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P.O. Box 1521  
Knoxville, TN 37901

625 Market Street  
Knoxville, TN 37902

*Via email and U.S. First Class Mail*

October 28, 2016

Tisha Calabrese Benton  
*Technical Secretary*  
Board of Water Quality, Oil and Gas  
312 Rosa L. Parks Avenue, 12th Floor  
Nashville, TN 37243-1102

cc: Patrick Parker  
TDEC Office of General Counsel

Jenny Howard  
*General Counsel*  
Office of General Counsel  
TDEC  
312 Rosa L. Parks Avenue, 2nd Floor  
Nashville, TN 37243-1102

**RE: NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems Permit (TNS000000) Appeal Petition**

Dear Ms. Calabrese Benton & Ms. Howard:

On behalf of the Tennessee Clean Water Network ("TCWN"), Obed Watershed Community Association, Tennessee Chapter of the Sierra Club, and the Tennessee Environmental Council, I have enclosed a Petition for Statutory Appeal of NPDES General Permit TNS000000 authorizing municipal discharges from conveyances (or systems of conveyances) into surface waters.

Petitioners file this appeal to reserve their rights, but they are open to alternative resolution. Please contact me at 865-522-7007 x 102 to explore potential meetings before a scheduling conference.

Sincerely,

A handwritten signature in blue ink that reads "Shelby R. B. Ward".

Shelby R. B. Ward (BPR #030394)  
*Attorney for Petitioners*

**State of Tennessee  
Department of Environment and Conservation**

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Small Municipal Separate  
Storm Sewer Systems  
NPDES Permit No. TNS000000

Before the Board of  
Water Quality, Oil & Gas

Tennessee Clean Water Network,  
Obed Watershed Community  
Association, Tennessee Chapter of the  
Sierra Club, and Tennessee  
Environmental Council,  
*Petitioners*

Case No.

Docket No.

v.

Tennessee Department of  
Environment and Conservation,  
*Respondent*

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**NPDES General Permit for Discharges from Small Municipal Separate Storm  
Sewer Systems (TNS000000) appeal petition**

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**Summary**

This petition for statutory appeal concerns National Pollutant Discharge Elimination System (“NPDES”) Permit Number TNS000000, which authorizes Tennessee Small Municipal Separate Storm Sewer Systems to discharge stormwater into surface waters. For reasons explained in this petition, the Final Permit violates federal authority by failing to include clear, specific, and measureable requirements. The Final Permit also violates federal and state authority by backsliding and omitting opportunities for public participation.

## I. Legal Issues

1. Federal authority requires clear, specific, and measureable requirements for the Tennessee NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems to ensure maximum extent practical (“MEP”) stormwater runoff control.
2. The Clean Water Act and state law prohibits backsliding in water protection under the Tennessee NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems.
3. Federal guidance provides opportunity for the public to review and comment on MS4 programs and plans before coverage under the general permit is granted.

## II. Parties

4. Petitioner Tennessee Clean Water Network (“TCWN”) is a nonprofit corporation organized under the laws of the State of Tennessee. Its principal office is located at 625 Market Street, 8th Floor, Knoxville, Tennessee.\* TCWN empowers Tennesseans to exercise their right to clean water and healthy communities by fostering civic engagement, building partnerships, and enforcing water policy for a sustainable future. TCWN has been engaged with stormwater policy for several years. TCWN is a membership organization with members who are injured by small municipal stormwater runoff. Many TCWN members live and recreate in

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\* TCWN’s mailing address is P.O. Box 1521, Knoxville, TN 37901.

MS4 Phase II communities near urban water impacted by stormwater runoff.

5. Petitioner Obed Watershed Community Association (“OWCA”) is a membership organization whose members reside primarily in Cumberland County, Tennessee. A number of OWCA members live on property with stream frontage along rivers and streams impacted by the management of Crossville’s MS4 Stormwater program and will be directly affected by both increases in flooding and pollution if stormwater is not managed properly by the City. Additionally, OWCA has completed over 30 stream restoration and streambank stabilization projects within the impacted area and the integrity of these projects is affected by stormwater management. OWCA holds a conservation easement on a wetland within the jurisdiction that is impacted by stormwater. Finally, there are two public parks (the Obed River Park and Centennial Park) that offer recreation along impacted streams. OWCA members will have their recreational opportunities negatively affected by ineffective stormwater control measures.
6. Petitioner Tennessee Chapter of the Sierra Club (“the Club”) has members in every county of Tennessee totaling 7,000 persons altogether. The Club is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystem and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Thousands of

members of the Club reside, have employment and operate businesses, and pay taxes to MS4 permit holding municipalities. The stormwater management by these cities and towns is crucial to protecting Club members from flooding of their properties and safe use of their streets during storms. Club members' ability to advocate for effective stormwater management that assures "maximum extent practicable" reductions of pollution discharges depends on the provisions of the MS4 Permit and its implementation by local permitting requirements and public employees.

7. Petitioner Tennessee Environmental Council ("Council") is a nonprofit corporation organized under the laws of the State of Tennessee whose mission is to educate and advocate for the conservation and improvement of Tennessee's environment, communities, and public health. Its principal office is located at One Vantage Way, Suite E250; Nashville, Tennessee 37228. The Council is a membership organization with thousands of members who are damaged by small municipal stormwater runoff and the pollution contained in it. The Council operates three core programs: Tennessee Tree Program, Sustainable Tennessee, and Watershed Support. The Watershed Support Program has and continues to work with members and residents of small MS4s in an effort to abate stormwater runoff pollution. The Council works on urban municipal river restoration, conservation, and preservation projects. Stormwater runoff adversely impacts Council projects by increasing sedimentation, bank erosion, habitat degradation, and riparian forest loss. These adverse impacts to

water quality and quantity harm and detrimentally affect the Council membership's ability to use surface waters for recreation (such as boating, fishing, and swimming), fish and aquatic life, and domestic water supply.

8. Respondent is the Tennessee Department of Environment and Conservation ("TDEC") Division of Water Resources. The Division is the entity responsible for administering the MS4 program in the State of Tennessee.

### **III. Jurisdiction**

9. Petitioners appeal the Final Permit under Tenn. Code Ann. § 69-3-105(i). As described in the Tennessee Water Quality Control Act ("TWQCA"), a petition for permit appeal may be filed by any aggrieved person who participated in the public comment period and whose appeal is based upon any issues that were presented to TDEC during the comment period. *Id. See also* Tenn. Comp. R. and Regs. 0400-40-05-.12. On May 11, 2016, Petitioners submitted written comments on the draft permit during the public comment period. They specifically addressed the legal issues of concern in this appeal. Further, Petitioners also testified at a public hearing concerning the same matters.
10. Tenn. Code Ann. § 69-3-105(i) requires petitioners seeking a permit appeal to file within thirty days of being notified of the Commissioner's decision to issue or deny the permit. TDEC issued the Final NPDES General Permit for Discharges from Small Municipal Separate Storm

Sewer Systems on September 30, 2016. Petitioners received notice via email on September 30, 2016. This appeal petition is timely filed within thirty days from notification of issuance to Petitioners.

#### IV. Legal Background

11. *Clean water law purposes.* The Clean Water Act exists “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Tennessee Water Quality Control Act (“TWQCA”) recognizes that waters of the state “are held in public trust for the use of the people of the state” and “the people of Tennessee, as beneficiaries of this trust, have a right to unpolluted waters.” Tenn. Code Ann. § 69-3-102(a).
12. *NPDES permits and federal requirements.* The NPDES system was created to eliminate pollution discharge into navigable waters. *See* 33 U.S.C. §§ 1311(a), 1342(a). Tenn. Code Ann. § 69-3-108(b)(8). States, in partnership with the U.S. Environmental Protection Agency (“EPA”), manage the NPDES permits. *See id.* § 1342; *see also* Tenn. Code Ann. § 69-3-108. Tenn. Code Ann. § 69-3-102(c). Under this arrangement, TDEC must comply with applicable federal statutes and regulations. Tenn. Code Ann. § 69-3-108(g)(1); Tenn. Comp. R. & Regs. 0400-40-05-.04(1)(f); *see also* 40 C.F.R. § 123.25 (listing specific federal NPDES regulations applicable to delegated permitting authorities, including Tennessee).

13. *MS4 Phase II Permitting.* Section 402(p) of the Clean Water Act authorizes EPA and states to set standards for municipal stormwater runoff. 33 U.S.C. § 1342(p). EPA promulgated Phase II MS4 regulations in 1999. These regulations require small MS4s in urbanized areas, as well as small MS4s outside the urbanized areas that are designated by the permitting authority, to obtain NPDES permit coverage for their stormwater discharges. See Environmental Protection Agency, *Stormwater Discharges from Municipal Sources*, <http://www.epa.gov/npdes/stormwater-discharges-municipal-sources> (last visited Oct. 28, 2016). Usually, general NPDES permits cover Phase II MS4s. *Id.*
14. *Anti-backsliding.* Under the Clean Water Act, a permit cannot be renewed, reissued, or modified with effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. 33 U.S.C. § 1342(o). Tennessee regulations also contain anti-backsliding provisions. Notwithstanding a provided exception,<sup>†</sup> effluent limitations, standards, or conditions of renewed or reissued permits must be “at least

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<sup>†</sup> Exceptions include: (1) “materially and substantially changed” circumstances between current and previous permit cycles that “would constitute cause for permit modification or revocation and reissuance;” (2) “[m]aterial and substantial alterations or additions to the permitted facility” that occurred after permit issuance that justify less stringent limitations; (3) new information (“other than revised regulations, guidance, or test methods”) justifying less stringent limits; (4) technical mistakes or interpretation of law mistakes; (5) events out of the permittee’s control “for which there is no reasonably available remedy;” and (6) “[t]he permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved.” Tenn. Comp. R. & Regs. 0400-40-05-.08(1)(j)(1).



as stringent as the effluent limitations, standards, or conditions in the previous permit.” Tenn. Comp. R. & Regs. 0400-40-05-.08(1)(j)(1).

Further, the rules provide that “[i]n no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard.” Tenn. Comp. R. & Regs. 0400-40-05-.08(1)(j)(3).

15. *Maximum Extent Practicable Standard – “Clear, specific, and measurable” requirements.* EPA requires that stormwater discharges be free of pollutants to the “Maximum Extent Practicable.” 33 U.S.C. § 1342(p). 40 C.F.R. § 122.34. Federal authority establishes that a permitting authority should establish clear, specific, and measurable requirements for components of an MEP-level MS4 program. *See* Letter from EPA Region 4 to Tisha Calabrese Benton (May 26, 2016) (attached as Exhibit 1).
16. *Notice of Intent.* Each municipality seeking to be covered under the general permit for discharges from the general permit must submit a Notice of Intent (“NOI”) detailing its Stormwater Management Program. The department must review and approve the Program and issue a Notice of Coverage which allows a municipality to discharge stormwater to other waters of the State.
17. *Stormwater Management Programs and Plans.* Under MS4 permits, municipalities develop stormwater management programs. Stormwater management programs establish control measures which avoid flooding,

manage safe disposition of stormwater, and avoid the discharge of pollutants carried by stormwater to public waters. Stormwater Management Plans describe stormwater control practices that will be implemented consistent with permit requirements to minimize pollutant discharge. See Environmental Protection Agency, *Stormwater Discharges from Municipal Sources*, <http://www.epa.gov/npdes/stormwater-discharges-municipal-sources> (last visited Oct. 28, 2016).

18. *EPA Guidance on Public Participation*. EPA Guidance provides that an agency giving public notice of NOIs received from municipalities should give the public a reasonable period for comment and an opportunity for public hearing. See Memorandum from James A. Hanlon on Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s (Apr. 16, 2004) (attached as Exhibit 2). See also *Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d. 832, 879 (9th Cir. 2003) (holding that agency actions to review an NOI and stormwater management plan were “functional equivalents of permits under the Phase II General Permit option” and, thus, subject to public notice and comment). EPA recommends that permitting authorities make the NOIs available to the public at least thirty days before authorization to discharge. See Memorandum from James A. Hanlon on Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices

of Intent & NPDES General Permitting for Phase II MS4s (Apr. 16, 2004)  
(attached as Exhibit 2).

## V. Factual Background

19. Stormwater runoff is a national concern for America's surface waters. Runoff of stormwater from human-modified landscapes can change natural hydrologic patterns and elevate pollutant concentrations and loadings. See 40 C.F.R. § 122.30(c). Runoff may contain or mobilize contaminants including sediment, suspended solids, nutrients, heavy metals, pathogens, oxygen-demanding substances, and floatables. See 40 C.F.R. § 122.30(c).
20. Tennessee streams and rivers face impairment due to stormwater runoff. According to the 2014 TDEC 305(b) report, approximately half of assessed Tennessee streams are impaired.<sup>‡</sup> Kimberly J. Laster et al. "2014 305(b) Report: The Status of Water Quality in Tennessee," December 2014. Stormwater runoff causes over 2,400 miles of streams to not meet their designated uses. *Id.*
21. TDEC released the Draft NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems in February 2016 for public review and comment. Petitioners submitted written comments on May 11, 2016.

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<sup>‡</sup> Of Tennessee's 60,435 miles of streams, 27,394 were assessed.

22. On April 27, 2016, TDEC held a public hearing using a two-way video arrangement with several TDEC Environmental Field Offices. Petitioners provided oral comments during this hearing.
23. The Division of Water Resources issued the Final Permit on September 30, 2016.

## VI. Causes of Action

The Final NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems violates the minimum requirements of federal law. Further, the permit violates the Tennessee Water Quality Control Act (“TWQCA”) and implementing regulations.

**The Final Permit violates federal law requiring MEP controls by failing to include clear, specific, and measurable requirements.**

24. The Clean Water Act (CWA) requires that MS4 permits “require controls to reduce the discharge of pollutants to the maximum extent practicable (MEP).” When permit provisions are vague or leave it to the permittee to determine what control measures will be chosen and implemented, the permit fails to ensure that required controls will reduce the discharge of pollutants to the MEP. As noted in this petition’s legal background section, it is the permitting authority’s responsibility to establish clear, specific, and measurable requirements that it determines to be components of an MEP-

level MS4 program. *See* Letter from EPA Region 4 to Tisha Calabrese Benton (May 26, 2016) (attached as Exhibit 1).

25. The Final Permit lacks specificity regarding best management plan maintenance, maintenance responsibilities, management inventory and tracking, and inspections. Examples from the Final Permit include the following:
  - a. Part 4.2 failed to clearly state minimum control measures in order to avoid vagueness and give MS4s and others fair notice of what the permit requires. This lack of clarity impairs an MS4's ability to achieve control of stormwater discharges to MEP.
  - b. Part 4.2.5.2.4, Note 5 about Water Quality Riparian Buffers is impermissibly vague in leaving criteria for alternative buffer widths and the circumstances under which they may be used to the discretion of permittees. Under such language, neither the public nor site operators have fair notice of buffer width or location requirements. TDEC and residents will be unable to ascertain compliance or seek enforcement of effective buffers.
26. Overall, the Final Permit fails to control stormwater discharges to MEP with vague requirements.

**The Final Permit violates federal and state law by backsliding.**

27. The Clean Water Act and TWQCA prohibit backsliding on permit effluent limits, conditions, and standards.

28. The Final Permit backslides in several ways. It lacks requirements regarding best management plan maintenance, maintenance responsibilities, management inventory and tracking, and inspections that were included in the prior permit. Failing to include these quality-control measures is a failure to make the renewed permit “at least as stringent as... the previous permit.” See Tenn. Comp. R. & Regs. 0400-40-05-.08(1)(j)(1). Additionally, the allowance of 20% reduction in Water Quality Treatment Volume (WQTV) articulated in Permit Section 4.2.5.2.2 backslides from the previous General NPDES permit.
29. Overall, the Final Permit impermissibly backslides.

**The Final Permit violates federal guidance by failing to provide the public opportunity to comment on draft Notice of Intent and Stormwater Control Measures.**

30. As explained in the legal background section, federal authority provides that the public should have the opportunity to comment on draft Notices of Intent and Stormwater Control Measures.
31. TDEC has not included a specific public participation requirement in the Final Permit.
32. Part 4.2.2 concerning Public Involvement/Participation fails to require MS4s to make stormwater program information, including stormwater appeals board hearings, available to the public in a timely manner. As such, public involvement is effectively eliminated from that element of the program.

33. Part 4.2.5.6 about Inventory and Tracking of Permanent Stormwater Control Measure Assets fails to require public access to information on the status of permanent stormwater control measures.
34. The permit needs to specify that MS4 phase II programs will provide all public material related to the stormwater program, including stormwater appeals board meetings on the jurisdiction's website within a timely manner to enable meaningful public involvement in decision-making related to the MS4 program.
35. NOIs (which essentially summarize stormwater management plans) should also be made publicly available. Permitting authorities can ensure the public availability of Phase II MS4 NOIs by providing notice on its website of the facilities applying for coverage under a general permit with either an electronic posting of the NOIs or information on how NOIs can be accessed.
36. In sum, the Final Permit falls short of providing the public with meaningful opportunities to engage in MS4 NOI development through notice and comment.

## **VII. Request for Relief**

TCWN respectfully requests that the Board, by and through an administrative law judge according to the procedures established by Tenn. Code Ann. § 69-3-110(a), provide the following relief:

37. Take jurisdiction over this appeal as a contested case according to Tenn. Code Ann. § 4-5-301 *et seq.*;
38. Issue an order declaring that the Final Permit violates the Clean Water Act by failing to include clear, specific, and measurable requirements to ensure MEP;
39. Issue an order declaring that the permit violates federal and state anti-backsliding requirements;
40. Issue an order declaring that the permit fails to include proper public participation mechanisms;
41. Remand the permit to TDEC with directions to conform to federal clear, specific, and measurable requirements to ensure MEP control measures, anti-backsliding requirements, and public notice standards; and
42. Grant such additional relief as the Board deems just and proper.

Respectfully submitted this 28th day of October, 2016.



Shelby R. B. Ward (BPR #030394)  
Tennessee Clean Water Network  
P.O. Box 1521  
Knoxville, TN 37901  
865-522-7007 x 102  
Fax 865-525-4988  
shelby@tcwn.org

*Counsel for Petitioners*



**Certificate of Service**

I certify that a true and correct copy of the **NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems (TNS000000) appeal petition** has been served by email and U.S. Mail upon the following on this, the 28th day of October, 2016:

Tisha Calabrese Benton  
*Technical Secretary*  
Board of Water Quality, Oil, and Gas  
12th Floor, William R. Snodgrass Tower  
312 Rosa L. Parks Avenue  
Nashville, TN 37243

Jenny Howard  
*General Counsel*  
TDEC Office of General Counsel  
2nd Floor, William R. Snodgrass Tower  
312 Rosa L. Parks Avenue  
Nashville, TN 37243

Patrick N. Parker  
TDEC Office of General Counsel  
2nd Floor, William R. Snodgrass Tower  
312 Rosa L. Parks Avenue  
Nashville, TN 37243

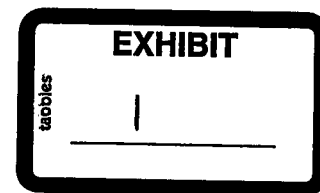


Shelby R. B. Ward  
*Attorney for Petitioners*



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

MAY 25 2016



Ms. Tisha Calabrese-Benton  
Director, Division of Water Resources  
Tennessee Department of Environment and Conservation  
William R. Snodgrass - Tennessee Tower  
312 Rosa L. Parks Avenue, 11<sup>th</sup> Floor  
Nashville, Tennessee 37243-1102

Dear Ms. Calabrese-Benton:

Thank you for the opportunity to review Tennessee's draft general permit for stormwater discharges from small municipal separate storm sewer systems (MS4s) (Permit No. TNS000000). The U.S. Environmental Protection Agency Region 4 has completed its review of the draft permit, first received by our office via electronic notification on February 26, 2016, and we are providing comments per the Memorandum of Agreement (MOA) between the State of Tennessee and EPA Region 4.

Overall, the permit does include requirements that are clear, specific and measurable. However, we have identified certain sections of the permit where the permit language should be revised to further clarify the requirements. Our detailed comments are enclosed.

The need for clear, specific and measurable requirements is a fundamental requirement of federal law. The Clean Water Act (CWA) requires that MS4 permits "require controls to reduce the discharge of pollutants to the maximum extent practicable (MEP)." When permit provisions are vague or leave it to the permittee to determine what control measures will be chosen and implemented, the permit fails to ensure that required controls will reduce the discharge of pollutants to the MEP. Accordingly, it is the permitting authority's responsibility to establish clear, specific, and measurable requirements that it determines to be components of an MEP-level MS4 program.

In addition, the CWA requires that the public be afforded an opportunity to participate in the development of permit conditions. When a permit includes only vague requirements and improperly empowers permittees to make their own determinations of MEP-level controls, the public is deprived of the opportunity to participate in and make informed comments regarding the development of permit requirements. Moreover, clear, specific, and measurable requirements ensure that the permit will be enforceable and the permittee accountable for compliance. Without these requirements, permittees are left without certainty or clarity as to their compliance obligations and the objectives of the permit may not be achieved.

In providing these comments, the EPA notes that, based on the Tennessee Department of Environment and Conservation's (TDEC) recent 305(b) report, approximately 46.5% of Tennessee's streams and rivers have been assessed, and of those assessed, approximately 47.9% are impaired. Discharges from

MS4s from urban-related runoff/stormwater was one of the top sources of impairment, causing close to 2,439 miles of streams of rivers to not meet their designated uses. (Ref: [https://ofmpub.epa.gov/waters10/attains\\_state.control?p\\_state=TN&p\\_cycle=2012](https://ofmpub.epa.gov/waters10/attains_state.control?p_state=TN&p_cycle=2012)). Given the significant impact that urban stormwater runoff has on instream water quality in Tennessee, it is important that TDEC's general permit for discharges from small MS4s meets the requirements of Section 402(p) of the CWA, to include controls which reduce the discharge of pollutants to the MEP, and provide protection of receiving waters.

Despite some of the changes made from the existing permit, the EPA agrees with TDEC's development of permanent stormwater management standards at new development and redevelopment projects to represent the MEP controls. The EPA agrees that the combination of stormwater control measures that rely on infiltration, evapotranspiration, or capture/reuse of the water quality treatment volume (where site-specific conditions allow) is an effective way to achieve pollutant removal. Scientific information supports the view that such techniques provide a higher degree of pollutant removal than other approaches. In addition, experience indicates that such measures are usually practicable to implement. This supports a determination that such measures are an important component of an MEP-level stormwater management program. However, the EPA also believes it is critical to ensure the long-term operation and maintenance of such stormwater control measures. The draft permit removes specific requirements that were included in the existing permit regarding the verification of maintenance responsibilities, inventory and tracking of management practices, specifics on best management plan (BMP) maintenance, and owner/operator inspections. Without specific requirements for ensuring maintenance of these pollutant control measures, the EPA is concerned that the effectiveness of these pollutant controls will be undermined and the level of environmental protection expected by the permit will degrade over time. The removal of such provisions raises questions about whether the permit includes controls that reduce the discharge of pollutants to the MEP, and also raises questions about whether the draft permit reflects impermissible backsliding. TDEC should restore the language and requirements of the existing permit for this issue.

We also note that the draft permit relaxes certain buffer requirements in the existing permit. Protection of riparian buffers is a widely-accepted best management practice for the removal of pollutants from new development and redevelopment projects. As with the removal of requirements for long-term maintenance of post-construction controls, the relaxation of effective buffer requirements that were contained in the existing permit raises questions about whether the permit continues to require MEP-level controls and whether the change reflects prohibited backsliding from the requirement in the existing permit.

As a general comment, we are aware of recent Tennessee legislation that prohibits TDEC from including requirements that are more stringent than federal law requires. As noted above, federal law requires that your permit contain clear, specific, and measurable requirements which reduce the discharge of pollutants to the MEP. Our comments are directed toward ensuring that these minimal federal requirements are met, and any control requirement that is determined to be a component of an MEP-level MS4 program is inherently a requirement of federal law.

We understand that TDEC has received significant public comments objecting to the draft permit, and that TDEC could propose to issue a permit with substantial changes. Copies of some of the significant written comments have been provided to the EPA. Accordingly, Tennessee is required to provide the EPA an opportunity to review the "proposed permit" prior to issuance of a final permit pursuant to Section IV.B. of the MOA. Along with a copy of the proposed permit, the EPA requests that you

provide comments received by TDEC on the draft permit along with TDEC's responsiveness summary responding to those comments.

If you have any questions, please feel free to contact Ms. Mary Kuo of my staff at (404) 562-9847.

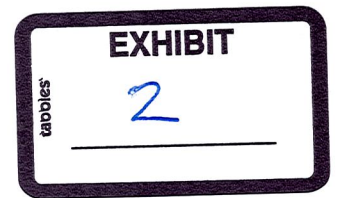
Sincerely,

A handwritten signature in black ink, appearing to read "James D. Giattina". The signature is stylized and somewhat cursive, with the first name being the most prominent.

James D. Giattina  
Director  
Water Protection Division

Enclosure

April 16, 2004



MEMORANDUM

Subject: Implementing the Partial Remand of the Stormwater Phase II Regulations  
Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s

From: James A. Hanlon /s/  
Director, Office of Wastewater Management

To: Water Management Division Directors, Regions I - X

The purpose of this memorandum is to provide guidance on implementing a partial remand of the Stormwater Phase II regulations. The U.S. Court of Appeals for the Ninth Circuit recently denied EPA's petition for rehearing in the Phase II litigation. Environmental Defense Center, et al. v. EPA, No. 70014 & consolidated cases (9<sup>th</sup> Cir., Sept. 15, 2003). The Department of Justice has informed us that further review by the U.S. Supreme Court is not available. This memorandum provides interim guidance to EPA and State NPDES permitting authorities pending a rulemaking to conform the Phase II rule to the court's order.

The Relevant Provisions of the Rules

This case challenged the NPDES stormwater regulations issued pursuant to Clean Water Act ("CWA") section 402(p)(6). That section directs EPA to "establish a comprehensive program to regulate" stormwater discharges designated by EPA. We commonly describe these regulations as stormwater "Phase II." The regulations require NPDES permits for discharges from certain municipal separate storm sewer systems ("MS4s") for which NPDES permits were not required under CWA section 402(p)(2) and the Phase 1 regulations.

The Phase II regulations require that MS4s reduce the discharge of pollutants "to the maximum extent practicable" (or "the MEP standard"). The regulations also require the MS4s to develop, implement and enforce a stormwater management program containing, among other things, best management practices ("BMPs") identified by the discharger. The regulations authorize the use of "general permits" and require that these BMPs (as well as measurable goals associated with these BMPs) be identified in the Notice of Intent ("NOI") filed by the MS4 in seeking authorization under a general permit. Relying on the "traditional" general permit model, the Agency did not require NOIs to be subject to public hearings.

## The Ninth Circuit's Decision

The Ninth Circuit held that these NOI requirements violated various provisions of CWA section 402. They concluded that “the EPA’s failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act.” The remand raises important questions regarding the procedures that would be appropriate for authorization of Phase II MS4 discharges *other than* through an individual permit.

In denying EPA’s motion for rehearing the court “vacated” the portions of the Phase II rule that address the procedural issues relating to the general permitting option for Phase II MS4s. Therefore, the Agency needs to take affirmative action to clarify the general permitting option for Phase II MS4s. In any such action, we believe it is imperative that implementation of the MEP standard remain an “iterative” process that optimizes the reduction of stormwater pollutants, rather than a static pollution reduction requirement.

In looking at options for implementing the court’s decision, we want to continue to provide States with maximum flexibility. Some State Phase II MS4 permitting procedures already appear to meet the court’s intent and will not need changes. However, the general permits and procedures of other States, along with the provisions developed by EPA in States where EPA has program implementation responsibilities, will need to change. To assist MS4 permitting authorities in moving forward with implementing program revisions where needed, EPA provides the following recommendations to address the court’s decision.

### Guidance for Issuance of New General Permits

1. Public availability of NOIs The Phase II rules already require that Phase II MS4 permittees make the records of their stormwater management plans publicly available at reasonable times during regular business hours. 40 C.F.R. 122.34(g)(2). NOIs (which essentially summarize stormwater management plans) should also be made publicly available. Permitting authorities can ensure the public availability of Phase II MS4 NOIs by providing notice on the web of the facilities applying for coverage under a general permit with either an electronic posting of the NOIs or information on how NOIs can be accessed. NOIs could also be public noticed in a newspaper, or by another effective manner.

Unless a permitting authority has already otherwise incorporated public notice procedures into its processes for issuance of Phase II MS4 general permits, NPDES agencies that have not yet issued final permits should include permit language explaining that (and how) NOIs will be made available to the public with sufficient time to allow for meaningful public comment. EPA recommends that permitting authorities make the NOIs available to the public at least thirty days before authorization to discharge.

2. Opportunity for public hearing The court's decision requires that the public be given an opportunity to request a public hearing. If the Phase II MS4 general permittee provides public notice for the NOI, the permitting authority will still need to provide the public an opportunity to request a hearing. EPA recommends that permitting authorities include permit language explaining the process for requesting a public hearing on an NOI, the standard by which such requests will be judged, the procedures for conducting public hearing requests that are granted, and the procedures for permitting authority consideration of the information submitted at the hearing in determining whether to grant authorization to discharge to the submitter of the NOI. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.

3. Permitting Authority reviews of NOIs The permitting authority will need to conduct an appropriate review of Phase II MS4s' NOIs to ensure consistency with the permit. General permits should, to the extent practicable, specify in objective terms what is expected of a Phase II MS4 in order to meet the MEP standard. Due to the iterative nature of the MEP standard, we do not believe official "approval" of NOIs is necessary, but the general permits will need to specify when authorization occurs, such as after notice from the permitting authority that review is complete, or after a specified waiting period. EPA notes that this process does not preclude the permitting authority from denying an MS4 authorization to discharge. Either of these timing options should provide the permitting authority with sufficient time to review NOIs, to ensure that NOIs have been publicly available, and that there has been an opportunity to request a public hearing to provide input.

#### Guidance for General Permits Already Issued for MS4s

Permitting authorities that already have issued general permits should determine the most effective way to provide public notice and review of MS4 NOIs. Unless a permitting authority has already otherwise incorporated such procedures into its processes for issuance of Phase II MS4 general permits, NPDES agencies that have issued final permits should:

- List on the State or EPA Region's web site those MS4 permittees who have submitted NOIs and how NOIs can be reviewed by the public. Include information on how comments can be submitted and a hearing can be requested. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.
- Conduct an appropriate review of submitted NOIs (to determine compliance with the permit) and contact the MS4 when changes appear to be needed.

MS4s continue to have an obligation to apply for permit coverage, whether under an individual NPDES permit or an NPDES general permit. We do not believe that the court ruling

creates legal vulnerability for violations of the CWA for Phase II MS4 permittees that have filed timely applications, whether or not authorization has been granted. The Phase II regulations establish application deadlines, not authorization deadlines. Even when Phase II MS4 permittees are authorized, the regulations do not require immediate compliance with the MEP standard, i.e., development and full implementation of the Phase II MS4 stormwater management program. Instead, the permitting authority specifies the applicable time period, which maybe be as long as five years after permit issuance.

We request that you communicate this guidance to States within your Region which are authorized to administer the NPDES program. If you have questions or concerns, please contact Linda Boornazian at (202) 564-0221 or Wendy Bell at (202) 564-0746.

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