

### ***Phase II Stormwater – Update***

Over the past three months the Phase II stormwater program is beginning to have all the marks of a train wreck. When the last article on stormwater appeared in the BFE, we had a March 10 deadline to file, an eagerly anticipated stormwater permit to be ready for public comment, and life was looking orderly and respectable. At this present writing, there is no general state stormwater permit, the Ninth Circuit court has remanded parts of the Phase II program, and most cities and towns are in a general state of confusion as to exactly what is expected of them.

### ***The Federal Level: The Ninth Circuit Court Weighs In***

In an attempt to sort out this regulatory Gordian knot without the use of a sword, let us first start at the federal level. On January 14, 2003, the Ninth Circuit Court of Appeals in San Francisco finally issued an opinion regarding the lawsuits challenging EPA's Phase II Storm Water Rules. (The opinion can be viewed at <http://www.mandf.com/Opinion.pdf>). The court had two basic challenges to consider. The first challenge was made by (among others) the National Homebuilders Association and the Texas Cities Coalition On Stormwater. The challenge, based on the Tenth Amendment, was that the federal government could not regulate nonfederal water such as stormwater.

This point of the case was decided by a vote of 2 judges to 1 judge (with a published dissent). The majority opinion was authored by the judge that was not present at oral argument and was joined by the judge that is considered by many to be the most liberal judge on the Federal bench (the same judge who has written opinions holding that the Pledge of Allegiance is unconstitutional and that the right to bear arms is not an individual right). Although there was some potential to overturn the decision of the three-judge panel through a motion for rehearing to the full Ninth Circuit or an appeal to the Supreme Court, no additional challenge has been made.

The second challenge came from the Environmental Defense Center, among others. This petitioner challenged the procedural notification program that the EPA created as part of the Phase II stormwater program. The majority of the judges agreed with the Environmental Groups and ruled that the EPA erred in allowing a city to be covered by merely filing a Notice of Intent ("NOI"). The court remanded those portions of the rule back to EPA, but the EPA is now asking for a rehearing, effectively delaying the remand until the full Ninth Circuit hears the case.

Meanwhile, the Fifth Circuit Court has heard a Tenth Amendment challenge coming from two Phase I stormwater cities, Abilene and Irving, TX. We are still waiting for that ruling.....

### ***Back at the Ranch...the State Level***

In December, the state of Oklahoma was to have a *Draft General Permit OKR04 Phase II Municipal Separate Storm Sewer System Discharges For Small Cities Within The State Of Oklahoma* ready for public comment. Although several drafts have been floated around for informal comment, the finalized draft may not appear until May or June 2003. Meanwhile, the federal regulations required all Phase II cities to submit their stormwater program to the regulatory authority (in this case, the Oklahoma Department of Environmental Quality) by March 10, 2003. This leaves the Phase II city in an interesting position: How does one file for a permit when the actual permit does not yet exist?

The (somewhat convoluted) answer is a gem of bureaucratic paperwork shuffling. The regulations allow a Phase II stormwater entity to apply for an *individual* (not Phase II) stormwater permit. During the expected processing time for the individual application (6-8 months), the general permit for the Phase II program will be completed. Then the city can withdraw application for the individual permit and refile for the Phase II permit when the state finishes work on the Phase II permit. Thus the federal regulations are satisfied, the state gets more time to work on the general Phase II permit, and everyone is happy.

### ***What Comes Next***

Two court decisions await us at the federal level. First is the Fifth Circuit Court decision regarding a Tenth Amendment challenge by Abilene and Irving, TX. A successful challenge may throw the entire stormwater program into a holding pattern until the Supreme Court sorts it out.

The second decision regards the current challenge by EPA in the Ninth Circuit Court regarding the public notification process. If EPA is unsuccessful, a rewriting of the notification requirements will be in order. How this will be achieved may largely depend on the ruling by the court.

At the state level, the draft general stormwater permit is eagerly anticipated to come out in May or June. After the public comment period, the permit will undergo a final revision before becoming effective later this year.

With all the elements of a good bureaucratic soap opera, the best way to end this article is: stay tuned!!!