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

To Whom it May Concern,

The Center for Progressive Reform (CPR) is a non-profit organization that provides legal analysis and commentary, in areas concerning health, safety and the environment. We believe that Municipal Separate Storm Sewer System (MS4) permits are a critical tool toward meeting water quality standards, and achieving wasteload allocations (WLAs) set forth in Total Maximum Daily Loads (TMDLs) for impaired urban waters around the country. In light of the great number of expired permits, and confusion regarding how MS4 requirements are to be implemented, the need for clear and specific MS4 regulation is imperative. Based on the notion that thoughtful and effective government policy is grounded in meaningful public participation, CPR respectfully requests EPA to consider the following comments in response to EPA's Proposed Rule concerning Municipal Separate Storm Sewer System General Permit Remand.¹ CPR urges EPA to take the following measures in MS4 permitting:

- Adoption of either the Traditional General Permit Approach or the Procedural Approach as long as meaningful public participation and permit review and approval requirements are ensured.
- Require clear, specific, and measureable criteria in every permit.
- Implementation of a checklist or other guide by permit writers to ensure

¹ 80 Fed. Reg. 415 (Jan. 6, 2016).

that each individual permit application is sufficiently tailored to the unique water quality standards and conditions of the applicant.

Effective regulation of municipal stormwater is a key element under the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”² Delegation of authority to the states to administer MS4 permitting confers a corresponding state responsibility to manage stormwater in a way that makes actual progress toward improving water quality standards and achieving WLAs set forth in identified TMDLs. Continued degradation and impairment of the nation’s waterways underscores the urgency for adoption of clear federal requirements prescribing state MS4 permit development. In response to the Ninth Circuit’s concerns in *Environmental Defense Center Inc., v. EPA*, 344 F.3d 832 (9th Cir. 2003), CPR respectfully urges EPA to reject any Phase II permit process that grants blanket approval, and instead require that stringent, measurable requirements be incorporated into every permit.

Public participation is a required element under the Clean Water Act.³ In order to ensure that each MS4 permit application receives the appropriate level of public comment and agency review, any approach that EPA chooses in its final rule must comply with certain basic requirements. For example, if the traditional general permit approach is selected, then the incorporation of a checklist, the use of specific requirements for separate categories of applicants, or other similar tools should be required in order to ensure that the general permit is sufficiently specific for *each* individual permittee. If the procedural approach is selected, then EPA must ensure that each state provides sufficient public comment and agency review of the NOI, which must contain all applicable BMPs and other enforceable requirements. Additionally, if the procedural approach is selected for the final rule, EPA should make clear that it will reject any permitting scheme that has the potential to bifurcate the permit approval process in a way that would allow for the inclusion of material requirements within SWMPs or other programmatic or implementation plans written after the opportunity for public participation closes.⁴

I. PERMITTING AUTHORITY REVIEW

According to the Court of Appeals for the Ninth Circuit, EPA’s original Phase II permitting scheme failed to comply with the Clean Water Act because it allowed MS4 operators to decide which “minimum measures” to implement and determine what constitutes compliance with the “maximum extent practicable” (MEP) standard applicable to MS4 permittees under the Clean Water Act.⁵ As a practical matter, the court noted that the Phase II rule allowed each MS4 to identify for itself the best management practices (BMPs) that it will undertake without any permitting authority review to ensure that measures taken “will *in fact* reduce discharges to the maximum extent

² Clean Water Act, 33 U.S.C. §1251(a).

³ 33 U.S.C. §1342(a)(1).

⁴ *Waterkeeper Alliance, Inc., v. EPA*, 399 F.3d 486, 502-503 (2nd Cir 2005) (holding that merely requiring a nutrient management plan without incorporating terms of the plan into the NPDES permit was insufficient to comply with CWA requirements); *Maryland Dep’t. of the Environ., v. Anacostia Riverkeeper*, 222 Md. App. 153 (Md. Ct. Spec. App. 2015) (holding that the Montgomery County, MD MS4 permit lacked specificity and therefore eluded both judicial review and effective public comment).

⁵ *Environmental Defense Center Inc., v. EPA*, 344 F. 3d 832, 855 (9th Cir. 2003).

practicable.” (emphasis in the original).⁶ The result of merely requiring “minimum measures” and allowing self-reporting by the small MS4 operator, absent oversight by the permitting authority, can be a wholly unenforceable and ineffective permit.⁷ CPR urges EPA to address this deficiency by rejecting any permitting scheme that allows for blanket permit approval and requiring instead a scheme that demands consideration of the individualized circumstances of the applicant, including the need for best management practices that make measureable progress toward the attainment of water quality standards, including any applicable WLAs. While flexibility is important from a practical perspective, adjustments are appropriate only if minimum levels of protection established in the permit are preserved.

Specific comments regarding permitting authority review under both the traditional general permit approach, and the procedural approach follow. As EPA noted in the supplementary information to this present proposal, to be consistent with the Ninth Circuit’s decision, the one criterion that either approach must meet is that it must ensure that the permitting authority provides a final determination on whether a permit application will reduce discharges to the MEP, protect water quality, and satisfy water quality requirements of the Clean Water Act. We believe these comments would adequately shift the final approval authority from the MS4 operator to the permitting authority as envisioned by the Ninth Circuit.

a.) Traditional General Permit Approach

A traditional general permit includes the specific requirements that permit applicants seeking coverage under the permit must meet. As a basic matter, the Ninth Circuit found that permits issued under the Phase II rule were not like traditional general permits in that the specific requirements for permittees were contained not in the general permit, but in the subsequent notice of intent (NOI). EPA notes in the present proposal that few states currently issue Phase II MS4 permits under the traditional approach, which is likely due to the difficulty of devising a permit with the necessary specificity to address the wide range of unique conditions that exist for each permit applicant.

If EPA selects the traditional general permit approach for the final rule, the primary concern is whether applicants will provide sufficient specificity to ensure that the general permit requirements are “clear, specific and measurable,” and thus reviewable by the permitting authority for compliance at the outset. CPR understands the desire for administrative efficiency for permit writers, which the traditional general permit approach has previously produced. However, if this approach is selected, CPR urges EPA to ensure that states issue permits containing sufficient specificity in their requirements through, for example, a detailed checklist and possibly also a categorization approach in which similarly situated applicants are given permit requirements specific to the needs of their category. An example of the checklist approach can be found in

⁶ 40 C.F.R. §§122.34(a) (defines “maximum extent practicable” as being met by implementation of best management practices without any additional measures required under 40 C.F.R. §123.35(h)(1)).

⁷ *Environmental Defense Center Inc., v. U.S. E.P.A.*, 344 F. 3d 832, 856 (9th Cir. 2003) (citing *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1305 (1992) (declaring a permitting scheme that allows self-reporting by industrial dischargers, contrary to congressional intent, and is therefore arbitrary and capricious.)).

Minnesota for Industrial Stormwater permits.⁸ The Minnesota checklist could serve as a model for MS4 permits by requiring applicants to describe at the outset the measurable, specific, and detailed steps that must be taken to reduce loads to the maximum extent practicable. The actions required in each permit would be informed by the applicant's answers to each question in the checklist. Significant effort might be necessary to produce a checklist or accompanying algorithm that comprehensively details the wide range of potential conditions and resulting actions that would be required of permittees. However, once a sufficient list of "if-then" statements is created, the permit reviewer's job would be relatively simple, limited to verifying that the applicant's statements are true and complete.

CPR agrees with the EPA Permit Improvement Guide that requirements contained in a permit should be detailed and specific.⁹ CPR urges EPA to require sufficient specificity in its rule to ensure that permits are *enforceable* and to avoid broad and ambiguous stormwater management plans (SWMPs) and implementation plans that risk allowing subjective interpretation and give applicants the ability to define their own unreviewable MEP standard. When practical and appropriate, MS4 permits should require objective criteria such as numeric or pollutant specific BMP requirements and enforceable TMDL implementation plans.¹⁰ In cases in which multiple pollutants or pollutant indicators are applicable or where limitations not easily quantifiable (such as impervious cover or stormwater flow), MS4 permits should describe in detail how the selected controls will reduce pollutant discharges to the maximum extent practicable and be consistent with any applicable wasteload allocations.

Further, while the traditional general permit approach may require additional effort by the permitting authority to review past data from the permittee to determine whether additional requirements are necessary to address applicable TMDLs, iterative progress has always been an

⁸ Minnesota Pollution Control Agency, SWPPP Checklist (Accessed Feb. 18, 2016), <https://www.pca.state.mn.us/sites/default/files/wq-strm3-57.doc>

⁹ Proposed Rule concerning Municipal Separate Storm Sewer System General Permit Remand, 80 Fed. Reg. 422 (Jan. 6, 2016) (quoting EPA's *MS4 Permit Improvement Guide* (2010) as guidance concerning level of specificity in MS4 permits. "... What needs to happen; Who needs to do it; How much they need to do; When they need to get it done; and here it is to be done. For each Permit Requirement: 'What' is usually the stormwater control measure or activity required. 'Who' in most cases is implied as the permittee (although in some cases the permitting authority may need to specify who exactly will carry out the requirement if there are co-permittees or the MS4 will rely on another entity to implement one of the minimum control measures). 'How much' is the performance standard the permittee must meet (e.g., how many inspections). 'When' is a specific time (or a set frequency) when the stormwater control measure or activity must be completed. 'Where' indicates the specific location or area (if necessary)").

¹⁰ See e.g., Anchorage, AK Stormwater Permit, NPDES Permit No. AKS-052558, available at: http://anchoragestormwater.com/Documents/KWood/files/aks052558_fp.pdf, (last accessed February 25, 2016) (listing applicable impaired waterways and identifying corresponding pollutant of concern.); Menomonee River Watershed-Based MS4 Permit, WPDES Permit No. WI-S051056-1, available at: <http://www.elmgrovetwi.org/DocumentCenter/View/684>, (last accessed Feb. 25, 2016) (listing applicable TMDLs and specific pollutants of concern in each impaired waterway); San Diego, CA Permit, NPDES Permit No. CAS0109266, available at: http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/updates052313/2013-0523_Order_No._R9-2013-0001_COMPLETE.pdf, (last accessed Feb. 25, 2016) (listing pollutant specific requirements based on applicable TMDLs); Prince George's Co., MD Permit, Permit No. MD0068284, available at: <http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Documents/Prince%20George's%20county%20final%20permit%20January%20202014.pdf>, (last accessed Feb. 25, 2016) (listing pollutant specific requirements based on applicable TMDLs).

essential and foundational requirement for MS4 permittees.¹¹ An iterative process, while risky in some contexts due to the potential to sanction delay, is understandably necessary for the pursuit by MS4 permittees of efforts to improve water quality. MS4 permits should become increasingly more detailed and stringent over time in order to preserve progress made as a result of past permits. Successive permit generations must be guided by the objective of making measurable progress toward the attainment of water quality standards.

b.) Procedural Approach

EPA notes that the procedural approach is far more common by states in issuing MS4 permits. Under this two-step approach, the NOI contains the detailed, enforceable requirements, including applicable water quality standards that the applicant must address. However, the Ninth Circuit found that the NOI is the functional equivalent of a permit itself,¹² and as such, it must be subject to review by the permitting authority and go through a separate public comment process.

In addition to the NOI, the Ninth Circuit also took issue with the role that SWMPs played in the implementation of MS4 permits. Because the Phase II rule stated that compliance with the SWMP constituted MEP compliance, the regulation allowed the permittee to define its own permit requirements without sufficient review by the permitting authority. The Ninth Circuit's fundamental concern is that all enforceable permit requirements, whether in a general permit, NOI, or SWMP be subject to review and approval.

CPR recognizes the comparison that EPA draws between the "two-step Procedural Approach" proposed here and concentrated animal feeding operation (CAFO) nutrient management plans pursuant to 40 C.F.R. §122.23(h). Currently, CAFO regulations require the CAFO operator to include specified information and a nutrient management plan for public review along with the NOI when seeking coverage under a previously approved general permit.¹³ Such regulations require the use of a form to describe the specific conditions under which coverage is sought.¹⁴ Further, the regulations list specifically required information (much like the checklist previously discussed) to be included in the NOI.¹⁵ These requirements must be reviewed by the permitting authority and must "*ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards" under the Clean Water Act.¹⁶ An analogous model in the context of a proposed MS4 NOI would include detailed information about the impacted geographic region, particular water quality challenges specific to that region, water quality standards, and WLAs under any applicable TMDLs. EPA also requests comment regarding whether "non substantial revisions" to BMPs, modeled after CAFO procedures in 40 C.F.R. §122.42(e)(6) should be permissible. The CAFO

¹¹ 80 Fed. Reg. 422 (Jan. 6, 2016).

¹² 81 Fed. Reg. 425 ("The NOI would continue to serve as the document that describes the BMPs and measurable goals that would be considered to be the enforceable requirements applicable to the permittee, in addition to the terms and conditions of the general permit).

¹³ 40 C.F.R. §122.23(h).

¹⁴ 40 C.F.R. §122.21(i)(1).

¹⁵ 40 C.F.R. §122.21(i)(1); 40 C.F.R. §122.42(e) (required information includes but is not limited to: the name of the operator, a topographic map, the number and types of animals, type of animal housing to be used, estimated amount of wastewater that will be generated, identification of site, and specific conservation practices).

¹⁶ *Waterkeeper Alliance v. U.S. E.P.A.*, 399 F.3d 486, 498 (2nd Cir. 2005).

regulations identify some “substantial” revisions that would require public notice and comment.¹⁷ Ultimately, the Director is vested with discretion to determine when a revision is “not substantial.” In the context of revisions under a MS4 NOI, EPA should similarly adopt specific criteria under which the permitting authority must make a determination that a substantial revision has occurred. For example, any revision that results in discharge of pollutants in an amount greater than was anticipated under the original NOI, should require additional notice and comment.

II. MEANINGFUL PUBLIC COMMENT

CPR believes that meaningful public comment can be achieved under either the traditional general permit approach, or the procedural approach given the recommendations discussed above. Meaningful public participation under the Clean Water Act ensures members of the affected public have an actual opportunity to comment at a stage where changes to the permit are still feasible.¹⁸ Under the traditional general permit approach, public participation requirements will be met during the permit approval process as long as all requirements are described in the permit and specifically describe how the permittee will “...reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriating water quality requirements of the Clean Water Act.”¹⁹ Under the procedural approach, meaningful public participation will hinge on timing of the notice and comment process.

Meaningful public participation is only achieved if the public has an opportunity for involvement at the relevant point in the MS4 approval process. If the public is only afforded the opportunity to review NOI requirements after the permit has been approved, such opportunity becomes merely a formality. Under the procedural approach, substantive requirements contained in the NOI must be made available to the public and remain malleable until after the permitting authority has considered material comments. CPR urges EPA to require that all pertinent information and any material incorporated by reference into a permit or NOI be made easily accessible to the public and available without incurring substantial time or expense. Further, the comment period should not begin until all relevant documents have been made publicly available.

CPR acknowledges that adding a second round of public comment as would be required under the procedural approach may impose additional financial and administrative costs on some states. However, if this approach is selected, a second round of public comment is the only way the public would have the opportunity to review permit requirements contained in the NOI. As such, if the procedural approach is selected, CPR believes that an additional notice and comment period as described above would be required in order to comply with the remand order issued by the Ninth Circuit.²⁰

In conclusion, CPR recommends that EPA adopt either the traditional general permit approach or the procedural approach subject to recommendations discussed above. Given the

¹⁷ 40 C.F.R. §122.42(e)(6)(iii)(A-D) (listing specific criteria requiring a “substantial change” determination).

¹⁸ 33 U.S.C. §1342(a)(1).

¹⁹ 80 Fed. Reg. 421 (Jan. 6, 2016) (quoting 40 C.F.R. §122.34(a)).

²⁰ *Environmental Defense Center Inc., v. U.S. E.P.A.*, 344 F. 3d 832, 858 (9th Cir. 2003).

substantial impact that MS4 discharges exert on the quality of our nation's waterways, CPR respectfully submits the above comments in connection with EPA's Proposed Rule concerning Municipal Separate Storm Sewer System General Permit Remand.

Sincerely,

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