

March 21, 2016

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Submitted Via the Federal eRulemaking Portal: <http://www.regulations.gov>

RE: Docket ID No. EPA-HQ-OW-2015-0671

Dear Greg,

The National Stormwater Advocacy Network (NSAN) appreciates the opportunity to comment on the Agency's proposed Municipal Separate Storm Sewer System (MS4) General Permit Remand Rule (Remand Rule). NSAN is a network of state, regional, and national stormwater associations that represent Phase II MS4s around the country reflecting the variety of interests and opinions of MS4s nationwide.

While NSAN is convened and facilitated by the National Association of Clean Water Agencies (NACWA), these comments reflect the broad, consensus thoughts regarding the proposed rule that are jointly shared by the signatory organizations. The specific members of NSAN participating on this letter are listed in the signature line. Some NSAN members have also submitted their own individual comments with more specific detail, and we encourage EPA to give serious consideration to those comments as well.

NSAN understands the Remand Rule proposal is intended to be a narrow response to the Ninth Circuit's 2003 *Environmental Defense Center (EDC) v. EPA* ruling. NSAN met with EPA and environmental NGO groups in advance of the proposal and believes there is a way to collaboratively ensure that the Remand Rule complies with the court's requirements and moves the small MS4 program forward, while also maintaining the maximum flexibility necessary for both the permitting authorities and permittees responsible for implementing these programs. The Phase II small MS4 general permit program is intentionally flexible in order to account for the wide variety of geography, hydrology, land use requirements, and state law that define each community's urban runoff challenges.

NSAN encourages EPA to allow permitting authorities to maintain maximum flexibility as they implement the necessary changes to comply with the regulation. States operate Phase II general permit programs in myriad ways, and certain states would find it very difficult to modify their program if either Option 1 or Option 2 were to be exclusively required. Accordingly, NSAN believes a hybrid option, referred to in the proposal as "State Choice" Option 3 where states

can choose – in consultation with their MS4 communities – either an Option 1 or Option 2 approach, would be the most appropriate path forward.

At the same time, NSAN has concerns that the potential impact of any of the proposed options could affect the national stormwater program more broadly for all permittees. Although the proposal preamble suggests the changes to the Phase II program will only be procedural and not substantive, NSAN is concerned there are aspects of the proposal – as further outlined below – that could have substantial substantive impacts on stormwater permit requirements.

Preference for Option 3, the Hybrid Approach

Many states already follow a process in their programs that aligns closely with either the Traditional General Permit Approach (Option 1) or the Procedural Approach (Option 2). For example, states like Virginia and Tennessee acknowledge that Option 1 is close to how their general permit functions now. But other states like Minnesota and Texas are using an approach similar to that outlined under Option 2, and Phase II MS4s in those states are pleased with the process.

NSAN members represent a variety of MS4 programs in different states across the country and are concerned that adoption of either Option 1 or Option 2 would unnecessarily burden those states that would have to completely change the administration of their programs. Accordingly, NSAN is most comfortable with the Option 3 hybrid approach, where the permitting authority could choose a procedural or traditional general permit approach, or some hybrid of the two, authorizing coverage under a general permit. The authority would then make program modifications to comply with the Remand Rule's requirements, without having to completely modify the underlying structure of their program that is already familiar to their municipal Phase II permittees. NSAN expects – and would ask EPA to encourage – states to consult with their MS4 communities in deciding what approach to take. Training or additional resources for permitting authorities will also be critical in ensuring progress under a flexible regime.

EPA provided proposed regulatory text for Option 1 in the rule proposal, but did not do so for Options 2 or 3. Though Option 3 appears to make the most sense conceptually in terms of providing maximum flexibility to state permitting agencies and MS4s, proposed regulatory text is crucial to understanding the impact of a modified Option 3 and how exactly it could allow permitting authorities to simultaneously incorporate elements of Options 1 and 2 into the regulatory framework while ensuring the strength of the small MS4 program. Accordingly, NSAN requests that EPA provide a Supplemental Notice that includes draft regulatory text Option 3 for public review. NSAN is also willing to work with EPA on developing what such regulatory language might look like.

Concerns and Requested Clarifications On Proposed Option 1 Regulatory Language

While NSAN generally supports an Option 3/hybrid approach as the best way to preserve state and local flexibility with respect to Phase II MS4 programs, the group also has some questions

and concerns regarding the proposed regulatory language for Option 1. The specific areas where NSAN requests clarification from EPA are below.

Effluent Limitations in General Permits and MEP

Option 1 adds and revises regulatory language that could impact what effluent limitations may be included in general permits. EPA revises and inserts a number of new sentences into 40 C.F.R. § 122.34(a) which raise concerns about what type of effluent limitations will be required for MS4s, raises questions that narrative effluent limitations are no longer permissible, and creates confusion over how best management practices (BMPs) will be monitored and benchmarked. While EPA states that the intent of this proposed rule is to make procedural, not substantive, changes to the Phase II program, some of the proposed new regulatory language is being interpreted as a more direct attempt to change the substantive “maximum extent practicable” (MEP) requirement for municipal stormwater discharges. This could have impacts not only on the Phase II program, but on the Phase I program as well.

For instance, EPA proposes new language stating that “[i]n each permit issued under this section, the Director must include permit conditions that establish in specific, clear, and measurable terms what is required to reduce the discharge of pollutants from the MS4 to the [MEP]....” In addition to requiring more specificity, this language suggests a new, more stringent standard to meet MEP. NSAN requests clarification from EPA on whether this is the intent of the proposed changes. Additionally, we suggest replacing the phrase “specific, clear, and measurable terms” with the phrase “focused, flexible, and effective terms,” as it better reflects the unique nature of MS4 programs and the need for flexibility.

EPA also proposed deleting the word “narrative” in 122.34(a) when describing the appropriate type of effluent limitations that should be included in MS4 permits, and proposes deleting the language in that section suggesting that narrative effluent limitations “are generally the most appropriate form of effluent limitations.” Taken together, these two changes could be interpreted to suggest EPA is implicitly moving away from non-numeric or BMP-based effluent limitations for stormwater discharges towards numeric effluent limitations. This in turn raises concerning questions about whether the proposed regulatory alterations are merely procedural in nature, or are in fact trying to make more substantive changes to the MEP standard. Any perceived effort by EPA to provide a new definition of MEP is inappropriate in this rulemaking. NSAN requests clarification from EPA on the intent of these changes.

Enforceability of Stormwater Management Plans (SWMPs)

The definition of “effluent limitation” has a potential broad interpretation in the Remand Rule proposal. Under Option 1, provisions in SWMPs could be interpreted by the public or environmental activist groups to be effluent limitations, thereby opening SWMPs to enforcement. EPA should more narrowly define “effluent limitation” and

clarify that SWMPs are for planning purposes only and not subject to challenge by outside parties. NSAN members have struggled to find clarity on this question under the current Phase II program as well, and request that EPA provide further clarification on this issue in the final rule.

NSAN appreciates the opportunity to provide these comments and looks forward to working closely with EPA over the next year as the Agency finalizes the Remand Rule to ensure the voices and perspectives of Phase II MS4 permittees around the nation are represented. Please do not hesitate to contact Brenna Mannion, NACWA's Director of Regulatory Affairs & Outreach, at 202/533-1839 or bmannon@nacwa.org on behalf of NSAN with any questions regarding these comments.

Sincerely,

Colorado Stormwater Council (CSC)
Florida Stormwater Association (FSA)
Maryland Association of Municipal Stormwater Agencies
National Association of Clean Water Agencies (NACWA)
National Association of Flood & Stormwater Management Agencies
Southeast Stormwater Association (SESWA)
Tennessee Stormwater Association
Virginia Association of Municipal Stormwater Agencies

A number of NSAN organizations including NACWA, FSA, SESWA, and CSC submitted separate comments on behalf of their specific organizations, and NSAN strongly encourages EPA to give those comments consideration as well.