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March 19, 2016

Mr. Andrew Sawyers
Director, Office of Wastewater Management
U.S. Environmental Protection Agency
William Jefferson Clinton Bldg.
1200 Pennsylvania Ave. NW, 4201M
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2015-0671
National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer
System (MS4) General Permit Remand

Dear Mr. Sawyers,

The Kentucky Division of Water (the Division) appreciates the opportunity to provide comments regarding the above remand, which resulted from the 9th Circuit Court of Appeals Order requiring revisions to Phase II MS4 regulations to address procedural deficiencies.

EPA states in its proposed rulemaking, that “The proposed revisions to the Phase II MS4 NPDES permitting requirements are **solely** for the purpose of responding to the partial remand of the Phase II rule in *Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d. 832 (9th Circuit. 2003) with respect to small MS4 general permits.” 81 FR 418 (emphasis added). However, EPA did not propose a concrete revision but “... discusses two options for addressing the remand, and a third option that is a hybrid of the two alternatives.” 81 FR 416. As such, this menu of options in the proposed rulemaking does not specifically or adequately respond to the remand nor does it comply with the Court’s September 14, 2015 Order (Case No. 14-80184), as EPA did not publish an appropriate proposed rulemaking that allows for meaningful comment and public participation.

The Division believes that the published rule extends beyond the remand Order. EPA is essentially utilizing a process reserved for advanced rulemaking, which when used for regular rulemaking leaves the states attempting to comment on options that are not clearly defined. Furthermore, Options 2 and 3 fail to provide proposed regulatory language which prevents stakeholders from providing useful and detailed comments. While the Division understands EPA’s need to meet the court-ordered deadline, we believe the EPA could have developed a more thorough proposal if there had been time afforded the states to provide feedback on all regulatory language.

In any case, the Division believes that EPA should provide more clarity for the options presented and provide opportunity for comment via advanced rulemaking or, alternatively, choose and then seek comment on the option the agency intends to implement. As it is, the lack of specifics provided for any of the three options does not provide an opportunity for thorough examination and comment, nor are the expectations, limitations, or standards of review well-defined.

The following revisions to 40 CFR 122.34(a) are ambiguous which makes it difficult for the Division to provide adequate and insightful comment:

~~“For the purposes of this section, narrative effluent limitations may be expressed as requirements to implement requiring implementation of best management practices (BMPs) with clear, specific, and measurable requirements, including, but not limited to, specific tasks, BMP design requirements, performance requirements or benchmarks, schedules for implementation and maintenance, and frequency of actions are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements (including reductions of pollutants to the maximum extent practicable) and to protect water quality. Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to §122.33 constitutes compliance with the standard of reducing pollutants to the “maximum extent practicable.”~~

These proposed revisions may cause the reader to conclude that “narrative” effluent limitations would no longer be sufficient for MS4s to comply with the program, and that the implementation of best management practices consistent with the program and the permit provisions required by 40 CFR 122.33 may no longer constitute compliance with the Maximum Extent Practicable (MEP) standard. The Division believes that the changes, as drafted, create ambiguity regarding MEP.

Option 1:

The “Traditional General Permit Approach” would require the permit to articulate in sufficient detail what is required to meet the minimum statutory and regulatory requirements, and that the applicable requirements are enforceable and understandable to the permittee and the public. However, the proposal does not clarify or establish any new substantive requirements for small MS4s. It also remains unclear whether the Storm Water Quality Management Plan (SWQMP) would still be required under Option 1 since the general permit itself would establish “specific, clear, and measurable” requirements.

This option requires the permitting authority to include substantive new requirements in the general permit, including (as yet to be determined) specific requirements for each MS4 based on size, financial capabilities, and water quality of the receiving waters. The Division believes that its current process of issuing a general permit, followed by review and comment on the MS4’s SWQMP, allows the Division and the MS4 to negotiate and come to agreement regarding what constitutes the MS4’s MEP. This oversight ensures that the MS4 is compliant with the MS4 program requirement to meet MEP, while optimizing use of the Division’s limited resources.

Option 2:

This “Procedural Approach” would require the MS4 to give notice of its intent to be covered by the permit and include the SWQMP which outlines the Best Management Practices (BMPs) the MS4 would implement in accordance with its general permit coverage. However, it appears that the MS4 would need to develop the SWQMP *before* it receives the permit, and that the SWQMP would then be subject to public notice and potential judicial review. It is also unclear under the Option 2 whether subsequent

modifications to the SWQMP would constitute a major permit modification (which is an anathema to a General Permit coverage) and require a new public notice and comment period. The proposal does not indicate whether the EPA will establish standards of review regarding timeframes and adequacy of BMPs so that the MS4, the permitting authority, and the public are fully informed of the process and expectations. There remains the question of whether the EPA would participate in the NOI and SWQMP review process to ensure BMPs are adequately “specific, clear, and measurable.”

Option 3:

This “Hybrid-State Choice” option appears to provide the most flexibility of the three options, however, this option may be the most ambiguous. The Division believes the preamble to the Remand Rule should provide more detail describing how the states would use the hybrid approach.

The Division believes that an issue of this magnitude would be more appropriately addressed through advanced rulemaking, or that the EPA should provide a specific proposal that clarifies EPA’s intent and the roles of the permitting authority and regulated industry. The Division finds it difficult to effectively comment on the three proposals, or options, because of insufficient detail regarding implementation and practical application.

The Division appreciates the opportunity to submit comments regarding this issue, and hopes that the EPA will take the time to further develop, define, and clarify the option(s) it intends to implement, and then provide an opportunity for public comment by permitting authorities, and stakeholders.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. Goodman', with a long horizontal flourish extending to the right.

Peter T. Goodman, Director
Division of Water

c: Bruce Scott, Commissioner
Jackie Quarles, OGC
Jim Giattina, EPA Region IV
Julia Anastasio, ACWA