



HARPETH RIVER WATERSHED ASSOCIATION

"Protecting the State Scenic Harpeth River and Clean Water in Tennessee Since 1999"

May 11, 2016

SENT BY E-MAIL

State of Tennessee, TDEC/Water Resources
William R. Snodgrass – TN Tower
312 Rosa Parks Avenue – 11th Floor
Nashville, TN 37243

Re: NPDES GENERAL PERMIT FOR DISCHARGES
From
SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEMS
PERMIT NO. TNS000000
Public notice MMXVI-004, February 25, 2016 (the "Draft Permit")

Dear Mr. Janjic and Mr. Higgins:

The undersigned organizations, representing tens of thousands of Tennesseans, respectfully offer the following comments on the Draft Permit. Although we appreciate TDEC's efforts and the hard work that went into preparing the Draft Permit, it requires significant revision.

The undersigned also believe it is important for TDEC to draft specific standards for permittees to implement to achieve "maximum extent practicable" requirements, so that permittees can avoid the potential for costly litigation as further discussed below, and conflict between their activities and federal law.

Each of the undersigned organizations reserve the right to object to the Draft Permit (and any subsequent final permit) as a whole. Without waiving those rights, each undersigned organizations additionally offers the following comments. Numbers refer to section numbers in the Draft Permit (N.B.: several comments are unnumbered and pertain to the Draft Permit as a whole and form a portion of these comments).

1.3.3.2 Non-stormwater discharges. This list includes the term "dechlorinated," but that term is not further defined or discussed in the permit. TDEC must further define what it considers necessary to satisfy that requirement.

1.5 Obtaining Authorization. The Draft Permit requires that an NOI and a “description” of the Stormwater Management Program be submitted. This section must be changed by deleting “a description of,” thereby requiring the applicant to submit an actual copy of the Program.

In accordance with Tenn. Comp. R. & Regs 0400-40-05-.06, the public must be afforded a meaningful opportunity to review and comment on permits. The authorization section of this permit must be expanded to require that MS4s provide public notice of NOIs and Programs, post them on their web sites, allow for comment and discussion, and make record of the comments received and their responses to those comments. All of that must be submitted with the NOI to be reviewed by TDEC as the agency determines whether coverage under the general permit should be granted to any particular MS4.

TDEC should seriously consider following Texas’ example, which is accessible here:

http://www.tceq.state.tx.us/assets/public/permitting/stormwater/txr040000_issued_permit.pdf

See “Public Notice Process for NOI submittal,” Part II.E.12, at page 25 of that state’s general permit for Small Municipal Separate Storm Sewer Systems, TXR040000.

2.1. Deadlines for Notification. This section instructs designated MS4s to submit an NOI for coverage, but fails to require the submittal of the Program as well. As noted in Section 1.5 comments, a copy of the Program must be submitted with the NOI.

2.2 Where and How to Submit Notice of Intent. Again, this section must require the submittal of a copy of the Program along with the NOI.

3.1 Discharges to Waters with Unavailable Parameters This section requires the permittee to determine whether it discharges stormwater into streams with unavailable parameters for nutrients, pathogens, siltation, or other parameters related to stormwater runoff. During the public hearing for the Draft Permit, TDEC informed participants that unassessed waters cannot be deemed to have unavailable conditions and therefore are assumed to have available conditions. This reasoning is contradictory to water quality protection and negates the rules in place to protect urban streams from further degradation. This section must require unassessed streams to be considered to have unavailable conditions for relevant parameters until demonstrated otherwise and thereby protected from polluted runoff.

4.1.1 and 4.1.2 Newly and Previously Permitted MS4s. This Permit eliminates the references to Part 4.2.5.6 that were in the previous [2010] permit. The prior permit required an “Inventory and Tracking of Best Management Practices.” This requirement of the prior permit must be maintained, not only for proper record keeping, but also to facilitate the public’s understanding of where they should expect such practices to be maintained.

4.2 Minimum Control Measures. This section sets out requirements for Minimum Control Measures. Each of these six parts needs to be expanded to include goals that are clear, specific and measurable. And, as discussed further at 5.4, the annual report form (CN-1291(Rev.11-12)) must be expanded to require detailed and meaningful reporting.

4.2.2 Public Involvement/Participation. This section remains very similar to the 2010 Permit and provides a number of elements for a required public involvement/participation program. In the ensuing years, it is now very simple for MS4 Phase II programs to provide agendas and the materials for MS4 meetings, public hearings and items on MS4 stormwater appeals board for public access. This can be done in the same manner used by the jurisdiction's planning commission, city council meetings and other governing bodies. 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 web site within a timely manner to enable meaningful public involvement in decision-making related to the MS4 program.

4.2.5.1 Program Requirements. This section of the Draft Permit makes no mention of hydrology. Part 4.2.5.2 of the 2010 permit provided this protection for urban waters: "The permittee must require that stormwater discharges from new development and redevelopment sites be managed such that post-development hydrology does not exceed the pre-development hydrology at the site." It is well established that one of the principal causes of impairment in urban waters is increased peak flows brought on by altering the land surface. Where surfaces become impervious and lose their resistance to flow, stormwater can then run off so intensely that watercourses are destabilized, introducing sediment loads to those systems and causing loss of habitat. Tennessee law protects waters from activities that alter their physical, chemical, radiological, biological, or bacteriological properties. Development and redevelopment in urban areas where such activity significantly alters waters must be regulated as required by law. Therefore, TDEC must retain the above-quoted language from the 2010 permit in the new Permit.

Further, this part refers to elements that "typical" programs are expected to include in their implementation plans for post-construction controls: plans review, site inspections, and Stormwater Control Measure maintenance policy. Nevertheless, this part of the new Draft Permit fails to establish clear, specific or measurable permit requirements so that TDEC, stakeholders and MS 4s themselves can determine if permit requirements are met. The Permit must state that for all projects MS4s will review plans, will inspect sites and will have maintenance programs that verify installation and assure long-term maintenance of post-construction controls. This would more clearly satisfy the "Maximum Extent Practicable" condition as required for NPDES permits.

4.2.5.2 Permanent Stormwater Standards. This section, without explanation or justification, eliminates the requirement for water quality buffers for areas that drain to any waters not included in the most recent 303(d) List. The requirement of a buffer must be re-inserted or equally protective controls must be required. The "maximum extent practicable" standard strongly suggests that buffers be used in addition to other reasonable and practicable controls, and TDEC has not shown that other controls are equally protective. As presently worded, this section of the Draft Permit constitutes prohibited backsliding. Further comments on this subject are at 4.2.5.2.2 and 4.2.5.3.

4.2.5.2.1 Site-Specific Limitations. This section of the 2010 permit (entitled "Runoff Reduction (green infrastructure)") contains the requirement that:

Site design standards for all new and redevelopment require, in combination or alone, management measures that are designed, built and maintained to infiltrate, evapotranspire, harvest and/or use, at a minimum, the first inch of every rainfall event preceded by 72 hours of no measurable precipitation. This first inch of rainfall must be 100% managed with no storm water runoff being discharged to surface waters.

The undersigned object to the elimination of this one-inch retention requirement on the following grounds (without limitation), absent a requirement for controls that are equally effective:

- Failure to include this requirement would violate Clean Water Act Section 402(p)(3)(B)(iii), which provides that MS4 permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, . . .” Tennessee has demonstrated, through the successful implementation of this one-inch retention requirement, that it is, in fact, “practicable.”
- Failure to include this requirement would violate SB1830/HB1892 because, since the one-inch requirement is “practicable”, that failure would put the Draft Permit in conflict with minimum requirements of federal law. As such, the elimination of the requirement would render the Draft Permit *ultra vires*.
- Failure to include this requirement would render future general permits without it subject to the anti-backsliding provisions of the Clean Water Act, and EPA regulations. Such failure might also render the Draft Permit subject to EPA disapproval. Such elimination would thus render the Draft Permit in violation of SB1830/HB1892, which requires that state standards meet the minimum requirements of federal law, as well as *ultra vires*.
- Failure to include a clear requirement in the Draft Permit will create a circular, “chasing its tail” standard. Clean Water Act Section 402(p)(3)(B)(iii) provides that MS4 permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, . . .” SB1830/HB1892 prohibits any “... permit issued pursuant to this section to a local governmental entity administering a municipal separate storm sewer system ... [from imposing] post-construction stormwater requirements, except to the extent necessary to comply with the minimum requirements of federal law.” Thus, failure to include a clear standard – such as that of the one-inch retention requirement, which has already been shown to be practicable – suggests that SB1830/HB1892 is itself void for vagueness under well-established principles of law.
- Failure to include a clear retention requirement will also likely result in costly litigation from both development proponents and opponents as to what is or isn’t stricter than federal requirements. It is further likely to lead to delays in the approval of development projects, possibly impairing growth in the state. . Failure to include clear standards will likely result in flooding of adjoining owners’ property. These adjoining owners’ property rights will thus be impaired, and they will have to clean up any damage caused, which may result in additionally costly litigation by them against project proponents who do not effectively control runoff. Post-construction flooding that enters public property (like streets, parks, and streams) will also cause taxpayers in affected communities to have to “pick up the tab” for easily preventable damage. TDEC should not adopt regulations that are likely to impose significant costs on regulated parties, adjacent property owners, or the general public.

Section 4.2.5.2.1 of the Draft Permit, as presently drafted, also provides a list of conditions that can limit the degree to which the entire Water Quality Treatment Volume must be controlled by infiltration evapotranspiration, or capture/reuse at any particular site. Some of the conditions listed as items *a* through *f* in that part were in the previous permit and all of those items are appropriate restrictions on how runoff from those sites should be managed. Item *g*, however, refers to “[o]ther conditions as approved by the permittee and documented in the SWMP.” The permit must not defer on this sort of decision to the permittee: any basis for determination that a site is unsuitable for the preferred controls, other than those listed as items *a* through *f*, must be approved on a site-by-site basis by TDEC. And all site-specific limitation determinations must be identified and explained in the MS4’s annual reports. Therefore, item *g* must be removed from this proposed permit.

The undersigned also note that whereas in the 2010 permit (§ 4.2.5.2) cost was explicitly prohibited as a sole criteria¹ for determining that standards cannot be met, the rationale for the new draft (§ IV.D.5) says that cost will now be a permissible basis for consideration of whether permanent stormwater standards can be met. However, the word “cost” does not appear in the draft permit itself, nor is there a clear reference to cost in that context. If cost is to be considered, it can disqualify preferred control practices only when it can be demonstrated by a qualified design professional that the cost of such controls at any particular site are significantly above less protective alternatives. Such demonstrations must be available for public review and summarized in annual reports. Further, as the requirement is to meet the “maximum extent practicable” standard, the introduction of this consideration is impermissible in any event and must be removed.

4.2.5.2.2 Water Quality Treatment Volume. The 2010 permit allowed incentives of 10% each to be credited against the volume of rainfall that had to be managed at redeveloped sites. The new draft inexplicably – without justification -- doubles incentives to 20% for each of the listed conditions and expands the allowance to include both new and redeveloped sites. This change, is therefore impermissible “backsliding.” The result will be that any redevelopment project within half a mile of a bus stop would instantly and automatically be relieved of 40% of its requirement to manage runoff from the first inch of a qualifying event. If the project were to employ now-optional buffers, the incentive reduction grows to its 50% cap. That degree of control fails any reasonable application of “Maximum Extent Practicable” under federal law² or “all prudent steps” under Tennessee law.³ The Division must reestablish the language from the 2010 permit and add clarification of the terms “mixed-use” and “transit-oriented.”

Also the draft permit adds a new item -- the addition of a water quality buffer on unimpaired streams -- to the list of conditions that would allow a 20% reduction in the volume of rainfall treated. This must be removed. Probably the most important role of a stream buffer is to provide physical space in which a stream channel can naturally adjust with time to changing hydrology upstream. Realistically, in many instances the upstream watershed will already have

¹ § 4.2.5.2 of the 2010 Permit states that: “A determination that standards cannot be met on site may not be based solely on the difficulty or cost of implementing measures,....”

² Clean Water Act § 402(p)(3)(B)(iii) and 40 C.F.R. § 122.26(d)(2)(iv).

³ Tenn. Code Ann. § 69-3-102(a).

land uses affecting the stream's hydrology that the MS4 Phase II jurisdiction will not have regulatory control over or can address. A stream buffer on all streams regardless of impairment is critical to maintain reaches that are not currently unstable to maintain water quality standards. Stream buffers literally also provide a "buffer" to protect private property being developed. Thus addition of a water quality buffer as a condition for reduction in treatment volume must be removed – subsection "a." must therefore be deleted.

4.2.5.2.3 Off-site Stormwater Mitigation or Payment into Public Stormwater Fund

The undersigned request clarification that "public mitigation projects" will treat 1.5 times the portion of the WQTV not treated on site.

4.2.5.3 Water Quality Riparian Buffers. Buffers are widely recognized as among the most cost-effective of stormwater control practices. The previous permit required permanent water quality buffers along all "waters of the state." That protection is unjustifiably reduced by this new Draft Permit.

This draft defines buffers at footnote 2 on page 17 as measured from and purports to require measurements of "streams," a subset of "waters of the state." It is well recognized, however, that contaminants introduced to small watercourses will very likely transport into larger waters. Therefore, the use of buffers next to established watercourses, including wet weather conveyances, will protect streams in those watersheds from contaminants originating in areas that drain to wet weather conveyances before entering streams. Where practicable, that protection should be continued and therefore, TDEC must revert to the language from the 2010 permit. We further note that during the question and answer session before the public hearing on the Draft Permit, TDEC staff orally asserted that the use of the word "streams" was not intended to limit coverage of all "waters of the state." This oral assertion should be reduced to writing. (Further, we reiterate the request made during the public hearing that video and/or a transcript of the question and answer session be made public on TDEC's website. The question and answer session included a number of specific answers to questions that should be part of the public and administrative record regarding the Draft Permit. A presentation given regarding the run-off assessment and assessment (RAT) tool should also be made part of the public and administrative record.)

The language in note 5 of this section leaves entirely too much to the discretion of the permittee. This section must be expanded to clarify what circumstances would allow a determination that buffer widths cannot be fully implemented and that any such cases must be documented in the MS4 annual report.

4.2.5.6 Maintenance of Stormwater Assets. This part of the new draft, labeled "Maintenance of Stormwater Assets," drops all of the detail in corresponding section of the previous permit and simply says the MS4 is to "develop a program" to sustain removal efficiency of permanent stormwater management measures. That wording fails to set any clear, specific or measurable goals and fails any sensible test of "Maximum Extent Practicable."

At minimum, the following elements need to be included:

- Annual reporting at a sufficient level of detail for the public to have confidence that the

requirements of this program element are being effectively carried out

- MS4 review of plans for permanent control
- Inspection of controls after installation by the MS4 or the design professional
- MS4 receipt of as-built plans and continuing public access to those plans
- Written maintenance agreements with all property owners acknowledging their requirement to maintain controls, which should be recorded in deed records as “institutional controls” as in the brownfield setting, so that there is fair notice of the control and it remains enforceable
- Inventory of all post-construction controls on the MS4’s web site including description, location and photographs
- Annual verification that controls are maintained for every site
- Periodic inspection by the MS4 to assure maintenance
- An enforcement program with authority to require correction where controls have been eliminated or rendered less effective

Long-term maintenance of post-construction controls is the most important part of mature stormwater programs. Without such assurance, urban streams will be unsustainable, subject to wider fluctuations in flow, more flooding and degrading water quality. Urban populations will be unjustifiably and unacceptably exposed to more pathogens, and more silt, nutrients and toxins will flush into our waters under the Draft Permit.

5.1 Analytical monitoring and 5.2 Non-analytical monitoring. Footnote 3 at the bottom of page 23 says a sampling program is only needed where the Division has designated stream segments as impaired at the time of permit issuance. It is well-established that in urban areas where a significant fraction of impervious cover, streams are very likely to be impaired. Monitoring requirements must be expanded to include streams assessed as impaired and unassessed streams in watersheds with 25% or greater impervious cover.

Both of these sections must clarify that the results of these monitoring programs are to be reported to TDEC and summarized in MS4 annual reports.

5.2 Non-analytical monitoring. This part must clarify the meaning of “...a stream segment is identified as being in need of additional controls.”

5.4 Reporting. MS4 annual reports are the most effective tool for Tennessee stormwater programs to communicate to their stakeholders what they are doing to protect the people and waters in their communities and downstream. Reporting requirements in the draft must be greatly expanded to be clear, specific and measurable. TDEC also needs to incorporate the monitoring data gathered by the MS4 Phase II permittees into its databases such as STORET, into its 303(d) and 305(b) water quality assessment program, TMDL program, and provide this data for related data gathering and analysis efforts by partner agencies.

For each of the six minimum control measures, the permit must specify annual reporting requirements applicable to each BMP associated with that measure, and the report form must be formatted to accommodate those responses. An example from the Arkansas Department of Environmental Quality is available at:

http://www2.adeq.state.ar.us/water/branch_permits/general_permits/stormwater/pdfs/annual_reporting_form.pdf

Also, the previous permit (§5.4) required MS4s to hold public hearings to present their annual reports. That requirement has been eliminated in this draft (in favor of allowing comments on a website). The requirement of a public hearing must be restored, so that MS4s can encourage stakeholders to attend to learn about and discuss their stormwater programs. Alternatively, a public hearing should be required if requested.

Uncertainty Created for Local Jurisdictions / Permittees. The Draft Permit creates significant uncertainties for local jurisdictions / permittees as noted in Commissioner Martineau's memo to Phase I and II MS4s dated April 4, 2016 re SB1830 / HB 1892. Commissioner Martineau's memo is attached hereto and incorporated herein by reference as comments by the undersigned. TDEC must respond to each of Commissioner's Martineau's comments and redraft the Draft Permit so as to resolve each of the issues noted.

The Draft Permit Violates the Minimum Requirements of Federal Law Standard. The letter dated December 23, 2015 from James D. Gaittina of EPA to Shari Meghreblian, Ph.D., of TDEC (a copy of which is attached hereto and incorporated herein by reference as comments by the undersigned) establishes the minimum requirements of federal law. This letter also establishes that EPA, through its authority under the Clean Water Act, has jurisdiction to regulate post-construction discharges. TDEC has similar authority, as do permittees, whether pursuant to federal, state or local law. The Draft Permit falls short of the minimum requirements of federal law. TDEC must respond to and adopt the EPA's position with respect to the four (4) points made in that letter to fulfill the minimum requirements of federal law.

In sum, and without prejudice to each of the comments above, the Draft Permit so diminishes the requirements of post-construction control for new and redeveloped sites as to violate the anti-backsliding provisions of state and federal law and rules. *See* Clean Water Act §402(o), 33 U.S. Code § 1342(o) and Tenn. Comp. R. & Regs Rule 0400-40-05-.08(j).

Thank you for considering our concerns and protecting Tennessee's water quality. We look forward to TDEC's revising the Draft Permit consistent with these comments. Should you have any questions or comments regarding the above, please contact James M. Redwine at jimredwine@harpethriver.org or 615-790-9767.

[Signatures on Next Page]

Sincerely,

Harpeth River Watershed Association



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