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CONFIDENTIAL
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MEMORANDUM

TO: Georgia Industry Environmental Coalition

FROM: Harvey A. Rosenzweig
Amanda C. Baxter

RE: Legal Analysis of Issues Raised by Riverkeeper's Petition - Industrial Stormwater Permit Appeal

DATE: October 3, 2005

As requested by Katie Kirkpatrick and Debbie Phillips, we are submitting this legal analysis of the issues raised in the Riverkeepers' Petition. The analysis will include our opinion regarding the Riverkeepers' chances of winning on each listed issue at a hearing. It should be kept in mind that EPD, as the issuer of the Permit, will be the primary entity defending the permit if the case proceeds to a hearing. We will certainly do our best to assist them in this effort if mediation does not resolve all the issues. However, if EPD's witnesses are not effective, Riverkeepers' chances of success go up dramatically. For those issues which can be decided prior to the hearing based upon motions and legal briefs, testimony of EPD witnesses will not be a factor.

The legal analysis of each of the issues raised in the Riverkeepers' Petition including our assessment of Riverkeepers' chance of success appears below.

COUNT I: Riverkeepers contend that discharges containing fecal coliform into water bodies which are impaired for fecal coliform are not adequately addressed by the General Permit.

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RIVERKEEPERS' CHANCE OF SUCCESS: MODERATE TO HIGH

DISCUSSION: Section III(C) of the challenged General Permit treats discharges into streams impaired for fecal coliform differently from discharges into other impaired streams. EPA regulations require that permits do not authorize discharges which will cause or contribute to the violation of water quality standards. Applicable EPD regulations refer to "new dischargers". [Rule 391-3-6-.16(8)(a)(6)]. Under EPA regulations a "new discharger" is one whose facility started discharging after August 13, 1979 and whose stormwater was not previously subject to permit discharge provisions. The provisions of the challenged General Permit do not require dischargers of stormwater to streams listed for fecal coliform to comply with Part III(C). Rather, those dischargers would comply with Part IV(D)(9) which requires that the SWP3 include a detailed description of the installation and maintenance of BMPs for each potential industrial source of fecal coliform and gives EPD the option to require sampling of the stormwater discharges to demonstrate compliance with the State Water Quality Standard.

EPD's explanation in the hearings and during negotiations about this Permit is that fecal coliform tests are not good indicators of the presence of the bacteria of concern and that the test method itself has technical problems. EPD is waiting for EPA to develop a standard for E. Coli. On this basis, EPD decided to carve out industrial stormwater discharges to streams impaired for fecal coliform and treat them differently. Although EPD has the option to require monitoring under section IV(D)(9) of the General Permit, it is not required by the Permit to do so.

While EPD's explanation is based upon a valid technical analysis, it does not provide a strong legal argument for EPD's position. The state has adopted a water quality standard for fecal coliform which appears at Rule 391-3-6-.03(6)(a), (b), and (c). This rule contains fecal coliform Water Quality Standards for drinking water sources, recreational waters and fishing waters. The Water Quality Standards rule for fecal coliform has not been modified to allow the type of differentiation that EPD wishes to make in the General Permit.

There is also technical merit to EPD's argument that industrial discharges containing fecal coliform will be required to address that pollutant in the SWP3 through Best Management Practices (BMPs). However, EPD continues to say in negotiating meetings and elsewhere that they have a limited staff and they will not be doing a thorough review of such documents.

Therefore, we expect Riverkeepers to argue that industrial discharges of fecal coliform must be treated the same as other discharges to impaired waters. Also, they may argue, that EPD's alternative method will not work because EPD has an inadequate staff to address these issues. During our recent meeting with EPD and Bill Phillips from the Attorney General's office, as well as the Georgia Poultry Federation, revisions to Part IIIC were suggested to address fecal

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coliform. In addition, and perhaps more importantly, EPD was willing to reduce the amount of monitoring required for all industrial dischargers to impaired streams. We believe that these suggested revisions strengthen the ability to defend the permit and would be beneficial to industrial dischargers covered by the Permit, including GIEC members.

COUNT II: Riverkeepers assert that Part III(C) of the General Permit violates the Clean Water Act and Georgia Water Quality Control Act because it does not require sampling where streams are impaired for one of several non-pollutant specific categories and there is no TMDL to be implemented.

CHANCE OF SUCCESS: LOW TO MODERATE

DISCUSSION: This section of the General Permit addresses facilities which are discharging to impaired waters listed because of biota, toxicity, the Fish Consumption Guidelines, shell fishing ban, commercial fishing ban, or trophic weighted residue value of mercury in fish tissue. The General Permit provides that sampling will only be required if a TMDL identifying a specific water quality parameter has been approved for the involved stream segment.

This approach seems reasonable to us. The listing criteria discussed in this section of the General Permit do not relate to specific water quality parameters. Under these circumstances, it is technically difficult, if not impossible to identify an appropriate parameter for sampling and analysis. Moreover, Larry Hedges has repeatedly stated that few, if any, of the industrial discharges covered by this permit are likely to contain pollutants which would have caused a stream segment to be listed for these criteria. Moreover, this section of the permit specifically states that where a TMDL has identified a specific water quality parameter and that TMDL has been approved for the stream segment, then sampling for that water quality parameter, if it is in the discharge, will be required. Riverkeepers' conclusory statement in the Petition that under this provision, the permit allows discharges that will cause or contribute to violations of water quality standards appears to be unfounded.

COUNT III: Riverkeepers claim that the General Permit violates the Clean Water Act and the Georgia Water Quality Control Act because it does not adequately require sampling of discharges to streams impaired for dissolved oxygen.

CHANCE OF SUCCESS: LOW

DISCUSSION: In contrast to the former two issues, for this issue, Riverkeepers are not claiming that EPD has not required sampling for industrial stormwater discharges containing

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dissolved oxygen to streams impaired for that pollutant. Rather, Riverkeepers claim that EPD has not required enough sampling.

The applicable provision of the Permit, Part III(C)(2)(a) requires sampling for dissolved oxygen in these situations only if organic material may be exposed to stormwater as a result of current or previous industrial activity at the facility. Riverkeepers claim that there should be additional sampling for non-organic sources, including but not limited to heat and sediment.

This issue is a challenge to EPD's discretion in formulating the appropriate criteria for monitoring industrial stormwater discharges into impaired streams. In this instance, EPD has coupled sampling requirements for the industrial stormwater discharge with the parameter for which the impaired segment is listed, namely dissolved oxygen. EPD made a judgment that monitoring for DO where organic material may be exposed to stormwater as the result of current or previous industrial activity at the facility is sufficient to address the issue. Riverkeepers' Petition is essentially arguing with EPD's exercise of discretion. Should we get to a hearing, this issue may well come down to a battle of expert testimony.

Moreover, EPA guidance for stormwater permitting specifically states "The amount and types of monitoring necessary will vary depending on the individual circumstances of each stormwater discharge. EPA encourages dischargers and permitting authorities to carefully evaluate monitoring needs and stormwater program objectives so as to select useful and cost-effective monitoring approaches." See EPA Interim Permitting Approach For Water Quality Based Effluent Limitations In Stormwater Permits, Question and Answer 9.

Our analysis concludes that EPD has the discretion to determine the type of monitoring that is necessary for a particular parameter for which a stream segment is impaired.

COUNT IV: Riverkeepers allege that the General Permit improperly allows case-by-case determinations.

CHANCE OF SUCCESS: Low

DISCUSSION: The Petitioners allege that case-by-case determinations are contrary to the concept of a general permit because they violate the public notice and participation requirements of the CWA and GWQCA. First, there is no prohibition in the CWA or GWQCA on case-by-case determinations in a General Permit. Second, EPA provided several case-by-case determinations in its MSGP demonstrating that EPA does not believe these determinations violate the law. See, e.g., MSGP Sections 1.2.3.3.3, 1.2.3.6.4, and 6.AD3. Further, additional analysis on the legal requirements of public notice and participation are discussed below under Count XI.

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COUNT V: Riverkeepers contend that the General Permit violates the Clean Water Act and the Georgia Water Quality Control Act because it does not specifically address antidegradation issues.

CHANCE OF SUCCESS: LOW

DISCUSSION: In the Petition, Riverkeepers point to federal and state regulatory requirements to prevent degrading of so-called Tier II waters. Part of Riverkeepers' analysis on this issue appears to severely undercut their argument. Riverkeepers refer to EPD regulation 391-3-6-.03(2)(b) which deals with antidegradation. The existence of this regulation as a requirement independent of the General Permit is sufficient to address the issue. EPD's contention is that it has addressed this issue in developing and issuing the General Permit. Moreover, amendments to the antidegradation were recently proposed. EPD is proposing to change the antidegradation rule to conform to EPA requirements. The current EPD rule contains additional language which is confusing and is not necessary to conform to EPA's antidegradation policy. This contention by Riverkeepers may be a way to try to insert into the General Permit antidegradation provisions in the current rule which they support.

COUNT VI: Riverkeepers contend that the General Permit is unlawful because it allows ineligible dischargers to remain covered indefinitely.

CHANCE OF SUCCESS: LOW

DISCUSSION: The Permit provides that any facility that applies for an individual permit will remain covered by the Permit until the individual permit is issued. Petitioners have no legal basis for this allegation. Georgia Rules provide that "whenever the Director decides an individual NPDES permit is required...[t]he discharger must apply for a permit...within 60 days of notice unless a later date is granted by the Director." Comp. Ga. R. and Regs. §391-3-6-.16(3)(c)(5)(v). Further, O.C.G.A. § 12-2-2(c)(1) provides that the Director "shall grant or deny any permit or variance within 90 days" of a complete application. Thus, the Statute and Rules provide specific deadlines for both EPD and the permittee.

The Petitioners' proposal to terminate coverage under the General Permit as soon as the permittee receives notice by the Director to apply for an individual permit violates due process requirements, and as such, is not an acceptable revision.

COUNT VII: Riverkeepers allege that the General Permit is unlawful because it does not require timely reporting of noncompliance that endangers health or the environment.

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CHANCE OF SUCCESS: HIGH

DISCUSSION: Federal regulations require that state-issued NPDES permits provide a requirement that the permittee report any noncompliance that may endanger health or the environment within 24 hours orally and within five days in writing after the permittee is aware of the circumstances. See. 40 C.F.R. § 122.41(l)(6); see Ga. Comp. R. & Regs. r. 391-3-6-.06(8) (requiring terms and conditions in permit be consistent with 40 § C.F.R. 122.41). However, Petitioner's proposed language is inconsistent with the Georgia Rule which provides that "if, for any reason, the permittee does not comply with, or will be unable to comply with any effluent limitations specified in the permittee's NPDES permit, the permittee shall provide the Division with an oral report within 24 hours..." Ga. Comp. R. & Regs. r. 391-3-6-.05(4).

COUNT VIII: Riverkeepers allege that the General Permit should require a discharger to have or comply with a SWP3 at the time the discharge commences.

CHANCE OF SUCCESS: HIGH

DISCUSSION: The Petitioners may argue that the timing of submission of the NOI and when to come into compliance with the SWP3 is under the Permittee's control, and thus, the Permittee does not need the leeway that the General Permit currently provides. As a practical matter, that argument may be successful. However, it should be noted that if a facility certifies compliance with the SWP3 at the time the NOI is submitted, it may still revise the SWP3 at a later date if changes are required. Thus, the current General Permit language may be hard to legally support because there is no practical basis for allowing the delay in compliance with the SWP3. Further, Georgia's General Permit is not consistent with other state multi-sector permits that do require compliance at the time the NOI is submitted.

COUNT IX: Riverkeepers assert that the Permit violates the Clean Water Act because it does not require monitoring for certain categories of industrial discharges which are covered in EPA's Multisector General Stormwater Permit.

CHANCE OF SUCCESS: LOW

DISCUSSION: In the Petition, Riverkeepers' reference a number of sections of EPA's Multisector General Permit (MSGP) which require monitoring for certain categories of industrial facilities which are not covered in the Georgia General Permit. However, Riverkeepers in paragraph 59 of the Petition also state that the MSGP was issued by EPA for industry stormwater discharges "where the state has not assumed permitting authority." This is a correct statement and the MSGP so states. The State of Georgia clearly has assumed permitting authority for

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industrial stormwater discharges, and that is the reason why it has issued a General Permit. Therefore, the MSGP by its own terms does not apply to industrial stormwater discharges in Georgia nor is Georgia required to have its permit be identical to the MSGP.

COUNT X: Riverkeepers allege that the General Permit is unlawful because it does not consider the impact of discharges on threatened and endangered species.

CHANCE OF SUCCESS: LOW

DISCUSSION: The Petitioners allege that the Permit will “cause to be committed” takings of threatened and endangered species in direct violation of Section 9 of the Endangered Species Act (“ESA”). 16 U.S.C. 1538(a)(1)(B). Under Section 9, it is “unlawful for any person” to “take” or “cause to be committed” a taking of threatened and endangered species. The ESA defines person to include a “department or instrumentality” of the State. Thus, Section 9 applies to EPD as well. However, the Petitioners do not have a good argument that the issuance of the General Permit will cause to be committed a taking of such species. Further, the MSGP Section 1.2.3.6.7 states that for State NPDES Programs, the ESA requirements of the MSGP will not apply. This language supports our argument that placing ESA requirements in the General Permit is not appropriate. Finally, it should be reiterated that every permittee (every person) has an independent ESA obligation to ensure that its activities do not result in a prohibited “take,” and providing this language in the General Permit is unnecessary for the protection of endangered and threatened species.

COUNT XI: Riverkeepers contend that the General Permit violates the public’s right to access, participation, and notice.

CHANCE OF SUCCESS: DEPENDS ON SPECIFIC REQUIREMENT:
FOR SWP3: LOW
FOR MONITORING: MEDIUM TO LOW
FOR INSPECTIONS: LOW
FOR CERTIFICATION: LOW
FOR NOI UPDATE: LOW

DISCUSSION: The General Permit does not require dischargers to submit to EPD their SWP3s, inspection reports, monitoring results, or certifications unless EPD requests them. Only NOIs are required to be submitted to EPD. For facilities covered by a numeric effluent limitation, EPA rules require that monitoring results be submitted to the agency at least annually. The Permit does not require permittees to update the site contact information on the NOI.

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FOR SWP3: There is no state or federal requirement to submit the SWP3 and EPA specifically does not require SWP3 submittal under the MSGP. Rather, Georgia Rules provide specific public notice requirements for General Permits. Submittal of the SWP3 is not part of these requirements. Comp. Ga. R. and Regs. 391-3-10-16(7)

Further, EPA's decision has been upheld in court. The Seventh Circuit Court of Appeals rejected environmental groups challenge to EPA's general construction stormwater permit based on the permit's (1) failure to require public availability of NOI and SWP3 and (2) failure to provide public with opportunity for public hearing on NOI and SWP3. Texas. Ind. Prod. v. EPA, 2005 U.S. App. LEXIS 11064 (7th Cir. 2005). Under the CWA, if the SWP3 or NOI constitute a "permit application" or "permit" then certain public participation requirements would apply. Consistent with EPA's interpretation, that court found that the NOI and SWP3 are not "permit applications" or "permits" for CWA Section 1342(j) or 1342(a)(1) requirements (public notice and participation).

FOR MONITORING: Georgia Rules and EPA rules provide that if a permit does not require monitoring results to be submitted, then the permit shall require the permittee to report all instances of non-compliance at least annually. Ga. Comp. R. & Reg. r. 391-3-10-.16(10), 40 C.F.R. § 123.44(i)(3). The General Permit does require submission of a summary of instances of non-compliance.

FOR INSPECTIONS: There is no state or federal requirement to submit the site compliance evaluation and inspection. Further, EPA does not require such submittal under the MSGP.

FOR CERTIFICATION: Based on the Petitioners' proposal, it is unclear exactly what certifications the Petitioners want to be submitted to EPD. However, there is no legal basis for requiring a permittee to submit certifications to EPD.

FOR NOI UPDATE: There is no legal basis for requiring a permittee to update the site contact information on the NOI.