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June 8, 2020

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Re: Proposed Modifications to National Pollutant Discharge Elimination System General Permits; Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts and New Hampshire (Docket ID number EPA-R01-OW-2020-0216)

Dear Mr. Tedder and Ms. Warner:

The Association to Preserve Cape Cod (APCC) submits the following comments on the proposed modifications to the National Pollutant Discharge Elimination System (NPDES) General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4) for Massachusetts and New Hampshire (Docket ID number EPA-R01-OW-2020-0216).

Founded in 1968, APCC is the leading nonprofit environmental advocacy and education organization for the Cape Cod, Massachusetts region. Representing thousands of members, APCC works for the adoption of laws, policies and programs that preserve, protect and enhance Cape Cod's natural resources and quality of life. While APCC is appreciative of some improvements that have been made to the MS4 permit, in other areas, we firmly believe the permit needs to be strengthened. The Clean Water Act (CWA) contains an anti-backsliding provision which prohibits, with few exceptions, a permit to have less stringent effluent limitations than the previous



permit (33 U.S.C. §1342(o)(1)). EPA guidance and permit manuals state, “the term anti-backsliding refers to statutory and regulatory provisions that prohibit the renewal, reissuance, or modification of an existing NPDES permit that contains effluent limitations, permit conditions, or standards less stringent than those established in the previous permit.” (U.S. Evtl. Prot. Agency, NPDES Permit Writers’ Manual, 2010, pp. 7-1 – 7-4, https://www3.epa.gov/npdes/pubs/pwm_chapt_07.pdf.)

The proposed permit revision is in violation of the backsliding provision highlighted in Section 402(o) of the CWA. At various points this permit both *omits* protective conditions previously included in prior MS4 permits and contains *less* stringent effluent limitations than prior permits. These concerns are further illustrated in our specific comments on the proposed modifications, organized by section, and provided below.

Section 2.1 - Water Quality Based Effluent Limitations

APCC recommends the following changes:

- Maintain the original general statement for the permit that discharges do not “**cause or contribute to an exceedance of**” water quality standards. EPA’s proposed replacement language, “meet applicable,” diminishes the enforceability of the permit’s terms because rather than requiring the permittee to demonstrate noncompliance with the MS4 discharging pollutants *and* a resulting exceedance of water quality standards, there must instead be a demonstration that the discharge failed to meet pollutant reduction requirements, which have been weakened in this permit draft. EPA’s proposed modification would diminish protections for the receiving water body. The former language is more protective of receiving waters, because the standard would be that discharges “do not cause or contribute to an exceedance of WQS.” The proposed replacement will only regulate the water quality of the discharge itself, not the receiving waters. The discharge should both meet water quality standards *and* not cause or contribute to an exceedance of water quality standards. If the receiving water body has better water quality than the discharge that barely meets water quality standards, then the receiving water body will become degraded by the discharge, even if the latter meets water quality standards.

Section 2.1.1a - Requirement to Meet Water Quality Standards

APCC recommends the following changes:

- Same comment as Section 2.1. The proposed modification, “meet applicable” weakens the intent of this section and should be corrected to “**cause or contribute to an exceedance of.**”

Section 2.1.1b - Requirement to Meet Water Quality Standards

APCC recommends the following changes:

- Remove the option for an “alternative schedule,” which extends deadlines and further weakens the permit’s requirements.

Section 2.1.1d - Requirement to Meet Water Quality Standards

APCC recommends the following changes:

- Remove the addition of the requirement of an official notice from EPA and MassDEP that there is an exceedance of a water quality standard, “notice from EPA or MassDEP to the permittee that a discharge of a pollutant from the MS4 that is exceeding applicable water quality standards.” This would indicate that it is unlikely that the permittee will have to “reduce or eliminate the pollutant in its discharge.” This addition also creates a barrier to citizen suits when EPA and MassDEP have failed to provide sufficient notice.
- Remove the following addition, “However, where such remedy or elimination within 60 days is impracticable, the permittee shall submit to EPA, by the same deadline, a schedule of actions to achieve a remedy or elimination in the shortest time not impracticable. The permittee shall implement such actions on the schedule submitted to EPA and report on progress in its annual reports unless or until EPA takes any other action that effectively replaces the schedule.” A permittee can claim that reducing or eliminating the pollutant is impracticable, and instead of reducing or eliminating the pollutant in 60 days, they need only submit a schedule to do so in their annual report. Rather than actually reduce the pollution as expeditiously as possible, the permittee need only set a schedule to reduce “in the shortest time not impracticable.” There is no way to include such a schedule in an annual report that is due in 6, 10, or even 12 months. In addition, the permittee should not be the party that defines what constitutes “impracticable.” This is a substantial weakening of the permit. This change diminishes protection of the water body by restricting regulation to the discharge only, not the discharge's effect on the receiving water body.
- Maintain the appropriate original language for this section, **“Except where a pollutant of concern in a discharge is subject to the requirements of part 2.2.1 and/or part 2.2.2 of this permit or is the result of an illicit discharge and subject to part 2.3.4 of this Permit, if a pollutant in a discharge from the MS4 is causing or contributing to a violation of applicable water quality criteria for the receiving water, the permittee shall, as expeditiously as possible, but no later than 60 days of becoming aware of the situation, reduce or eliminate the pollutant in its discharge such that the discharge meets applicable water quality criteria.”**

Section 2.1.2 - Increased Discharges

APCC supports the following revision:

- “If an applicable MassDEP approval specifies conditions or requirements related to the increased discharge, **such requirements may be independently enforceable under State law and may be adopted into a future permit.**” This language appropriately recognizes future actions to be taken by MassDEP.

Section 2.2.2 - Discharges to Certain Water Quality Limited Waters Subject to Additional Requirements

APCC recommends the following changes:

- Same comment as Section 2.1. The proposed modification, “meet applicable” weakens the intent of this section and should be corrected to **“cause or contribute to an exceedance of.”** Again, it seems to be the discharge itself being regulated, not the discharge *and* its effect on the receiving water body.
- On the May 4th, 2020 MS4 Webinar, EPA’s Newton Tedder noted that the 303d listing would be notification of impairment, indicating that no further formal notification would be necessary. If this is EPA’s intention, this should be explicitly stated in the new permit.

Section 2.3.3 - Public Involvement and Participation

APCC recommends the following changes:

- Clarify the following, “The SWMP, all documents submitted to EPA in accordance with Appendix F, and all annual reports shall be available to the public utilizing the permittee’s website, **other website, or other means.**” This language should be strengthened in order to carry out the stormwater program’s intent and minimum measures for public involvement. Notice and access are critical for meaningful public involvement and participation. The permittee should be required to post and conspicuously publicize the availability of documents on the permittee’s website unless website posting is infeasible. At a minimum, the permittee should be required to explain why it cannot post to its own website. The language should also be amended to clarify what “other website” may entail.

Section 2.3.5 - Construction Site Stormwater Runoff Control

APCC supports the following revision:

- “The construction site stormwater runoff control program required by this permit is a separate and distinct program from EPA’s **Construction General Permit in that the former is implemented by the MS4 operator to ensure that runoff from construction**

sites discharging to the MS4 are controlled consistent with the MS4's applicable requirements, whereas the latter is implemented by construction site operators to comply with the terms and conditions of EPA's permit (<https://www.epa.gov/npdes/2017-construction-general-permit-cgp>." This addition is an improvement as it clarifies that the permittee can impose sanctions for noncompliance with ordinances for sediment and erosion control.

Section 2.3.5.c.ii.1 - Construction Site Stormwater Runoff Control

APCC recommends the following changes:

- Clarify the following, **"consideration of potential water quality impacts."** Many of the proposed changes relate to regulating just the discharge and weakening protection of the receiving water body, as first noted in 2.1. How is the permittee supposed to consider potential water quality impacts of a discharge if the permit itself does not take into consideration the effects of the discharge on the receiving water body? This language should also be amended to clarify how the permittee must respond in consideration of these potential water quality impacts.

Section 2.3.4.c.ii.2 - Construction Site Stormwater Runoff Control

APCC recommends the following changes:

- Amend current language "the requirement that inspections of BMPs occur during construction of BMPs as well as after construction of BMPs to ensure **they are working as described in the approved plans**" to instead use the customary **"installed as designed."** This is far easier to document than expecting a permittee to capture how "they are working as described in the approved plans."

Section 2.3.6.a.ii.1, 2, 3, & 4 - Stormwater Management in New Development and Redevelopment (Post Construction Stormwater Management)

APCC recommends the following changes:

- While we support the addition of language confirming that **"Stormwater management systems design shall be consistent with, or more stringent than, the requirements of the 2008 Massachusetts Stormwater Handbook,"** the language should be amended to make explicit that new versions of the Stormwater Handbook must be adhered to. APCC suggests that the sentence be amended to "...2008 Massachusetts Stormwater Handbook **or as updated.**"
- Strike section 2.3.6.a.ii.3.a.4, **"utilizing offsite mitigation that meets the above standards within the same USGS HUC12 as the new development site."** While it is circumscribed to the same HUC 12 (subwatershed) that may limit its use, there are very

few greenfield sites where onsite retention and pollutant removal is not possible. This language would weaken the intent of the permit and should be removed.

APCC supports the following revisions:

- “Low Impact Development (LID) site planning and design strategies must be **implemented unless infeasible in order to reduce the discharge of stormwater from development sites.**” This is a significant improvement given the recognized co-benefits of Low Impact Development (LID) for the environment.
- “Utilizing offsite mitigation that meets the above standards within the same USGS HUC12 as the redevelopment site.” This change to allow offsite mitigation for redevelopment only in the same HUC 12 is an improvement. Anywhere in the same HUC 10—the prior permit provision—results in far less, and sometimes no, environmental benefit for the impaired segment when offsite is far downstream. Routine, full onsite compliance must be achieved first before offsite mitigation is allowed.

Section 2.3.7.b.ii.3 - Good House Keeping and Pollution Prevention for Permittee Owned Operations

APCC recommends the following changes:

- Same comment as Section 2.1. The proposed modification, “meet applicable” weakens the intent of this section and should be corrected to **“cause or contribute to an exceedance of.”**

Section 4.1.c - Program Evaluation

APCC recommends the following changes:

- Maintain the original language in this section,

“EPA or MassDEP may **require** the permittee to add, modify, repair, replace or change BMPs or other measures described in the annual reports as needed to satisfy the conditions of this permit.

- **To address impacts to receiving water quality caused or contributed to by discharges from the MS4; or**
- **To satisfy conditions of this permit**

Any changes requested by EPA or MassDEP will be in writing and **will** set forth the schedule for the permittee to develop the changes and **will** offer the permittee the opportunity to propose alternative program changes to **meet the objective of the requested modification.**”

The proposed language for this section weakens the intent of the permit. Under the proposed change, EPA can only request, not *require*, changes or additions to BMPs to satisfy permit conditions during the permit term. While EPA could take enforcement

action where warranted and thereby specify additional BMPS, this seems extremely unlikely given EPA's scarce staffing for the stormwater program. The language should be amended and returned to its original state to prevent weakening of the permit.

Section 4.4.b.ii - Annual Reports

APCC recommend the following changes:

- Same comment as Section 2.1. The proposed modification, "meet applicable" weakens the intent of this section and should be corrected to **"cause or contribute to an exceedance of."**

Appendix F, A.II, Lake and Pond P TMDLs

APCC recommends the following changes:

- EPA, not the permittee, should make the determination whether meeting the Phosphorous (P) reduction milestone is "impracticable." This language should be amended to make clear that EPA is responsible for making this determination and describe what metrics EPA will be using to determine impracticability.
- As noted in Footnote 25, **"Alternative Schedule Request package must be made available to the public consistent with 2.3.3. of the permit."** As stated in our earlier comments on 2.3.3, the language in this section should be strengthened to carry out the stormwater program's intent and minimum measures for public involvement. Notice and access are critical for meaningful public involvement and participation. The requirement should be to post and conspicuously publicize the availability of documents on the permittee's website unless website posting is infeasible. At a minimum, the permittee should be required to explain why it cannot post to its own website. The language should also be amended to clarify what "other website" may entail.
- Notifications should be sent to local watershed organizations and interested parties that an ASR has been filed within 24 hours of filing. EPA should be responsible for the notifications at each stage (at the ASR filing, determination of completeness etc.). There should be an opportunity for the public to submit comments at each stage of the process.
- EPA should amend the current language in Appendix F to make explicit that ASR's should only be used very sparingly and only when a permittee has used their best efforts to achieve each P reduction. Importantly, as EPA recognizes in Footnote 27, EPA will consider the extent of P reductions at the time of the ASR request. A permittee that is out of compliance with their permit or requirements of Appendix F should be subject to enforcement and treatment since an ASR would not be appropriate.
- The P reduction milestone at year eight in the permit (20 percent) is overly generous. Most of the P reductions are permit back-ended and the language in this section should

be amended to reflect that and prevent a weakening of the intent of the permit.

APCC is appreciative of, and supports, the following revisions in the permit:

- There is no grace period for complying with existing milestones when the permittee files an Alternative Schedule Request (ASR).
- The Alternative Schedule Request and new milestones become enforceable permit conditions.
- There is no constructive approval of an ASR request if EPA fails to act on an ASR request within 90 days of the close of the public comment period. Constructive approval would be far too drastic. Given that EPA is now allowing ASR relief, the agency should have the ability to extend the review time, if necessary, for its considered review.

Thank you for your time and consideration.

Sincerely,



Andrew Gottlieb
Executive Director