



SCIENCE AND ENVIRONMENT DIVISION

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December 18, 2018

Mr. Lynn Van Every
Idaho Department of Environmental Quality, Pocatello Regional Office
444 Hospital Way #300
Pocatello, ID 83201

**Subject: Review Comments for City of Pocatello, City of Chubbuck, Bannock County, Idaho
Transportation Department District #5 and Idaho State University**
NPDES Permit No. IDS02805 - Pocatello Urbanized Area MS4 Permit – November 2018

Dear Mr. Van Every:

The Pocatello Urbanized Area permittees (City of Pocatello, City of Chubbuck, Bannock County, Idaho Transportation Department D5, and Idaho State University) ("Permittees") are pleased to submit our consolidated comments on the Phase II storm water permit and 401 Certification issued as draft on November 2, 2018 (Draft Permit). Individually, the permittees have (and continue to) participate in watershed groups and understand the necessity to protect Idaho's water resources and acknowledge the responsibility we share for water quality in the Portneuf River Watershed.

The Idaho Department of Environmental Quality (DEQ), Pocatello Regional Office has certified that the propose Permit fulfills Idaho's water quality standards requirements. The Association of Idaho Cities (AIC) has prepared comments on the 401 Certification in light of the statewide impact and precedence established regarding a number of important issues.

The permittees urge DEQ to consider the attached comments from AIC and consider revising the 401 Certificate accordingly. We look forward to collaborating with you regarding the Pocatello Urbanized Area's MS4 permit. Please don't hesitate to contact me if you have any questions regarding our comments.

Sincerely,

Hannah Sanger, MS MA
Pocatello Urbanized Area Permit Coordinator

cc: Brian Blad, Mayor of Pocatello
Jeff Mansfield, Pocatello Public Works Director/City Engineer, City of Pocatello
Kevin England, Mayor of Chubbuck
Ken Bullock, Bannock County Commission Chairman
Ed Bala, District Engineer, Idaho Transportation Department, District 5
Pocatello Urbanized Area MS4 Permit permittee staff
Misha Vakoc, Permit Writer, Environmental Protection Agency, Region 10
Clark Weaver, Director of Environmental Health & Safety, Idaho State University
Johanna Bell, Association of Idaho Cities

Attachment



Association of Idaho Cities
3100 South Vista, Suite 201, Boise, Idaho 83705
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www.idahocities.org

December 17, 2018

Mr. Lynn Van Every
Idaho Department of Environmental Quality, Pocatello Regional Office
444 Hospital Way #300
Pocatello, ID 83201

Re: City of Pocatello, City of Chubbuck, Bannock County, Idaho Transportation Department-District #5, and Idaho State University Draft MS4 Permit - November 2018; NPDES Permit #IDS028053 (Pocatello Area MS4 Phase 2 Permit)

Dear Mr. Van Every,

The Association of Idaho Cities (AIC) serves to advance the interests of the cities of Idaho through legislative advocacy, technical assistance, training, and research. Idaho cities play important roles as primary implementers of the Clean Water Act, representing over 70% of all Idaho residents. These stakeholders have a significant interest in the development of stormwater permits and other federal programs related to the protection of human and aquatic life. AIC is actively engaged in water quality issues through the work of our Environment Committee, chaired by Boise City Council President Pro Tem Elaine Clegg and our Municipal Water Users Group, chaired by Jerome City Council President Bob Culver.

The Environmental Protection Agency (EPA) Region 10 proposes to issue a NPDES permit authorizing the discharge of stormwater from all municipal separate storm sewer system (MS4) outfalls owned and/or operated by the City of Pocatello, City of Chubbuck, Bannock County, Idaho Transportation Department-District #5, and Idaho State University. The Idaho Department of Environmental Quality (DEQ), Pocatello Regional Office has certified that the propose Permit fulfills Idaho' water quality standards requirements AIC has prepared the attached comments on the 401 Certification in light of the statewide impact and precedence established regarding a number of important issues.

AIC urges the DEQ to consider the attached comments and consider revising the 401 Certification accordingly. Should you have questions concerning our comments, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Jess Harrison", is written over a light blue horizontal line.

Jess Harrison, Executive Director

cc: Elaine Clegg, AIC Environment Committee Chair
Bob Culver, AIC Municipal Water Users Group Chair
Misha Vakoc, US EPA R10 Municipal Storm Water Permit Coordinator
AIC Stormwater Technical Task Force

Attachment



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General Comments

AIC appreciates the opportunity to comment on the proposed individual Phase 2 MS4 permit and Idaho 401 Certification. AIC understands that the Permittees look forward to working with our state and federal partners in the development of final permit conditions that conform with federal EPA Phase 2 regulations, protects water quality in Idaho in areas where stormwater may be having the most potential effect, and thus achieves a cost-effective use of local funding and resources to manage stormwater. AIC seeks to support the Permittees in these efforts because many of the Idaho MS4 Permittees are AIC's members.

The protection of public health and safety is an important responsibility of Idaho communities. AIC has observed how these stakeholders consistently seek to ensure compliance, and wish to preserve their ability to comply over the long term with Clean Water Act regulations. Both financial and technical resources are required by Idaho communities in order to ensure these investments are made in a manner that will ensure long-term compliance under the Clean Water Act. Idaho communities' investments must be informed through a well-supported Clean Water Act MS4 permitting program that takes into account the need to employ adaptive management strategies over the long term.

Individual Versus General Permitting Approach

The US Environmental Protection Agency, Region 10 (EPA) was previously working on a statewide General Permit that would cover all Phase 2 regulated Municipal Separate Storm Sewers (MS4s) in Idaho (i.e., during 2016 through the first half of 2018). During this period of time, the EPA received comments from AIC and other stakeholders on two versions of the draft general permit. As the Fact Sheet Supporting the Pocatello Area MS4 Phase 2 Permit states the "EPA has decided to issue individual permits instead of a general permit" and that the "information received, in conjunction with the permit renewal application and Annual Reports, has been used to inform the current draft Permit."

Given this history, AIC wishes to go on record as strongly urging the EPA to revise the decision to develop multiple individual permits rather than a statewide Phase 2 MS4 General Permit. AIC wishes to ensure the DEQ also understands the many benefits

from a General Permit rather than multiple individual permits as Idaho prepares to assume responsibility for issuing MS4 permits in the future. There are many compelling reasons that support a statewide General Permit approach, including but not limited to following reasons:

- Reduced regulatory agency and Permittee workloads (federal, state, and local)
- Improved Permittee coordination of resources
- Fairness and consistency across Idaho
- Supports a better and more smooth transition to Idaho primacy

AIC's Support for a Number of Proposed Permit Requirements

AIC supports a number of proposed Permit requirements and wishes to draw attention to a few in particular:

- Establishing numerous placeholders throughout the proposed Permit for the "Permit Effective Date," in order to invite input from the Permittees regarding a feasible time line for the schedule of program development and compliance elements (See Schedule on page 2 or 68, and numerous other places in the proposed Permit).
- Providing the affirmative statement that "If the Permittees comply with all the terms and conditions of this Permit, it is presumed that the Permittees are not causing or contributing to an excursion above the applicable Idaho Water Quality Standards." (See Section 2.1).
- Clarifying allowable non-stormwater discharges through a detailed list of common urban infrastructure and situations (See Section 2.4.5).
- Ensuring that valid receiving water impacts and the significance to public health are taken into consideration prior to determining whether a stormwater discharge is a source of pollution to Water of the United States (See Section 2.4.5.2).
- Acknowledging the limited legal authority of the Permittees provided by Idaho law and providing for progress reports as a compliance pathway where limited regulatory mechanisms are available (See Section 2.5.4).
- Recognizing that some of the Permittees are a type of entity that do not have legal authority over private property and revising permit requirements accordingly (See Section 3.1.4).
- Construction site plans for projects disturbing **one or more acres** for Permittees review (See Section 3.3, emphasis added).
- Recognizing that some of the Permittees are a type of entity with limited legal authorities and, therefore, may comply with the permit through the development of an enforcement response plan that is "appropriate to its organization" (See Section 3.3.6).
- Controls at new development and redevelopment project sites that result in land disturbance of **greater than or equal to one (1) acre** (including

construction project sites less than one acre that are part of a larger common plan of development or sale that would disturb one acre or more) **and that discharge into the MS4** (See Section 3.4, emphasis added).

- Providing for “alternatives for local compliance” in those situations where onsite retention is not technically feasible (See Section 3.4.2.2).
- The affirmative statement that “A Permittee will be presumed to be in compliance with applicable Idaho Water Quality Standards if the Permittee is in compliance with the terms and conditions of this Permit,” (See Section 5).
- Ensuring the Permittees have adequate time to prepare annual reports by providing 61 days following the end of each reporting period (See Section 6.4).
- The affirmative statement that “The provisions of this Permit are severable, and if any provision of this Permit, or the application of any provision of this Permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this Permit, shall not be affected thereby.” (See Section 8.12).

Schedule of Compliance

AIC appreciates EPA’s and the DEQ’s commitment and intentions to construct the proposed Permit in a manner that preserves the “Maximum Extent Practicable” (MEP) standard under the Clean Water Act.¹ However, AIC believes the final Permit requires an affirmative statement regarding how the MEP standard will be achieved. Therefore, AIC has strongly urged the EPA to insert a paragraph into Section 2.1, “Compliance with Water Quality Standards” to address this issue.

It is AIC’s intention to support both the EPA and Idaho in the preservation of the MEP standard in this and other MS4 permits and offers the following justifications in support of the inclusion of this language in final Permits issued in Idaho:

- Congress did not mandate a “minimum standards” approach or specify that the EPA develop minimal performance requirements;²
- Under 33 U.S.C. § 1342(p)(3)(B)(iii) the EPA's choice to include either management practices or numeric limitations in the permits is within its discretion;³ and,

¹ Maximum Extent Practicable: Municipal stormwater dischargers must control the discharge of pollutants to the “maximum extent practicable” (“MEP”) by implementing best management practices that control runoff. (33 U.S.C. § 1342(p)(3)(B))

² See 1992 Natural Resources Defense Council Inc. vs. US EPA;
<https://openjurist.org/966/f2d/1292/natural-resources-defense-council-inc-v-united-states-environmental-protection-agency>

³ See 1999 Defenders of Wildlife vs. Browners;
[https://yosemite.epa.gov/oa/eab_web_docket.nsf/8362EA577FA6FBF3852570830051362A/\\$File/Ariz.%20Mun.%20SW%209th%20Cir.%20Dec..1.17.2018pdf.pdf](https://yosemite.epa.gov/oa/eab_web_docket.nsf/8362EA577FA6FBF3852570830051362A/$File/Ariz.%20Mun.%20SW%209th%20Cir.%20Dec..1.17.2018pdf.pdf)

- EPA understands that MS4s need the flexibility to determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process.⁴

With respect to how the recommended affirmative statement complies with the Idaho water quality standards and associated 401 Certification, AIC respectfully points out that important justifications are found in the EPA approved 2010 Portneuf River TMDL Addendum:⁵

- “...implementation of the Pocatello Urbanized Area (PUA) Phase II Stormwater Permit is in its fourth year and is geared toward decreasing the impact of urban stormwater on the Portneuf River and select tributaries. It is anticipated that through implementation of the provisions in the Federal Phase II Stormwater permit that sediment, nutrients, bacteria and oil and grease will be reduced to the maximum extent practicable and ***move the river towards compliance*** with the pollutant reductions detailed in this TMDL revision. (DEQ, 2010; Portneuf River TMDL Revision and Addendum, Reasonable Assurance, pg. 152)
- “***No time frame is proposed*** for the overarching goal of restoring beneficial uses throughout the Portneuf River subbasin...” (DEQ, 2010; Portneuf River TMDL Revision and Addendum, Implementation Strategies, pg. 154)
- “***...DEQ is encouraged by the apparent decreasing phosphorus concentrations*** and is hopeful this trend continues.” (DEQ, 2010; Portneuf River TMDL Revision and Addendum, Response to Comments, pg. 342) (emphasis added)

As for the Idaho 401 Certification, AIC believes that Idaho’s assessment that the proposed Permit complies with the Idaho Water Quality Standards is correct. However, AIC respectfully requests the DEQ include an affirmative statement regarding how the requirements of the permit constitute an Idaho-authorized schedule of compliance. AIC perceives that this affirmative statement belongs in the section which addresses the “Protection and Maintenance of Existing Uses (Tier I Protection):”

To ensure that the Permittee's activities achieve timely compliance with applicable water quality standards, the Permittees shall implement the Storm Water Management Program, monitoring, reporting and other requirements of this permit in accordance with the time frames established in the permit. This timely implementation of the requirements of this permit constitutes the Idaho-authorized schedule of compliance.

⁴ See 81 FR 237, pg. 89323, December 9, 2016; <https://www.gpo.gov/fdsys/pkg/FR-2016-12-09/pdf/2016-28426.pdf>

⁵ http://www.deq.idaho.gov/media/464542-water_data_reports_surface_water_tmdls_portneuf_river_portneuf_river_revision_addendum_final.pdf