

February 24, 2015

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Newton Tedder
USEPA Region 1
5 Post Office Square
Suite 100, Mail Code OEP06-4
Boston, MA 02109-3912

Re: Massachusetts Small MS4 Draft General Permit Comments

Dear Mr. Tedder:

The Massachusetts Coalition for Water Resources Stewardship (the Coalition) appreciates the opportunity to comment on the Small MS4 draft general permit for Massachusetts. The Coalition, and its members, promote the use of scientifically based, fiscally responsible approaches to realize environmental and community goals, as well as watershed-based policies and regulations to effectively manage and conserve water resources. Nearly 40 Coalition members are municipalities and districts¹ who will be among the 200 or so communities charged with implementing the provisions of this permit. In previous comments on the New Hampshire Small MS4 Draft Permit (August 15, 2013) and in the comments that follow, we hope to guide Region 1 in crafting a stormwater permit that addresses water resources issues but remains reasonable, considerate of the realities of municipal operations and finances, and is consistent with statutory limitations on municipal stormwater pollution control stipulated in the Clean Water Act. Unfortunately, many of our concerns expressed in comments on the New Hampshire permit remain unaddressed and the Massachusetts draft permit fails in terms of reasonableness, consideration of municipal realities, and concurrence with the law.

General Comments:

While the goal of the Clean Water Act is laudable and supported by the Coalition, we consider the requirements in the MA Small MS4 general permit to be overly prescriptive, burdensome, and most likely unachievable for most communities.

¹ The following municipalities and districts are members of the Coalition: Charles River Pollution Control District, Cherry Valley Sewer District, City of Attleboro, City of Beverly, City of Chicopee, City of Haverhill, City of Holyoke, City of Marlborough, City of New Bedford, City of Peabody, City of Salem, City of Worcester, Greater Lawrence Sanitary District, Lowell Regional Wastewater Utility, South Essex Sewerage District, Springfield Water and Sewer Commission, Town of Bellingham, Town of Concord, Town of Danvers, Town of Dedham, Town of East Longmeadow, Town of Fairhaven, Town of Framingham, Town of Franklin, Town of Holden, Town of Marblehead, Town of Medway, Town of Milford, Town of Millbury, Town of North Reading, Town of Southbridge, Town of Uxbridge, Town of Wellesley, and Upper Blackstone Water Pollution Abatement District

Schedule Constraints: The schedules set forth in the draft permit are not reasonable or feasible when considered in the context of municipal realities. Schedules for some aspects of the permit may appear reasonable but become unreasonable when the permit is viewed in its entirety and it becomes clear that schedules for most parts of the permit overlap.

Significant Administrative Burden: The permit, as drafted, would create a significant administrative burden for municipalities that would detract from their ability to provide direct benefits to water quality through such concrete activities as increased street sweeping, increased catch basin cleaning, and removal of illicit discharges. The permit goes overboard in terms of monitoring, measuring, and quantifying changes in pollutant loads. More environmental progress would be gained if communities could focus resources on actual, physical improvements to stormwater systems and not on pollutant accounting. Per the Clean Water Act municipalities are obligated to remove pollutants from stormwater to the maximum extent practicable and that should be the objective of the permit. The ongoing assessment of receiving waters is a function of MassDEP, not individual communities.

Funding Challenges: Many of the deadlines provided in the draft permit do not allow sufficient time to allocate funding within set municipal budget cycles to complete the tasks required. No item in the permit should be required to be completed during the first permit year except the preparation of the Stormwater Management Plan (SWMP).

Integrated Planning Opportunities: There should be language within the permit that references EPA's Integrated Planning framework and how integrated planning can be utilized to address a community's stormwater/MS4 requirements. That language should be specific about how an integrated planning approach could be applied through the permit and how permit conditions, including implementation schedules, would be modified under an integrated plan.

Section-Specific Comments:

1. **Section 2.1 Water Quality Based Effluent Limitations and 2.1.1-Requirement to Meet Water Quality Standards:** Section 2.1 (page 9) states that "Pursuant to Clean Water Act Section 402(p)(3)(B)(iii), this permit includes provisions to ensure that discharges from the permittee's small MS4 do not cause or contribute to exceedances of water quality standards...". Similarly, the Fact Sheet, at page 4, states "Section 402(p)(3)(B)(iii) of the CWA also authorizes EPA to include in an MS4 permit 'such other provisions as [EPA] determines appropriate for the control of ... pollutants'" and that "[t]his provision forms a basis for imposing water quality-based effluent limitations (WQBELs)" citing to *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), and EPA's preamble to the Phase II regulations, 64 Fed. Reg. 68722, 68753, 68788 (Dec 8, 1999); and at page 16, that "EPA interprets this latter clause (i.e. "such other provisions as [EPA] determines appropriate for the control of . . . pollutants" at Section 402(p)(3)(B)(iii) of the CWA) to authorize the imposition of water quality based effluent limitations." This interpretation distorts entirely the meaning of CWA Section 402(p)(3)(B)(iii) and the intent of Congress in enacting this provision, and is incorrect. When Section 402(p) of the CWA was added

in 1987, it established a comprehensive new scheme for regulation of stormwater. It differentiated the technology-based requirements for MS4s relative to the rest of the NPDES program by creating a new “maximum extent practicable standard,” in contrast to the traditional BAT/BCT standard that applied to industrial stormwater and other wastewater discharges. The opening clause of CWA § 402(p)(3)(b)(iii) states that, unlike industrial stormwater permits, MS4 permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable” A subordinate clause states that such controls shall include “management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” Each of those controls is subject to the limitation in the first clause that they shall be required “to the maximum extent practicable.” EPA’s interprets this provision contrary to its plain meaning and in a manner which suggests that the final clause referring to “such other provisions as the Administrator or the State determines appropriate” is independent and coequal with the requirement to reduce pollutants to the “maximum extent practicable.” Region 1’s reading distorts the syntax of § 402(p)(3)(B)(iii) and the intent of Congress in enacting this provision.

The Region also suggests, incorrectly, that the Ninth’s Circuit’s opinion in *Defenders of Wildlife v. Browner* supports this misreading of the statute. While in dicta at the end of its decision, the court suggested that the “such other provisions” clause allowed EPA the discretion to include “either management practices or numeric limitations” in MS4 permits, the court did not say that the discretion to include numeric limitations or to require compliance with water quality standards could be exercised without regard to the “maximum extent practicable” limitation in the statute. That issue was not presented by the facts of the case before it, and it was not addressed in the court’s opinion. Had the court so ruled, it would have been contrary to the plain language of the statute and subject to reversal on appeal.

Federal courts have consistently ruled that the MEP standard is the only standard that MS4 discharges are required to meet. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 966 F.2d 1292, 1308 (9th Cir. 1992) (CWA § 402(p)(3)(B) “retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal stormwater discharge); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999) (CWA § 402(p)(3)(B) “replaces” the requirements of § 301 with the MEP standard for MS4 discharges, and it creates a “lesser standard” than § 301 imposes on other types of discharges); *Environmental Defense Center v. EPA*, 319 F.3d 398 (9th Cir. 2003), vacated, rehearing denied by, and amended opinion issued at 344 F.3d 832 (9th Cir. 2003) (CWA “requires EPA to ensure that operators of small MS4s ‘reduce the discharge of pollutants to the maximum extent practicable’”); *Mississippi River Revival, Inc. v. City of St. Paul*, 2002 U.S. Dist. LEXIS 25384 (N.D. Minn. 2002) (“the CWA specifically exempts municipal stormwater permittees” from the requirement to ensure that water quality standards are met).

In addition, EPA's citation to the Preamble to the Phase II regulations, 64 Fed. Reg. 68722, 68753, 68788 (Dec. 8, 1999) to support its interpretation of Section 402(p)(3)(B)(iii) of the CWA as authorizing the imposition of water quality based effluent limitations is disingenuous. The Preamble to the Phase II rule at 64 Fed. Reg. 68788, states only that EPA disagrees with commentators who challenged EPA's interpretation of the CWA as requiring water quality based effluent limits for MS4s. The Preamble gives no legal rationale. Like the fact sheet, at page 4, the Preamble to the Phase II rule cites to *Defenders of Wildlife*. As noted above, *Defenders of Wildlife* does not support the proposition that EPA can require MS4 operators to comply with WQBELs regardless of practicability.

EPA has taken the position in the defense of the Phase II rule in *Environmental Defense Center* that:

MS4 requirements... rest on the "maximum extent practicable" ("MEP") standard which CWA Section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii), prescribes for Section 402(p) municipal storm sewer permits. 40 CFR § 122.34(b). Thus, while the regulations suggest numerous ways in which small MS4s ought to control their stormwater discharges, *the MS4s are not, in the end, required to do anything that is not "practicable."* 2000 U.S. 9th Cir. briefs 70014, 70020 (June 26, 2001). (Emphasis supplied)

Given the plain language of Section 402(p)(3)(B)(iii), any application of the Phase II rule to require that MS4 discharges need to meet WQBELs regardless of "practicability" would be *ultra vires*.

The cited section of the Clean Water Act makes no mention of water quality standards. Instead, it establishes Maximum Extent Practicable (MEP) as the standard to which pollutants must be removed from municipal MS4s. The language in section 402(p)(3)(B)(iii) of the Act is clear that MEP governs pollution control requirements for municipal stormwater discharges. Section 402(p)(3)(B)(iii) of the Act states that controls to reduce the discharge of pollutants to the MEP include management practices, control techniques and systems, design and engineering methods, and such other provisions as the Administrator determines appropriate for the control of pollutants. The "such other provisions" clause is within the broader context of the MEP standard, not separate from it as EPA tries to imply. The proper wording throughout the permit that would be consistent with the Act would be for the permittee to meet water quality standards to the maximum extent practicable. For Congress to bother to include such language in the Act is clear and unassailable evidence that lawmakers understood that there are limitations in the ability of municipalities to meet water quality standards in stormwater discharges. These limitations are spelled out in the statutory standard of MEP applied only to municipal stormwater discharges. NPDES stormwater permits for municipalities will continue to be contentious as long as EPA refuses to recognize that the MEP standard applies as the only mandate for pollutant removal from MS4s. Water quality standards and TMDL waste load allocations may be goals but are not the required

standards that must be achieved in municipal stormwater.

2. Section 2.1.2 Increased Discharges: New and additional stormwater flow to impaired waters regardless of concentration would be prohibited under this draft permit. This requirement could only be overcome by demonstrating that the pollutant of concern is not present in the new/increased discharge or that the total load of pollutants to the impaired waters will not increase. Even the most innocuous “new discharge,” say a new single family home with a driveway and stormwater-minimizing design, will produce some pollution and will add some additional load, be it insignificant, to a receiving water. The language in this section could thus be interpreted to mean no new development in MS4 areas draining to impaired waters. Many urban areas of Massachusetts have nothing but impaired waters. This section could effectively preclude new development in such communities. That is an impact that goes far beyond EPA and federal authority. This language must be modified to stipulate thresholds on new/additional pollutant loads being significant and not merely all new loads.
3. Section 2.2.1.b (pages 11-15) and Appendix F, Part A: The permit requires compliance with TMDL waste load reductions associated with stormwater. It mandates a progressive reduction in pollutant loads with 100% reduction achieved within 15 years. The permit neglects to recognize that most TMDL’s developed for Massachusetts waters are lacking in sound science and are instead based on very generic models of watershed loading. In many cases there is a dearth of actual sampling data from the TMDL regulated waters or data may be 25 or more years old. Even in the more rigorous Charles River TMDL for phosphorus, the model used to determine needed phosphorus reduction produced results that are not supported by actual test data. The TMDL’s which drive pollutant removal requirements in the draft permit are wholly inadequate for this purpose and cannot legitimately justify specific pollutant load removal for the vast majority of waters. To be consistent with the Clean Water Act and avoid reliance on unsubstantiated pollutant load reductions, municipalities should be required to remove the pollutant of concern to the maximum extent practicable by implementing feasible BMPs, including structural and non-structural measures, that have been demonstrated through generally accepted research to be effective at removing that pollutant. Municipalities cannot do any more than what is feasible and should not be squandering limited resources chasing highly tenuous pollutant “numbers”.
4. Section 2.2.1.c (pages 15-17) and Appendix F, Part B: Massachusetts municipalities should not be held to comply with out-of state TMDL requirements. TMDLs are determined by state environmental agencies. While there may be an “open” regulatory process for TMDL development it is highly unlikely that process and its requisite public notification was extended to potentially impacted communities outside of the state. The interests of Massachusetts municipalities were not represented by anyone during TMDL development in Rhode Island, Connecticut, New York, Vermont or New Hampshire. Massachusetts cities and towns are now being subjected through this draft permit to regulatory programs in other states to which they had no opportunity to participate. Even within Massachusetts, the majority of TMDLs were developed in the early 2000’s at a

time when their link to future stormwater permits was unknown. Massachusetts TMDLs, with few exceptions, were offered as stand-alone documents with little bearing on anything that a municipality would be required to do. Had it been clear that these documents would have substantial and costly implications for cities and towns the TMDL development process would have fallen under much greater scrutiny and the haphazard, unscientific way they were created would likely have been challenged. The TMDL program in Massachusetts is so hopelessly flawed in terms of science and public process that it should not be utilized for NPDES permitting at all, let alone be the primary focus of a MS4 general permit.

5. Section 2.2.2 Discharges to Certain Water Quality Limited Waters Subject to Additional Requirements (pages 17-22) and Appendix H: This section assumes that there has been sound and defensible science used to determine the cause of impairments of numerous water bodies. That has rarely been the case. State agencies including Massachusetts DEP have rarely had the resources to perform legitimate water quality investigations of lakes, ponds and rivers. Very often an assessment of a water body is based on the most cursory information (visual observation of weeds or algae) and lacks the detailed sampling and analysis needed to truly determine conditions and causes. Yet this unscientific assessment will now result in communities expending significant resources developing nitrogen source identification reports and phosphorus source identification reports along with the planning, implementation and tracking of structural BMPs for removal of these pollutants. For some communities, the “water quality limited waters” driving these added expenses could be 75 miles downstream. It is ludicrous to imagine that stormwater generated in a small community of 5,000 people could have a significant impact on a coastal bay nearly 100 miles distant yet that is what is being described in this section. There needs to be both better science and common sense applied before cities and towns are held to “fix” problems that often do not exist.
6. Section 2.3.2 Public Education and Outreach: While EPA provides more time to conduct the public education program in this draft of the permit, it is important to keep in mind that the majority of the public does not understand how stormwater can become polluted and how it can contribute to water quality issues. Most of the public still believes that catchbasins in their roads transport stormwater to a treatment facility prior to discharge. In addition, most people do not understand the concept of a watershed, or the concepts related to the water cycle (rainfall, runoff, infiltration, and evapotranspiration). A significant amount of awareness-raising must be done across the United States prior to an individual community education/outreach campaign in order to truly stimulate behavior changes in the general public. Many municipalities see a large influx of visitors during the tourist season and thus education must extend well beyond the immediate locality to be truly effective. Stormwater education is a national need and should be spearheaded by EPA nationally through a consistent education campaign and not simply left to municipalities.
7. Section 2.3.4 Illicit Discharge Detection and Elimination (IDDE) Program (pages 25-37): Overall the IDDE program as described is highly prescriptive and very burdensome.

While IDDE is necessary and valuable for a strong stormwater management program, the extent to which a municipality can comply with the edict mandated in the draft permit is questionable. The schedule mandated by the permit is unreasonable for an initiative that constitutes a major capital project requiring significant expenditures and coordination. The described program needs to be tempered by the Maximum Extent Practicable standard and thus subject to that which is feasible.

8. Section 2.3.4.1 Definitions and Prohibitions (page 25): EPA needs to modify its definitions to differentiate illicit discharges caused by mis-connected sewer laterals or direct introduction of contaminants into the MS4 by illegal dumping from those caused by systemic failures within the sanitary sewer or MS4. It is one thing to track, identify, and remove an illicit connection but altogether different to track, identify, and correct a failed sanitary sewer or similar system defect. The former are generally easy to locate and repairable within a relatively short time while the latter are extremely difficult to locate and repair and may involve wholesale replacement of large parts of the sanitary sewer collection system. The language in section 2.3.4 implies a “one size fits all” approach to IDDE and it clearly is not in terms of locating and removing the illicit discharge.
9. Section 2.3.4.4 a through e: This Sanitary Sewer Overflow reporting requirement is redundant and should be removed from the Small MS4 permit. MassDEP already requires SSO reporting through statewide regulations. For purposes of this MS4 permit, the term SSO needs to be defined. Relative to stormwater management and MS4 permitting the only SSO that should be considered are those that discharge through a stormwater outfall into a receiving water. SSOs that enter basements or are contained on street surfaces or upland areas have no link to an MS4.
10. Sections 2.3.4.5 and 2.3.4.6 (page 26-28): Outfall and interconnection inventory and system mapping are necessary and valuable components of stormwater management. However, the timeframe to complete these more detailed studies is likely inadequate, especially for smaller communities that may lack GIS and GPS capabilities. Communities should identify feasible schedules for completing this work within their SWMP.
11. Section 2.3.4.7.d.i (page 32): The Coalition objects to the requirement that the permittee adopt a screening and sampling protocol consistent with a January 2012 draft document (EPA New England Bacterial Source Tracking Protocol). If this protocol is to be used in a regulatory context as proposed for this permit, it should be subject to rule making, peer reviewed, and scrutinized by others outside of the Agency and become a Final, not a draft, before making its use mandatory. Otherwise, the draft document may be useful as a suggested reference only.
12. Section 2.3.5 – Construction Site Stormwater Runoff Control, and 2.3.6 – Stormwater Management and New Development and Redevelopment (Post Construction Stormwater Management). These provisions require permittees to develop, implement, and enforce a

program to reduce pollutants and any stormwater runoff discharge to the MS4. EPA has no authority to make local land-use decisions by compelling permittees to make specific choices with regard to ordinances or other regulatory mechanisms. EPA is exercising federal land-use mandates on a local basis in violation of the 10th Amendment of the Constitution.

These provisions would also apply to public road reclamation and resurfacing projects involving more than ¼ mile of 30 foot wide pavement (approximately 1 acre equivalent). By doing so, this permit would cripple local road maintenance budgets by effectively requiring redesign and construction of entirely new stormwater collection and control systems for all but the smallest road resurfacing project. Maintaining safe, passable roads is among the highest priorities of local government and one that is currently grossly underfunded. Taking limited funds and utilizing them for stormwater improvements for virtually every significant resurfacing project will greatly curtail meaningful improvements to local roads. Resurfacing and pavement maintenance projects should be exempted from this requirement to meet stormwater standards. The standards might be applicable to road reconstruction projects but only to the extent that they are practicable.

13. Section 2.3.6.d (pages 42-43) Directly Connected Impervious Area: The requirement to monitor and track impervious cover is a burdensome and inappropriate requirement for most municipalities. It has the appearance of a research effort and not a tool that will benefit stormwater management by the community. Compiling and tracking impervious area will require manpower and costs that would be better utilized implementing better stormwater control systems. If Region 1 is that interested in tallying impervious cover acreage, the Coalition suggests it directly fund and coordinate with colleges and universities to accomplish the task through graduate and undergraduate GIS projects.

Region 1's effort to regulate impervious surfaces raises the legal issue on whether such surfaces are "point sources" under the NPDES permit program. Impervious surface, on its own, cannot be subject to regulation under the NPDES permit program because impervious surfaces are neither a "point source" nor a "pollutant." Instead, it is a feature of the landscape that indirectly influences how water is carried on and off land. Congress predicated the stormwater permitting program and Section 402(p) of the CWA on "point source" discharges of "pollutants" from certain categories of dischargers, including MS4s and industrial activities. If Region 1 were to interpret "point source" to include impervious surfaces, it renders that term meaningless and contrary to Congressional intent to define the term and distinguish between "point sources" and "nonpoint sources." In addition, Region 1's authority to control pollutant discharges does not encompass the ability to mandate land-use decision-making. While local authorities can develop a regulation, for example, to limit impervious surfaces or other stormwater flows into the MS4, EPA is limited to regulating the discharge of pollutants from the MS4 and cannot force MS4s to do what EPA is not otherwise authorized to do, including imposing restrictions on local land use decisions. While on November 26, 2014, EPA released a guidance memorandum in which it asserts authority to mandate retention standards based upon the amount of impervious surface at a site, that authority is necessarily limited to

discharges from MS4 storm system (i.e., the "point source") into navigable waters. In short, impervious surfaces are not "point sources" under the NPDES permit program. CWA Section 304 prohibits unauthorized point source discharges, but Congress left the regulation of nonpoint source pollution to the states.

The Coalition appreciates the opportunity to comment on Massachusetts Draft Small MS4 General Permit. We urge EPA to consider modifications to the permit that will make it more sustainable and reasonable for municipalities and consistent with the Clean Water Act.

Sincerely,

A handwritten signature in black ink, reading "Philip D. Guerin". The signature is fluid and cursive, with the first name "Philip" and last name "Guerin" clearly legible.

Philip D. Guerin
President & Chairman

CC: MCWRS Members
Massachusetts Congressional Delegation
Commissioner Martin Suuberg - MassDEP