and capricious under the Administrative Procedure Act." *Id.*

Similarly, in *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003), the Environmental Defense Center ("EDC") challenged the EPA's promulgation of a regulation to control pollutants discharged into waters from small municipal separate storm sewer systems (MS4s). EDC claimed that "the Rule creates an impermissible self-regulatory system." *Id.* at 854.

> The Phase II general permitting scheme differs from the traditional general permitting model. The Clean Water Act requires EPA to ensure that operators of small MS4s "reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). To ensure that operators of small MS4s achieve this "maximum extent practicable" standard, the Phase II Rule requires that each NOI contain information on an individualized pollution control program that addresses each of the six general criteria specified in the Minimum Measures; thus, according to the Phase II Rule, submitting an NOI and implementing the Minimum Measures it contains "constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable.'" 40 C.F.R. § 122.34(a).

Id. at 853. "[W]hile each Phase II general permit will likely ensure that operators of small MS4s comply with certain standards of the Clean Water Act, they will not 'require controls to reduce the discharge of pollutants to the maximum extent practicable.'" *Id.* at 855. The Court explained:

> According to the Phase II Rule, the operator of a small MS4 has complied with the requirement of reducing discharges to the "maximum extent practicable" when it implements its stormwater management program, *i.e.*, when it implements its Minimum Measures. 40 C.F.R. § 122.34(a); *see also* 64 Fed. Reg. at 68753 (stating EPA's anticipation that limitations more stringent that the minimum control measures "will be unnecessary"). Nothing in the Phase II regulations requires that NPDES permitting authorities review these Minimum Measures to ensure that the measures that any given operator of a small MS4 has decided to undertake will in fact reduce discharges to the maximum extent practicable.
>
> * * *
>
> In fact, under the Phase II Rule, in order to receive the protection of a general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum practical reduction. No one will review that operator's decision to make sure that it was reasonable, or even good faith. Therefore, as the Phase II Rule stands, EPA would allow permits to issue that would do less than require controls to reduce the discharge of pollutants to the maximum extent practicable. *See* 64 Fed. Reg. at 68753 (explaining that the minimum control measures will protect water quality if they are "properly implemented").

Id. at 855-856 (footnotes omitted). The Court concluded that "storm water management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable. We therefore remand this aspect of the Rule." *Id*. at 856.

The draft CSGP is no different than the CAFO regulation struck down in *Waterkeeper Alliance, Inc.* or the Phase II rule struck down in *Environmental Defense Center, Inc.* The draft CSGP requires all construction site operators to develop and implement a CBMPP to ensure compliance with the water quality requirements of the Clean Water Act. With the exception of CBMPPs for "priority" construction sites, CBMPPs are not required to be submitted to ADEM for review and confirmation that they will ensure compliance with Clean Water Act requirements. Thus, the CSGP establishes an impermissible self-regulatory permitting regime that violates the Clean Water Act.

Public Participation

The Clean Water Act provides that EPA shall not approve state NPDES programs that fail "[t]o insure that the public, and any other State the waters of which may be affected, receive notice of *each application* for a permit and to provide an opportunity for public hearing before a ruling on *each such application*; . . .." 33 U.S.C. § 1342(b)(3) (emphasis added). "Under the Phase II Rule, NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements." *Envtl. Defense Ctr., Inc. v. U.S. Envtl. Protection Agency*, 344 F.3d 832, 857 (9th Cir. 2003). *Contra*, *Texas Indep. Producers and Royalty Owners Ass'n v. U.S. Envtl. Protection Agency*, 410 F.3d 964, 977-978 (7th Cir. 2005) (a NOI is not a "permit application").

Ala. Admin. Code r. 335-6-6-.23(5)(d) provides:

> Each general permit *may* specify the appropriate public notice procedures required to be followed *by each discharger* prior to the coverage of any discharge under the general permit. Notice by individual dischargers shall not be required in instances where the Department can notice the dischargers with notice of the permit. For instance during renewal of a permit, those dischargers already covered may be noticed with the permit.

(Emphasis added). Neither r. 335-6-6-.23(5)(d) nor the draft CSGP specify any public notice procedures for CSGP NOIs. Moreover, the public notice of the draft CSGP does not identify dischargers or NOIs. Thus, the public will not have an opportunity to comment on a NOI or an opportunity for a public hearing on any such NOI.

In *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2nd Cir. 2005), the Waterkeeper Alliance and others challenged a regulation promulgated by EPA under the Clean Water Act to abate and control the discharge of water pollutants from concentrated animal feeding operations (CAFOs). The Waterkeeper Alliance and others claimed that the EPA regulation fails to provide public participation as required by the Clean Water Act, because the public receives neither notice nor opportunity for hearing regarding a NOI. The Court found that "the CAFO Rule prevents the public from calling for a hearing about – and then meaningfully commenting on –

NPDES permits before they issue. *See* 33 U.S.C.§§ 1342(a), 1342(b)(3)." *Id*. at 503. The Court said:

> Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act. The Act unequivocally and broadly declares, for example, that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e). Consistent with this demand, the Act further provides that there be an "opportunity for public hearing" before any NPDES permit issues, *see* 33 U.S.C. §§ 1342(a), 1342(b)(3); . . ..

Id. at 503. The Court concluded that the CAFO Rule violates the plain dictates of the Clean Water Act.

In *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003), the Environmental Defense Center ("EDC") challenged the Phase II stormwater rule because it fails to provide for public participation as required by the Clean Water Act, *i.e.*, the public receives neither notice nor opportunity for hearing regarding an NOI. *Id*. at 857.

> [W]e conclude that clear Congressional intent requires that NOIs be subject to the Clean Water Act's public availability and public hearings requirements. The Clean Water Act requires that "[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public," 33 U.S.C. § 1342(j), and that the public shall have an opportunity for a hearing before a permit application is approved, 33 U.S.C. § 1342(a)(1). Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy. *See* 33 U.S.C. § 1251(e); *see also Costle v. Pacific Legal Found.*, 445 U.S. 198, 216, 100 S. Ct. 1095, 63 L.Ed.2d 329 (1980) (noting the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program"). EPA has acknowledged that technical issues relating to the issuance of NPDES permits should be decided in "the most open, accessible forum possible, and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit." 44 Fed. Reg. 32,854, 32,885 (Jun. 7, 1979).

Id. at 856-857.

> Under the Phase II Rule, NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements. Thus, if the Phase II Rule does not make NOIs

> "available to the public," and does not provide for public hearings on NOIs, the Phase II Rule violates the clear intent of Congress.

Id. at 857. Accordingly, the Court rejected the Phase II Rule as "contrary to the clear intent of Congress insofar as it does not provide for public hearings on NOIs as required by 33 U.S.C. § 1342(a)(1)." *Id*.

Neither the draft CSGP nor r. 335-6-6-.23(5)(d) provide for notice and opportunity for comment or hearing on NOIs. Accordingly, the draft CSGP does not comply with the Clean Water Act, 33 U.S.C. § 1342(b)(3).

Conclusion

The draft CSGP establishes an "impermissible self-regulatory permitting scheme" whereby permit applicants are required to develop CBMPPs that create enforceable permit requirements that are not subject to review by ADEM prior to coverage under the CSGP. This permitting scheme fails to ensure that CBMPPs will comply with applicable Clean Water Act provisions as required by 33 U.S.C. § 1342(b)(1)(A). To satisfy Clean Water Act requirements, all CBMPPs must be submitted to and reviewed by ADEM prior to coverage under the CSGP.

A NOI is the functional equivalent of a permit application. Neither Ala. Admin. Code r. 335-6-6-.23(5)(d) nor the draft CSGP provide for an opportunity for public comment or public hearing on each NOI as required by 33 U.S.C. § 1342(b)(3). To satisfy Clean Water Act requirements, all NOIs must be publicly noticed and opportunity for public comment and public hearing must be provided prior to coverage under the CSGP.

Sincerely,

David A. Ludder

enc: Draft Construction Stormwater General Permit
Public Notice of Comment Period (Nov. 16, 2010)
Notice of Public Hearing (Nov. 23, 2010)
Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency, 399 F.3d 486 (2nd Cir. 2005)
Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency, 344 F.3d 832 (9th Cir. 2003)

cc: James Giattina, EPA Region 4