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1200 Pennsylvania Avenue, NW

Washington, DC 20460

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

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

Dear Greg,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the Agency's proposed Municipal Separate Storm Sewer System (MS4) General Permit Remand Rule (Remand Rule). NACWA represents nearly 300 public clean water utilities, including stormwater agencies and Phase II MS4s from around the country that will be impacted by the Remand Rule.

NACWA understands the Remand Rule proposal is intended to be a narrow procedural response to the Ninth Circuit's 2003 *Environmental Defense Center (EDC) v. EPA* ruling and a subsequent 2014 petition related to the decision, but has concerns that the potential impact of the proposed options could be farther reaching, with significant substantive consequences for permittees. The current 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 laws that define each community's urban runoff challenges. NACWA believes any changes EPA ultimately makes to the national Phase II program should address the Ninth Circuit's fundamental concerns from the *EDC* case but also preserve the flexibility that is inherent and necessary in the Phase II regulations.

Of the three options proposed in the Remand Rule, NACWA believes Option 3 will best address the procedural and participatory elements of the court's requirements while also maintaining sufficient flexibility for permitting authorities and permittees to develop and regulate their small stormwater programs. Permitting authorities who operate a Phase II general permit program do so in myriad ways, due to the large number and diversity of permittees and water quality goals. Many authorities would find it impossible to modify their program if either Option 1 or Option 2 were to be exclusively required - resulting in complete program overhaul which is not, as EPA

states throughout the proposal, the intent of this rulemaking. A hybrid option, referred to in the proposal as “State Choice” Option 3, would be the most acceptable path forward that provides states and municipalities with the greatest flexibility possible to implement the Phase II program.

NACWA believes there is a way to collaboratively ensure that the Remand Rule complies with the court’s requirements, moves the small MS4 program forward, and maintains the maximum flexibility necessary for both the permit authorities and permittees responsible for implementing these programs. During its stakeholder outreach, the Agency conveyed that it also shares this opinion. In order to more fully understand the Remand Rule proposal’s scope of impacts, NACWA has undertaken substantial outreach with its Phase I and Phase II MS4 members, the environmental NGO community, state interests, and the National Stormwater Advocacy Network members who represent an even deeper pool of Phase II communities. The overwhelming majority of those groups echoed the need to allow permitting authorities to maintain maximum flexibility as they implement the necessary changes to comply with the regulation. The results of NACWA’s outreach are reflected in the Association’s comments on the proposal outlined below.

Reaction to Traditional General Permit Approach, Option 1

Option 1 is called the “Traditional General Permit Approach.” Under Option 1, “all substantive permit requirements [will] be in the general permit.” 81 Fed. Reg. at 421. The requirements would be put into the general permit by the permitting authority in what EPA describes as “shifting the decision as to what is needed to meet [MEP] ... from the permittee to the permitting authority.” *Id.* The revised 40 CFR 122.43(a) would require the permitting authority to articulate in sufficient detail in the general permit what is required to meet the statutory and regulatory requirements.

In short, Option 1 largely follows the instructions that EPA received from the court remand. Option 1 requires that the permitting authority identify the effluent limitations, requires the effluent limitations to be in the permit itself, requires the permitting authority to make a determination that the effluent limitations in the permit will satisfy the statutory and regulatory requirements, and the permit will be subject to the notice and public comment procedures as required by CWA §§ 402(a)(1), (j). Under Option 1 the NOIs are no longer a substantive component of the regulatory regime, but simply procedural correspondence. Further, the Proposal says explicitly that Option 1 “*removes the possibility that effluent limitations could be proposed in the NOI ... and made part of the permit once permit coverage is provided.*” Under Option 1, the NOIs would not be subject to public notice as that would be the responsibility of the permitting authority in the development of the general permit. There would be fewer number of opportunities for public engagement in this process as compared to Option 2, but there would also be less administrative work for the permitting authority to provide public notice and comment on each individual NOI.

While NACWA supports Option 3 overall, we also believe Option 1 is preferable to Option 2. Some permittees feel their states are already putting significant substance in their general permit, to the point that procedurally, Option 1 is not substantially different from their current process.

However, NACWA is concerned that Option 1, in its assertion that permit requirements must be “clear, specific, and measurable”, may impact what effluent limitations may be included in general permits and get dangerously close to redefining the Maximum Extent Practicable (MEP). Specific concerns are outlined 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 in to 40 CFR 122.34(a) that raise concerns about what type of effluent limitations will be required for MS4s -- especially questions about whether narrative effluent limitations are no longer permissible -- and creates confusion over how 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 in Option 1 is being interpreted as a more direct attempt to change the actual substantive MEP requirement for municipal stormwater discharges. This could have impacts not only in the Phase II program, but also in 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. NACWA requests clarification from EPA on whether this is the intent of the proposed changes. Additionally, NACWA suggests 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 also 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 have been interpreted by some in the MS4 community to suggest EPA is implicitly moving away from non-numeric or BMP-based effluent limitations for stormwater discharges towards numeric effluent limitations. In particular, some are concerned that EPA is suggesting narrative limits are no longer permissible for MS4 permits.

The modifications to the regulatory text noted above, when taken in sum, raise concerning questions about whether the proposed regulatory changes are merely procedural in nature, or are in fact trying to make more substantive changes to the MEP standard. There is also a concern that even if it is not EPA’s intent, it may be the practical effect of the proposed modifications. Any perceived effort by EPA to provide a new definition of MEP is inappropriate in this rulemaking. EPA should not attempt to define what qualifies as MEP for Phase II permits in the Remand Rule. An effort by EPA to provide a strict definition of MEP in a national rulemaking would also be legally suspect and open to legal challenge. NACWA requests that EPA clarify in the preamble of the final rule its intent in this rule with regard to the MEP standard and what it believes are the practical effect(s) of the proposed modifications to the regulatory text.

EPA states “The proposed modifications do not alter the existing, substantive requirements of the six minimum control measures in 40 CFR 122.34(b).” NACWA supports EPA’s decision to not establish minimum substantive requirements or “floors” in this rulemaking. The court decision did not require the Agency to establish minimum substantive requirements in this Rule, nor is it an appropriate place to do so.

Should EPA choose Option 1 (or incorporate Option 1 elements via Option 3) EPA should retain the narrative terminology in the regulatory text but also underscoring in the preamble that the Agency's intention is not to define MEP as part of this national rulemaking. EPA should emphasize the fact that there are a host of different options to incorporate numeric provisions in permits, without using end-of-pipe limits. EPA should also clarify that "measurable" does not mean "monitoring".

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. NACWA members have struggled to find clarity on this issue under the current Phase II program as well, and request that EPA provide further clarification on this issue in the final rule.

Incorporating TMDLs into General Permits

Small MS4s in some cases have obligations to meet water quality standards in impaired waters through Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs). There is confusion from stakeholder groups, permittees and permitting authorities around how WLAs would be adequately addressed in a general permit under Option 1. Fundamentally, incorporating TMDL WLAs into a general permit seems to violate the basic rule for use of general permits as laid out in 40 CFR 122.28(a)(2)(1) and (3), which states that the sources "shall be subject to the same water quality-based effluent limitations." At the same time, it is true that some general permits do currently address WLAs, typically by including the various TMDLs and associated stormwater dischargers in an appendix. However, in most of these general permits, there is no specific plan included to reduce pollutant loads sufficiently to ensure compliance with water quality standards/WLA. They still rely on the SWMP to lay out a set of actions and activities necessary to meet the requirements of applicable TMDLs. Those SWMPs would then constitute substantive permit requirements but would not be subject to public comment and authority review, thus would likely be enforceable (as noted above). The hybrid option may be the only way to address water quality-based effluent limitations tailored to particular MS4 dischargers. NACWA requests additional clarification from EPA on how TMDLs would be incorporated under an Option 1 approach.

Shifting Discretion

A number of the line edits proposed in the Option 1 regulatory text seem minor, but could have significant implications on both permittee and permitting authority discretion that could weaken states' abilities to manage the General Permit program and utilities' abilities to manage their local systems. The proposed language at 40 CFR 122.34(b)(3)(ii) changes "if you identify [illicit discharges]" to "if [illicit discharges] are identified" which could be interpreted to remove permittee discretion to determine if discharges into the MS4 are a source of pollutants. The text should remain in its original form, otherwise it could be interpreted that an environmental group or other outside interest would be able challenge the illicit discharge detection and elimination (IDDE) provisions of the permit.

The proposed new CFR 40 122.34(c) language also removes explicit reference to permitting agency and permittee discretion to determine when BMPs are appropriate instead of numeric effluent limits – this strike out could be read as a push toward including numeric limits in stormwater permits. In any event the revised language is much more stringent. EPA should clarify this and eliminate another potential pressure point for legal challenges while also maintain permitting agency discretion to determine when more stringent measures are required to include TMDLs in the permits.

Reaction to Procedural Approach, Option 2

Option 2, or the Procedural Approach, would be the most literal response to the *EDC* decision, with the most significant change to the Phase II regulations being that the “*permitting authority provides a final determination on whether the requirements to which the MS4 is subject*” are adequate in both the general permit and individual Notice of Intent (NOI). Under the Procedural Approach, MS4s would submit an NOI with proposed best management practices (“BMPs”) and other permit requirements. The permitting authority would then review the NOI to make an affirmative determination that the proposed effluent limitations satisfy the statutory and regulatory requirements, and then allow public notice and comment before the discharges from the MS4 would be authorized by the general permit.

NACWA members believe this approach could work, but also have concerns about the additional administrative burden this could create for the permitting authorities and the potential for additional legal challenges to individual review of NOIs. On the one hand, the MS4 best knows their distributed system and its nuances, and this approach affords the MS4 the continued ability to identify the BMPs that it determines are needed or best suited to meet the regulatory requirements with guidance and oversight from the permitting authority. On the other hand, this approach would create a public review process for each NOI that small MS4s will be ill-equipped – and in some cases incapable – to handle. It also allows the public an opportunity to review, comment and request a hearing on each NOI. EPA must ensure that the permitting authorities manage the comprehensive public participation and that they have the additional resources needed to do so. The public review process on NOIs could also create another opportunity for legal challenge by third parties or the permittee, creating costs and burdens for the permitting authority and permittee.

Option 2 is NACWA’s least preferred option. If EPA chooses to proceed with this option, any finalized version of the Procedural Approach must consider the following points:

1. The permitting authority must be responsible for receiving and reviewing the public comments on individual NOIs. Certain permittees may be comfortable making their own public notice, but the permittee should not be responsible facilitating for this process.
2. It is unclear how often the public would request a hearing, but the administrative burden of organizing and hosting a hearing could be onerous for the permitting authority. This potential cost does not appear to be sufficiently addressed in EPA’s cost estimates.

Hybrid Option 3, “State Choice”

NACWA recommends that EPA’s final rule allow permitting authorities to choose either the Traditional General Permit Approach or the Procedural Approach, or some combination of the two. The “State Choice” approach would maintain the flexibility needed to administer the Phase II program while also meeting the

requirements on the *EDC* decision. Option 3 would further ensure resource-strapped states with robust, established small MS4 general permit programs can make the most efficient changes to their processes and permits without having to, in some cases, redesign their Phase II programs. NACWA also believes this option could provide important efficiencies for municipal permittees, which is an important consideration for small communities facing resource constraints and affordability concerns. If EPA selects Option 3, it should make it clear what components of Options 1 and 2 are incorporated into the final rule. To the extent EPA includes components of Option 1 as laid out in the proposal in a final rule that selects Option 3, NACWA requests that the Agency address the Association's specific comments in this letter on those components of Option 1.

In line with EPA's request for specific comment on how and when Option 3 could be applied, NACWA is exploring the possibility of providing specific regulatory text for this Option and have discussed that possibility with EPA staff. In the meantime, the following hypothetical scenarios are intended to illustrate examples of how a state could use elements of the Traditional Permit Approach vs. Procedural Approach.

1. State X is already publically noticing their General Permit, and then noticing and reviewing each NOI. They would select Option 2, make minor changes, for example to ensure the public's ability to request a hearing on each NOI, and be in compliance.
2. State Y is already incorporating all or most of its applicable effluent limits in its General Permit. The State refines its general permit requirements to include what it believes are "clear, specific, and measurable" benchmarks in line with Option 1. The state further clarifies that an MS4 cannot revise, modify or tailor the applicable effluent limitations in the general permit through its SWMP because the effluent limitations must be established in the permit, not in the SWMP. State Y is now in compliance.
3. State A uses a general permit as laid out in the State Y example, but recognizes that in some instances, the needs of a particular water body require that the permitting authority develop water quality-based effluent limitations tailored to particular MS4 dischargers – especially in a state with a large number of impaired waters with TMDLs. In this case the state would want to preserve permittee's ability to develop TMDL implementation plans and SWMPs that specifically outline how they can achieve the pollutant reductions to meet the WLA. This would be done using the Procedural Approach: i.e. the submitted plan would be subject to public notice by the permitting authority, public comment permitting authority review, an opportunity for a public hearing, and approval by the permitting authority. This is an example of a state that would not choose exclusively Option 1 or Option 2.
4. State B also does not exclusively choose to follow either option but establishes a Traditional General Permit in compliance with the Rule similar to State Y. State B allows those permittees - perhaps those being issued their first permit, or a group of co-permittees - who feel that because of special circumstances they cannot meet the requirements laid out in the General Permit, to submit an NOI and SWMP under the procedural approach detailed in State A's process.

Supplemental Notice

EPA provided proposed regulatory text for Option 1 in the rule proposal but did not do so for Options 2 or 3. NACWA believes Option 3 makes the most sense conceptually in terms of providing maximum flexibility to state permitting agencies and MS4s. However, we also believe 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, NACWA requests that EPA provide a Supplemental Notice that includes draft regulatory text for public review based on Option 3. NACWA is also willing to work with EPA on developing what such regulatory language might look like. Although we understand that EPA believes whatever regulatory changes are included in the final rule would be a “logical outgrowth” of what’s been described in the proposal, supplemental notice with proposed regulatory language for Option 3 would improve the ability of the MS4 community to comment on this option in a meaningful way.

Conclusion

NACWA endorses an Option 3 approach which allows the permitting authority to simultaneously incorporate Options 1 and 2 into the regulatory framework as appropriate based on consultations with the regulated MS4 Phase II community. We believe this hybrid approach would reaffirm EPA’s commitment to cooperative federalism and acknowledge the iterative realities of the over 6,500 small MS4s covered under the general permit program. This approach, that would also incorporate the suggested changes to the proposal language around Option 1, would avoid any inadvertent negative consequences to both the permittees and permitting authorities as they implement the new requirements.

As EPA noted in the preamble to the Proposal, “*an important consideration for this rulemaking is how to provide the flexibility to MS4s while retaining the general permit option in a manner that comports with the remand.*” 81 Fed. Reg. at 420. EPA has repeatedly stated its commitment to maintaining maximum flexibility in the Phase II program, and NACWA appreciates this position from the Agency. We believe that an Option 3 approach will provide this flexibility by meeting the EDC remand requirements, enabling the public to have more meaningful opportunities to comment on Phase II permits, empowering permitting authorities to exercise more oversight, and most importantly better positioning small MS4s to achieve their stormwater management goals and improve water quality.

NACWA again appreciates the opportunity to provide these comments and looks forward to continuing to collaborate as the final rule is developed. Please do not hesitate to contact me at 202/533-1839 or bmansion@nacwa.org.

Sincerely,



Brenna Mannion
Director of Regulatory Affairs and Outreach