Alliance of Rouge Communities

OURS TO PROTECT

Working together, restoring the river

James W. Ridgway, P.E.
Executive Director

May 8, 2008

Mr. Steve Chester
Constitution Hall
525 West Allegan St.
PO Box 30473
Lansing, MI 48473

Dear Mr. Chester:

I am writing to express the disappointment of the Alliance of Rouge Communities (ARC) in our inability to negotiate a flexible, comprehensive General Watershed Permit. I am also asking that you use the authority of your position to address the three major challenges that may preclude these communities from seeking coverage under the proposed general permit.

The major points of contention include the following and are further described below:

1) The MDEQ is requiring mapping and data collection throughout the municipally-owned storm water collection systems - not just at the outfall locations.
2) Dry weather and wet weather monitoring throughout the regional drainage system is prescriptive, costly, and required to be collected in an unreliable manner.
3) The post-construction runoff control requirements establish “one-size-fits-all” design standards for the entire State of Michigan.

The MDEQ staff has committed extensive time and effort during our negotiations. A number of our initial concerns were addressed by the MDEQ, as they incorporated the following changes:

- A SWPPI approval process and reopener clause was included;
- An “elective option” for TMDL monitoring was included;
- A watershed-wide Public Education Plan is now referenced as an option;
- The Construction Site Runoff control language was updated to accurately reflect the Part 91 rule; and
- The 25% reduction requirement in TSS from paved roads and parking lots was removed.

At the same time, the larger, more costly requirements that represent a very prescriptive approach have not been resolved. I have reviewed the ARC’s beginning position and our current position and conclude that the MDEQ has conceded on the smaller details in the permit, but has not agreed to our suggested changes on the larger issues that we believe more accurately represent the watershed approach.

As the communities reviewed the proposed permit, they were reminded that the MDEQ has the authority to impose stricter standards than imposed by the Clean Water Act (CWA). The CWA

authorizes a "Federal Floor" for protection of water quality but allows states to implement more stringent programs to protect water quality within their individual state borders. The ARC supports the MDEQ's right and responsibility to regulate the waters of the state. This, however, does not mean these communities want to accept "make work" requirements that do not improve water quality.

Thus, as we reviewed the proposed permit, the requirements were sorted into three categories:
1) those required under the CWA;
2) those that are required under state rules; and
3) those that may be good practices but are not required in either the federal act or the state rules.

For several months, all parties have been negotiating in good faith. Still the communities have to conduct monitoring throughout their collections systems, many have extensive E. coli wet weather sampling requirements, all still have aggressive mapping requirements and there remains stringent, post-construction standards. All of this effort and cost is required even if the communities are meeting water quality standards today. The MDEQ staff has offered to entertain "alternative approaches" but never really defines what would be required to have the alternative accepted. In the end, the communities remain at the mercy of the MDEQ staff to interpret an un-documented standard.

Another serious concern is that the stated requirements are ambiguous and therefore, difficult to understand. I recommend that the permit be edited by a technical writer that can clarify the requirements in a way that the permittee can understand them without legal representation. As written, the text can be interpreted in many ways. That is a serious concern to many communities.

The following six proposals represent those issues that raise the highest concerns to the ARC.

PROPOSAL 1
Limit the mapping, data collection, and monitoring to outfalls that discharge to the waters of the state.

Much of the MDEQ argument for extensive mapping requirements is based upon staff's belief that the EPA is requiring this prescriptive approach. In my discussions with EPA, I have not found this to be the case. Furthermore, I believe that the MDEQ Director has the authority to limit the permit requirements to direct "point source" discharges to the "waters of the state." The communities would support this limited view because it would protect in-stream water quality without imposing excessive regulatory requirements. The following provides two recent documents that support this assumption of limited regulatory requirements.

The EPA issued a document entitled "MS4 Program Evaluation Guidance" that provides the MDEQ a great deal of flexibility in implementing the MS4 storm water permitting process. On the first page of the text, it states:

> *"Unlike NPDES industrial wastewater permits which typically contain specific end-of-pipe effluent limits based on water quality standards or available treatment technology, MS4 permits usually include programmatic requirements involving the implementation of best managements practices (BMPs) in order to reduce pollutants discharged to the "maximum extent practicable" (MEP). In addition, the permittees often are allowed flexibility in the types of BMPs and activities implemented to meet*

permit requirements. This flexibility, as well as the multifaceted nature of the requirements, makes it difficult to evaluate the effectiveness of MS4 stormwater programs."

The EPA also recognized that their authority to regulate drainage issues that do not discharge directly to the waters of the state have been questioned given recent Supreme Court rulings. In a recent summary of the hearing on the Clean Water Restoration Act of 2007 to the US House Members of the Committee on Transportation and Infrastructure, the Subcommittee on Water Resources and Environment Majority Staff stated:

"While the facts of the Rapanos decision centered on filling four Michigan wetlands, and the application of section 404 on the Clean Water Act, the implications of this decision have called into question the operation on the entire Clean Water Act, including the ability of the Act to protect against discharges of pollutants from point sources.

The Structure of the Clean Water Act prohibits the "discharge of any pollutant," except in compliance with a permit. This phrase is further defined as including the "addition of any pollutant to navigable waters from a point source." Accordingly, ***the uncertainty raised by the Rapanos decision on the term "navigable waters" is equally applicable to the ability of the EPA or State authorities to prevent the discharge of pollutants from point sources under section 402 – the National Pollutant Discharge Elimination System (NPDES) program."***

PROPOSAL 2

Limit monitoring to flexible, but useful, data collection that is directly applicable to identifying and removing pollutant sources and/or statistically significant data that can be used to measure the success of the program.

The permit, as currently drafted, requires a lot of monitoring, within both the TMDL and IDEP requirements. This prescriptive sampling is expensive AND has been proven to be unusable for most applications AND was specifically removed from the Federal Permit requirements.

The MDEQ prescribes when and where this monitoring is required with little regard for the current in-stream water quality. The prescriptive monitoring requirements of the Phase 1 storm water program have proven to be costly and ineffective at locating wet weather pollution sources. In an effort to impose strict requirements on the under-performing communities, the MDEQ has chosen to return to a program that has been documented to be unreliable.

The wet weather sampling is also particularly troubling. The data currently required will have NO statistical significance. By specifying that the data is to be collected all over the drainage area, including locations where storm sewers change jurisdiction, the permittee will be unable to draw any meaningful conclusion AND will not be able to afford a more intensive investigation (even though the draft permit requires that "*The permittee shall use these results...to develop and prioritize actions to reduce the discharge of E. coli to be consistent with the TMDL*" (currently 130 counts). The MDEQ did add language to allow for an "elective option" for TMDL monitoring; however, there are no assurances that an updated ARC 5-year monitoring program (or any other program) will satisfy this requirement.

When the Phase 2 language was being crafted in Washington, a federal advisory committee (FACA) met for over two years. During their discussions, one consistent position of the Phase 1

communities was the uselessness of this type of sampling. As a result, this type of prescriptive sampling was taken out of the Phase 2 permit requirements. It was debated again in Michigan's Phase 2 Rules implementation work group. During those negotiations, professionals from the Rouge Communities provided similar guidance taken from the FACA discussions. This permit should not incorporate requirements that have been shown to be ineffective.

PROPOSAL 3

Allow permittees to develop and specify post-construction standards that are representative of permittee and watershed conditions.

The prescriptive standards contained in the permit should only be used as guidance for permittees that have no understanding of the types of design standards to implement. This one-size-fits-all solution is completely contrary to the overall watershed management approach we have been successfully implementing for many years.

The federal guidance and the state rules allow flexibility but the proposed permit prescribes what is required. The MDEQ has allowed alternatives but has required permittees expend extensive resources in order to justify the alternative approach prior to implementation and submittal to the MDEQ. Given that significant resources that have been expended across the country to identify and develop unique, innovative approaches to storm water management, communities and counties should be afforded the opportunity to select those standards that are applicable to their situation. The state rule requires the following:

> *A program to address post-construction storm water runoff from new development and redevelopment projects that disturb 1 or more acres, including projects less than 1 acre that are part of a larger common plan of development or sale, that discharge into the regulated MS4. The program shall include an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under state or local law. The ordinance or other regulatory mechanism shall be designed to prevent or minimize water quality impacts, including resource impairment resulting from extreme flow volumes and flow conditions, and shall include all of the following:*
>
> *(i) A requirement for review of post-construction storm water best management practices during initial site plan review, as applicable.*
>
> *(ii) Strategies for implementation of structural or non-structural, or both, best management practices appropriate for the community.*
>
> *(iii) Requirements for adequate long-term operation and maintenance of best management practices.*

This rule allows for flexibility across a watershed and even for flexibility on a site-by-site basis. It also supports a watershed approach by encouraging updates to standards utilizing a lessons learned approach. The current permit requirements exceed the water quality and channel protection standards that have been in place in much of the Rouge watershed for many years and which have demonstrated improvement.

PROPOSAL 4
Seek MDEQ's support to modify the existing Michigan Storm Water Rules.

If the current storm water rules required "permits" for every inter-jurisdictional connection, I recommend that the rules be changed.

I have argued that the large number of "discharge points" requiring mapping, sampling, and reporting is not required by federal law. I also believe that the Michigan Rules do not require this level of detail. However, if the state determines otherwise, then I would ask them to join with us to get the rules changed.

I remain respectful of the rules, but now conclude that there must be a modification of these rules to make them practical. The definitions vary between the rules and the permit and the result is a number of newly imposed requirements that seem to expand the previous requirements. Once again, I concede that the MDEQ has the authority to expand the permit requirements, but I do not believe that the communities wish to take on additional responsibility unless they are provided the flexibility to expend their limited resources wisely.

There are some very poorly conceived requirements put into the rules and the MDEQ staff believes that these rules should be placed into the permit. (I'm not certain why R 323.2111 was rescinded from the rules but I believe there are other paragraphs that should be reconsidered.)

Specifically, the permit defines "discharge point" as:

> *"any location on the MS4 owned or operated by the permittee that discharges directly to the surface water of the state. Or any location on the MS4 owned or operated by the permittee that discharges to any other separate storm sewer system before discharging to a surface water of the state.*

The first sentence is fine. The second, however, is an expansion of the federal requirements. The practical result of this additional requirement means that every time a pipe (or ditch) owned by one municipality discharges into a pipe (or ditch) owned by another municipality, a number of requirements are triggered. There may be a hundred of thousand of these inter-connections in an urban county. Each will be required to be mapped, sampled, and reported upon even if the water discharging to the waters of the state is pristine. To reiterate, clean water flowing in each of the thousands of township-owned backyard drains discharging to county road drains will have to be sampled every five years and if they happen to be located in a community with a TMDL, 50% of these locations will need to be sampled during wet weather as well. Is this the best use of our limited resources?

"Discharge point" is NOT defined in the rule however, "point source discharge" is defined to include,

> *"a discharge that is released to the waters of the state by discernable, confined, and discrete conveyance, including any of the following from which wastewater is or may be discharged: a pipe, a ditch, a channel, a tunnel, a conduit, a well, a discrete fissure, a container, and concentrated animal feeding operation, and a vessel or floating craft."*

I read this to limit the "point sources" requiring permits to "waters of the state." The aforementioned Supreme Court ruling seems to support my reading. Thus, I recommend that the

requirements be limited to the "point source discharges" defined in the rule. This would eliminate thousands of inter-jurisdictional connections. Still, every point that enters the "waters of the state" would be regulated. That, to me, is consistent with the intent and letter of the Clean Water Act.

I believe that all Rouge communities agree that the communities must be responsible for their discharges into the waters of the state from point sources. That was established by the Supreme Court and lead to the 1987 amendments to the Clean Water Act. The Act, did not, however, require the discharger to provide excessive detail on their collection systems to the regulating agencies.

The State Rules define "separate storm sewer systems" as:

> *means of drainage including, but not limited to roads, catch basins, curbs, gutters, ditches, conduits, pumping devices, or man made channels"* (unless part of a combined sewer system or a publicly-owned treatment works).

I am not certain how roads, curbs, and gutters became part of a storm sewer system but I contend that it is an overly-encompassing definition. It also causes the MDEQ to feel obligated to collect information not required by the federal laws or guidance.

This definition is clearly broader than that provided in the recent USCOE/USEPA guidance document that implemented the Rapanos decision.

> "*The guidance document states that the Corps and EPA will generally not assert jurisdiction over … ditches (including roadside ditches)excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water, regardless of their potential to water quality." (Hearing on the Clean Water Restoration Act – April 11, 2008).*

PROPOSAL 5
Revisit how TMDLs are addressed in the permit.

The TMDL language is prescriptive, inconsistent, and too costly to implement. The ARC believes that the MDEQ staff has unilaterally eliminated some constituent (dissolved oxygen and habitat) and imposes strict requirements on others (E. coli and Phosphorus). The ARC members with E. coli TMDLs are concerned that the wet weather monitoring is costly and ineffective. At the same time, some ARC members have TMDLs for dissolved oxygen and habitat. What requirement can we expect for those constituents?

Lastly, the potential permittees recognize that the draft permit states:

> *"A person issued a state permit... who is not in compliance with applicable effluent standards...shall achieve compliance within a period of time as set forth by the department...The department shall require compliance...in the shortest period of time...or within a time schedule for compliance which shall be specified in the issued permit...If the time schedule...is more than 9 months, then the time schedule shall provide interim dates (which)...shall not be more than 9 months."*

Knowing that almost all urban storm water fails the E. coli standard, the communities do not want to be required to sample 50% of the overly prescriptive list of outfalls during wet weather. They

are unsure what will be required to *"develop and prioritize actions to reduce the discharge … to be consistent with the TMDL.*"

Until the TMDL requirements are clarified, most communities that drain to a waterway on the 303 (d) list remain extremely concerned.

PROPOSAL 6
Accept the requirement to public notice all Storm Water Pollution Prevention Initiatives (SWPPIs).

The MDEQ has suggested that the courts are requiring this prescriptive permit to avoid the need to public-notice the SWPPIs. I believe the ARC would welcome opening up our individual efforts to public scrutiny. My review of the Court Decisions suggests that the public notice could be quick and easy using the MDEQ web site. Thus, I do not understand why the permit is so drastically different from the earlier watershed permit.

CONCLUSION

The ARC asks the MDEQ to revisit the need for the drastic revisions proposed to the Watershed Storm Water permit.

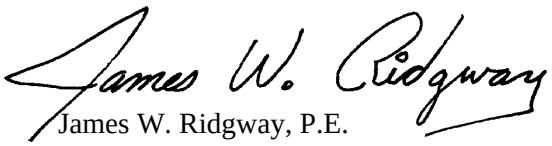
These communities have committed thousands of hours and millions of dollars to develop a nationally-recognized watershed program. Rather than be rewarded for their efforts to date, they are being put in the position of re-prioritizing their financial commitments to respond to an unproven approach. Michigan's first watershed permit was workable. It had a couple of un-realistic clauses but those were overlooked by both the regulators and the regulated community. Rather than refine this successful permit, the MDEQ has proposed major changes.

If the ARC members had been making poor progress, they could better understand the need for this more prescriptive approach. With the GREAT progress they have made to date, this drastic revision makes little sense.

If you have any further questions, feel free to call me and/or any of the ARC staff members at 313-963-6600.

Sincerely,

ALLIANCE OF ROUGE COMMUNITIES



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