



FLORIDA STORMWATER ASSOCIATION

Leadership in Stormwater Management and Utilities

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Via Electronic Mail

March 21, 2016

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2015-0671
Municipal Separate Storm Sewer System General Permit Remand Rule

To Whom It May Concern:

The US Environmental Protection Agency (EPA) proposes revisions to the regulations governing National Pollutant Discharge Elimination (NPDES) permits for small Municipal Separate Storm Sewer Systems (MS4s) in response to *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). There, the court stated that EPA's failure to review the Notice of Intents (NOIs), as it relates to general permits for small MS4s, and the Agency's failure to make these NOIs available to the public or subject to public hearing contravenes the requirements of the Clean Water Act (CWA). The court remanded the matter to EPA. EPA published its proposal in the Federal Register on January 6, 2016. This letter represents the comments and recommendations of the Florida Stormwater Association, Inc., (FSA) concerning the proposal.

The Florida Stormwater Association

The Florida Stormwater Association (FSA) is a voluntary, non-profit Florida corporation organized under subsection 501(c)(4) of the Internal Revenue Service Code. FSA has been actively involved in the development of water quality policy and the implementation of water quality improvement and permitting programs in Florida and elsewhere for the past 23 years.

There are 300 organizational members (comprising more than 3,000 people) of FSA, primarily consisting of municipal and county governments that must obtain and comply with MS4 permits, many of which comply with Phase II permits. FSA's membership also includes various water control districts, Water Management Districts, academic institutions, and consulting and

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engineering firms that provide services for city and county governments. All members of FSA have an interest in surface water quality improvement and the effective implementation of the MS4 permit program.

Analysis of Proposed Regulations

Before analyzing and commenting on the proposed regulations, we believe it is critical to remember the intent of Congress when MS4s were added to the CWA. This is important so that the CWA is not rewritten by rule or consent agreement.

Unlike point sources – or readily discernable sources – of discharge subject to effluent limitations, permits for MS4s were required to reduce the discharge of pollutants to the “maximum extent practicable” given the diffuse nature of stormwater runoff from city and county governments. Congress also recognized the many differences between large and small municipalities when providing that smaller urban areas would be required to comply with the MS4 permit program at a later date than the large urban areas.

In relevant summary, there were three (and only three) concerns with the Phase II permitting program that were expressed by *Environmental Defense Center*:

- The failure to ensure permitting authority review of NOIs;
- The failure to provide adequate public notice of NOIs public; and
- The failure to provide adequate public comment and hearing opportunity for NOIs.

Notably, *Environmental Defense Center* did not intend to make the Phase II permitting program like that for the larger (Phase I) municipalities, nor did it direct that there be any other changes to either the Phase I or Phase II MS4 permitting programs, other than the requirements noted above. We therefore believe that the proposed regulations should focus exclusively on matters directly related to the notice requirements. Thus, EPA should not make any other proposed rule changes – even if these changes “would not establish any new substantive requirements for small MS4s.”

As to *Environmental Defense Center*, EPA proposes the adoption of one of three options. The options are as follows:

- **Option 1:** Traditional General Permit Approach
- **Option 2:** Procedural Approach
- **Option 3:** State Choice Approach

However, EPA provides rule language only for Option 1, discussing the other two options in the proposed rule's preamble. Yet without specific rule language, FSA and its members must guess at the effect any rule language might have. This deprives FSA and its members of adequate notice and opportunity to comment on Options 2 and 3. While we believe the *concept* outlined by Option 3 is most appropriate, EPA should propose rule language consistent with this option and allow interested parties to comment.

Option 1 – the only option for which there is rule language – should be rejected. This option establishes a “one size fits all” approach that would impose a significant hardship on many of the 6,000+ Phase II permit holders around the country. Specifically, Option 1 does not account for wide-differences at the local level in budgets and fiscal capacity, familiarity and competence in permitting programs and corresponding water quality improvement programs, nor the ability of the administering entity of the MS4 program, whether it is state government or the EPA Regional Offices, to absorb the additional workload required to implement such a change.

These concerns are especially true if the courts uphold recently-adopted regulations of EPA and the US Army Corps of Engineers revising the definitions of “Waters of the United States,” as the universe of waters subject to the MS4 program, and therefore the workload of both the permit holder and the program administrator, will increase exponentially.

Recommended Revisions to the Proposed Regulations

Based only on a description of how the program would be structured, we recommend that EPA proceed with Option 3 - the State Choice Approach.¹ Option 3 appears to give the administering entity (whether states and or EPA Regional offices), as well as the permitted entities, the most flexibility in complying with *Environmental Defense Center*. The State Choice Approach ensures that the goals of improved notice will be attained but in a manner that recognizes the vast differences in capacity and resources among the Phase II community throughout the country.

Additionally, we strongly urge EPA to delete any and all references to the use of the term “effluent limitations” within the rules. As previously mentioned, Congress recognized the differences between industrial or point-source dischargers and non-point discharges (i.e. MS4s) when the CWA was applied to municipalities. MS4s were to comply with the CWA and corresponding regulations to the maximum extent practicable. Effluent limitations were

¹ FSA's recommendation assumes that EPA would re-propose the rule, providing FSA and other interested parties an opportunity to comment on actual rule language rather than a promising concept. As EPA seemingly recognizes on page 429 of the Federal Register notice, this promising concept includes several related issues concerning state-level implementation. Actual rule language would allow these issues to be properly considered.

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specified for industrial or point-source dischargers - not MS4s. There is no need for this proposed rule language for EPA to comply with *Environmental Defense Center*.

As always, we stand ready to answer any questions that you may have concerning our comments and to work with EPA to improve water quality.

Sincerely,
FLORIDA STORMWATER ASSOCIATION

A handwritten signature in black ink, appearing to read "Kurt Spitzer". The signature is stylized with a large, sweeping flourish at the end of the last name.

Kurt Spitzer