

March 21, 2016

Mr. Greg Schaner
Office of Wastewater Management
Water Permits Division (M4203)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Submitted via Regulations.gov

Re: Comments on Proposed Rule: National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand (Docket ID No. EPA-HQ-OW-2015-0671)

Dear Mr. Schaner:

Thank you for the opportunity to comment on the Environmental Protection Agency's (EPA) proposed revisions to the permitting regulations for small municipal separate storm sewer systems (MS4s).¹ We present these comments on behalf of the undersigned 46 local, regional and national environmental groups.

In summary, we urge EPA to: (i) establish performance standards defining the "maximum extent practicable," including an on-site retention standard for new development and redevelopment; (ii) adopt a hybrid of proposed Options 1 and 2, which, we believe would provide the most effective water quality protections; (iii) ensure that permittees' evaluation and assessment requirements (including monitoring) are linked directly to the permit's measurable requirements; (iv) delete ill-conceived "guidance" that discourages permit requirements beyond the minimum control measures; and (v) ensure that all small MS4 general permits conform to Clean Water Act requirements as soon as legally possible. Please note that some of our organizations will be submitting additional, more detailed comments.

1. As EPA, the National Research Council, and the courts have recognized, urban runoff, including from "small MS4s," is a widespread source of water pollution that EPA must better regulate to meet Clean Water Act goals.

In a landmark 2008 report, the National Research Council (NRC) found that "[s]tormwater runoff from the built environment remains one of the great challenges of modern water pollution control, as this source of contamination is a principal contributor to water quality impairment of water bodies nationwide."²

¹ 81 Fed. Reg. 415, Proposed Rule—National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand (Jan. 6, 2016).

² Committee on Reducing Stormwater Discharge Contributions to Water Pollution, National Research Council, "Urban Stormwater Management in the United States" (2008), p.vii.

EPA explained, in a 2009 Federal Register notice, that “the NRC found that ‘stormwater permits leave a great deal of discretion to the regulated community to set their own standards and to self-monitor.’ As a result, across the Nation there is inconsistency in the NPDES program and in stormwater management programs required by NPDES permit with respect to stormwater discharges from MS4s caused by stormwater discharges from development.”³ The NRC itself described the situation even more bluntly: “Most dischargers have no measurable, enforceable requirements.... Significant changes to the current regulatory program are necessary to provide meaningful regulation of stormwater dischargers in the future.”⁴

Accordingly, EPA’s 2009 notice announced the Agency’s “plans to initiate national rulemaking to establish a comprehensive program to reduce stormwater discharges from new development and redevelopment and make other regulatory improvements to strengthen its stormwater program.”⁵ EPA stated that the Agency, “shares the NRC Committee’s perspective that it is imperative that the stormwater regulations be as effective as possible in protecting water quality.... The role of MS4s in reducing stormwater impacts from the built environment is crucial and growing, given that these sources of adverse water quality impacts are continually expanding.”⁶

Despite the unequivocal findings of the NRC report, EPA has since “deferred” that earlier rulemaking effort – unjustifiably, we believe. Nonetheless, EPA’s conclusions and the NRC’s warnings about the importance of improving stormwater regulations and MS4 permitting remain equally pressing today.

EPA’s current rulemaking is intended to end the self-regulatory scheme reflected in EPA’s current small MS4 general permitting regulations, which the NRC found to be ineffective and the U.S. Court of Appeals for the Ninth Circuit has found to be unlawful.⁷ Although the focus on small MS4s is narrower than the rulemaking EPA initiated in 2009, small MS4s account for a substantial share of urban stormwater pollution – potentially more even than larger municipalities, in the aggregate.⁸ EPA must act, consistent with the views expressed in 2009 to make these revisions to the small MS4 regulations “as effective as possible in protecting water quality.”⁹

³ 74 Fed. Reg. 68,617, 68,620, Stakeholder Input; Stormwater Management Including Discharges from New Development and Redevelopment (Dec. 28, 2009) (quoting NRC report).

⁴ National Research Council, “Report in Brief: Urban Stormwater Management in the United States” (2008).

⁵ 74 Fed. Reg. at 68,617.

⁶ 74 Fed. Reg. at 68,620.

⁷ *Env’tl. Def. Center, Inc. v. United States Env’tl. Prot. Agency*, 344 F.3d 832 (9th Cir. 2003).

⁸ EPA estimates that there are about 6,700 regulated small MS4s. Nationwide, the vast majority of municipalities with populations under 100,000 that are located within Census-defined “urbanized areas” are regulated as small MS4s. Such municipalities comprise about 44% of the U.S. population. This is substantially more than the larger municipalities regulated as “large” and “medium” MS4s, which account for about 27% of the U.S. population. See Census statistics available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1142.pdf> and <https://www.census.gov/geo/reference/ua/uafaq.html?cssp=SERP>. Further, because smaller municipalities typically have a lower population density, due to sprawl development patterns, the total land area of small MS4s almost certainly exceeds the land area of the larger ones.

⁹ 74 Fed. Reg. at 68,620.

2. EPA rules should establish meaningful, substantive pollution control requirements for all small MS4 permits, including an on-site retention standard for new development and redevelopment.

EPA presents three options in the proposed rule. However, none of these options would establish substantive pollution control standards defining the Clean Water Act's requirement to reduce MS4 pollutant discharges to the "maximum extent practicable" (MEP). Instead, all three options leave it to the permitting authority in each state to establish pollution control standards, on a permit-by-permit basis. The absence of nationwide substantive standards will most certainly lead to inconsistent protections around the country, making it less likely that residents of all fifty states will receive a consistent, robust level of protection for their cherished local waterbodies.

Therefore, we urge EPA to establish performance standards and other measurable requirements defining the "maximum extent practicable," to ensure that the permitting authority in each state provides at least a certain minimum "floor" of protection.¹⁰ Most significantly, with respect to post-construction runoff from new development and redevelopment, EPA should adopt an on-site retention standard that prevents or minimizes water quality impacts by keeping runoff on-site, before it can cause pollution in local water bodies. This approach is both the most effective means of controlling stormwater pollution from developed areas and is indisputably "practicable" throughout the country, as it has been applied in numerous communities throughout the country.¹¹

3. EPA should adopt a "hybrid" approach for small MS4 general permits, requiring the "Traditional General Permit Approach" (Option 1) for the six minimum control measures and the "Procedural Approach" (Option 2) for water quality-based effluent limitations.

Each of EPA's three options in the proposed rule calls for NPDES permitting authorities – not MS4 permittees – to determine the pollution control measures that small MS4s must implement. This is essential to ending the unlawful, ineffective self-regulatory scheme that prevails today under EPA's existing rules.

Under Option 1 ("Traditional General Permit Approach"), EPA would require permitting authorities to establish within the permit itself all requirements that MS4s must comply with to meet legal standards. Under Option 2 ("Procedural Approach"), EPA would require permitting authorities to review all permittees' proposed pollution control programs to determine their legal sufficiency, and to allow public comment and the opportunity for a hearing before that

¹⁰ EPA rules should be clear that such a "floor" is not all that the Clean Water Act demands. First, EPA rules should require that the permitting authority determine whether, based on the best current scientific understanding of stormwater management and the best practices in use in other jurisdictions at the time of permit issuance, the "maximum extent practicable" includes any more stringent pollution control obligations beyond the "floor". Second, EPA should be clear that permitting authorities must also determine whether any additional effluent limitations are necessary "to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." 40 C.F.R. § 122.34(a). EPA should also emphasize that general NPDES antibacksliding rules would apply, and therefore states would not be permitted to weaken existing standards that exceed the federally-established "floor."

¹¹ See, e.g., EPA, Post-Construction Performance Standards and Water Quality-Based Requirements: A Compendium of Permitting Approaches (2014), available at http://www3.epa.gov/npdes/pubs/sw_ms4_compendium.pdf.

determination is made. Under Option 3 (“State Choice Approach”), the permitting authority would choose between the first two approaches or implement a combination of the approaches within the same permit.

We urge EPA to adopt a hybrid of Options 1 and 2, which we believe would provide the most effective water quality protections. Specifically, the final rule should require permitting authorities to: (1) use the Traditional General Permit Approach to develop permit condition’s implementing the MEP standard (i.e., the six minimum control measures); and (2) use the Procedural Approach where the needs of a particular water body require additional water quality-based effluent limitations tailored to particular MS4 dischargers (for example, to implement a wasteload allocation from a total maximum daily load or otherwise ensure a discharge does not cause or contribute to water quality standards violations).

a. EPA should require the use of Option 1 to establish permit terms implementing the “maximum extent practicable” standard.

First, in regard to implementing the MEP standard, the Traditional General Permit Approach provides the best opportunity to ensure that all small MS4s will be held accountable for implementing pollution control measures that reduce pollution discharges to the maximum extent practicable. This option requires permitting authorities to include in the general permit itself a set of “clear, specific, and measurable” requirements concerning each of the six minimum control measures. This would help to eliminate the existing disparity among small MS4s’ stormwater programs within any given state. It would also make it easier for citizens, as well as EPA, to weigh in on proposed permit requirements, as that feedback could be provided once, through comments on the draft general permit, rather than dozens or even hundreds of times with regard to each individual MS4 within a state.

To strengthen EPA’s proposed Traditional General Permit approach, we also urge EPA to include the following specific requirements in the rule:

- In determining what pollution control requirements are necessary to reduce the discharge of pollutants to the “maximum extent practicable,” a state’s permitting authority must compare its existing permit terms with other states’ permit terms. If another jurisdiction is implementing a pollution control requirement that achieves a greater pollution reduction, the state’s permitting authority must either adopt it or explain why it would not be practicable within that state. EPA should collect, publish, and continually update examples of the most protective requirements in existing permits, which states should be required to consider rather than haphazard or cherry-picked examples selected by permitting authorities.
- Permitting authorities must clearly explain in the administrative record why the selected pollution control measures meet the maximum extent practicable standard. In other words, the record should explain why other possible standards, including those received from public comments and including in EPA’s compendium, would not achieve greater pollution reductions than the selected standard or would not be practicable to implement.

b. EPA should require the use of Option 2 to establish water quality-based effluent limitations.

Second, the Clean Water Act requires the establishment of water quality-based effluent limitations within MS4 general permits when MEP requirements alone cannot ensure compliance with water quality standards – for example, when a receiving waterbody is impaired by pollutants associated with MS4 discharges, or the MS4 discharge otherwise has a “reasonable potential” to cause or contribute to impairment. Where an MS4 general permit includes water-quality based effluent limitations, EPA should require permitting authorities to use the Procedural Approach to develop such permit terms. Water quality-based NPDES permit terms are driven by the needs of a particular water body, and require the permitting authority to develop pollution control requirements tailored to particular dischargers. The Procedural Approach, unlike the Traditional General Permit Approach, facilitates the development of such tailored requirements. A common example involves obligations to meet water quality standards in impaired waters: some MS4 permits direct permittees to develop TMDL implementation plans that identify the measures the permittee will implement to achieve required wasteload allocations (WLAs) or, in the absence of applicable WLAs, plans to reduce pollutant loads sufficiently to ensure compliance with water quality standards. We believe this is a necessary and appropriate use of the Procedural Approach, provided that strict procedural safeguards are established to ensure that permitting authorities do not create an unlawful self-regulatory scheme.

Specifically, EPA’s rules should require that permittee-developed plans to meet water quality standards shall be subject to public notice by the permitting authority; a period for public comment to the permitting authority; EPA review and opportunity for EPA objection; an opportunity for a public hearing before the permitting authority; and approval by the permitting authority, with or without modifications to the permittee’s proposed plan. To ensure that this review process will be meaningful and effective, the rules should require that a full proposed plan (not merely a summary of one, such as a Notice of Intent) must be submitted for review.

The rules should require that, upon approval, such plans become enforceable under the permit. The rules should provide that the enforceable provisions of plans must (a) impose clear, specific, measurable, and enforceable obligations on the permittee specifying the pollution control measures that must be implemented; and (b) include clear quantitative performance standards and specific deadlines for compliance with each obligation imposed on the permittee.

Further, the rules should provide that a plan can be approved only if the permitting authority determines, based on an adequate administrative record, that the plan imposes obligations stringent enough to meet applicable legal standards. To that end, the rules should provide that the permit must specify the required elements of an approvable plan and the water quality-based standard by which the adequacy of the plan will be judged.

4. The rule’s “evaluation and assessment requirements” must pertain to a permittee’s compliance with the permit’s measurable pollution control obligations, rather than achievement of the permittee’s self-defined measurable goals.

The proposed rule provision concerning “evaluation and assessment requirements” provides that a permit must require the permittee to “[e]valuate...progress towards achieving identified

measurable goals,”¹² and “report [on]...progress towards achieving its identified measurable goals for each of the minimum control measures.”¹³ To avoid impermissible self-regulation, the rules must provide that evaluation and reporting is based on the measurable requirements specified in the permit, not measurable goals identified by the permittee. This includes measurable goals associated with water quality-based effluent limitations, not only those associated with the minimum control measures. Where the permit includes measurable requirements stated in terms of pollutant load limits or compliance with ambient water quality standards, the rule should require such monitoring as is necessary to enable evaluation of compliance with those permit terms.

5. EPA should delete the “guidance” in the current rule that recommends against including in permits additional requirements beyond the minimum control measures.

We strongly support EPA’s proposal to delete the “guidance” currently found at 40 C.F.R. § 122.34(e)(2). That existing paragraph “strongly recommends” against including water quality based effluent limitations in small MS4 permits in the absence of a TMDL or equivalent analysis. Given the slow pace of TMDL development around the country, the approach recommended in that paragraph has failed to protect water quality.

6. EPA should clarify that the Clean Water Act principles giving rise to the remand are binding on permitting authorities immediately, and should ensure that all small MS4 general permits conform to the final rule as soon legally possible after the rule’s effective date.

Thirteen years have passed since the Ninth Circuit vacated and remanded, in part, the Phase II rule. States continue to issue permits that violate the Ninth Circuit’s holding and, therefore violate the Clean Water Act. EPA must do everything within its power to ensure that permitting authorities *immediately* cease issuing permits that violate the Clean Water Act and that, once the final rule is promulgated, all small MS4 general permits conform to the rule as soon as legally possible. Specifically, EPA should do three things.

First, the proposed rule’s preamble correctly explains that “to be consistent with the [*Environmental Defense Center*] decision,... [EPA’s rules] must ensure the permitting authority provides a final determination on whether the requirements to which the MS4 is subject, whether identified fully in the permit itself or defined in whole or in part by the MS4 operator in the NOI [Notice of Intent], meet the NPDES requirements to reduce discharges to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Act.”¹⁴ However, EPA’s 2004 memorandum on implementation of the *EDC* ruling provided a contrary – and incorrect – interpretation of the court decision. The memo states that, although the permitting authority must “conduct an appropriate review” of each NOI, permits can authorize discharge based simply on the *submission* of an NOI, without any permitting authority *determination* that an MS4’s self-selected best management practices meet applicable Clean

¹² Draft Rule at § 122.34(d)(1).

¹³ *Id.* at § 122.34(d)(3)(i).

¹⁴ 81 Fed. Reg. at 420.

Water Act requirements.¹⁵ EPA should immediately revoke the 2004 memo and replace it with one that correctly describes permitting authorities' responsibilities under the Clean Water Act. EPA headquarters should direct the Agency's regional offices to ensure that, going forward – even before a final rule takes effect – all MS4 general permits issued or renewed must comply with those Clean Water Act requirements.

Second, EPA should ensure that the final rule is implemented in practice as soon as legally possible. The preamble to the proposed rule suggests that states may need to amend their own rules before the new EPA rule takes effect. It is not evident to us that this is correct. Because the final rule will be implementing core procedural principles of NPDES permitting, it would seem that every approved state program should already have authority to implement the rule. Moreover, EPA regional offices have authority to object to any permit that is contrary to the Clean Water Act. When issuing the final rule, EPA should speak to this issue more precisely to ensure that, to the extent that the law allows, all permits issued or renewed after the rule's effective date will comply with the final rule.

Third, following issuance of the final rule, EPA should use any applicable authorities to secure the reopener and modification of existing permits that do not satisfy the rule's requirements, particularly where such permits were issued or renewed recently before the rule's effective date.

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Thank you for your consideration of our comments.

Sincerely,

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¹⁵ The 2004 memo (at p. 1) presumes that an NOI will identify the MS4's self-selected best management practices. Yet, the memo states (at p. 3) that EPA "do[es] not believe official 'approval' of NOIs is necessary" and that authorization to discharge can occur merely "after a specified waiting period" following submission of the NOI. James Hanlon, Director, EPA Office of Wastewater Management, *Memorandum: Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s* (Apr. 16, 2004).]

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