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December 10, 2018

Mr. Dan Opalski, Director of US EPA Region 10 Office of Water and Watersheds
U.S. Environmental Protection Agency, Region 10
Office of Water and Watersheds
1200 Sixth Avenue, Suite 155, OWW-191
Seattle, Washington 98101

Re: North Idaho Highway Districts MS4 Permit Public Notice Draft-Oct. 2018 - NPDES Permit #IDS028207

Dear Mr. Opalski,

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 Lakes Highway District, Post Falls Highway District, and East Side Highway District. AIC has prepared the attached comments on the draft Permit in light of the statewide impact and precedence established regarding a number of important issues.

AIC urges the EPA to carefully consider the comments submitted by the Permittees, supplemented by those attached to this letter prior to making a final decision regarding the permit's scope and requirements. Should you have questions concerning our attached comments, please feel free to contact me.

Sincerely,

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
Daniel Redline, IDEQ Coeur d'Alene Regional Office
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 looks 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.

The protection of public health and safety is an important responsibility of Idaho communities. 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 Verses 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 North Idaho Highway Districts MS4 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 preferring a statewide Phase 2 MS4 General Permit due to the following reasons:

- Reduced regulatory agency workload (both federal and state)
- Improved Permittee coordination of resources
- Fairness and consistency across Idaho
- Better supports a 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 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[1] (See Section 3.3, emphasis added).
- Recognizing that 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

[1] AIC notes that this supports the current program in place and that these programs appear to substantially meet the required control measures. For example, Lakes Highway District (LHD) currently implements Resolution 2009-12 and Resolution 2010-4 to require all construction projects disturbing one (1) or more aces to be performed in accordance with the requirements of the statewide Construction General Permit, Associated Highway District Standards, and the Kootenai County Site Disturbance Ordinance No. 34. Further, any work within LHD right-of-ways requires a LHD permit; special conditions of this LHD permit require contractors to comply with Resolution 2010-4.

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).

Limits to Jurisdictional Boundaries and Authorities

Section 1.1 "Permit Areas" states that this "Permit covers ***all areas*** within the Coeur d'Alene Urbanized Area (see Part 9, Definitions) ***served*** by the municipal separate storm sewer system owned and/or operated by the Lakes Highway District, Post Falls Highway District, and East Side Highway District (Permittees)" (emphasis added).

First, 40 CFR §122.26(a)(7) clarifies that if a small MS4 is not located entirely within an urbanized area, only the portion that is within the urbanized area is regulated. Second, AIC wishes to point out that the definition of a "small MS4" found at 40 CFR § 122.26(b)(16) does not include storm sewer in "very discrete areas" such as individual buildings that are not part of the municipal system. Further, as observed in Section 3.1.4., the Permittees are entity types that do not have legal authority over private property. Taken together, there are a number of permit requirements associated with the sic (6) minimum measures that will need to be revised accordingly. AIC respectfully points out that the Permittees jurisdictions are linear, and EPA should therefore revise multiple permit conditions that extend beyond these linear jurisdictions or apply to private property.

In addition, AIC encourages the EPA to take the following into consideration:

- If the Permittees are located within an 'urbanized area' that requires Phase 2 MS4 permits, then it would appear as though the adjacent jurisdiction, Kootenai County, may also be within the same urbanized area.
- The Permittees inherently rely on adjacent jurisdictions to control pollutants in a manner to retains these pollutants on site and preventing them from discharging from one jurisdiction to another.

- In other Phase 2 MS4s these issues are addressed through joint Permittee requirements.
- Kootenai County authorizes and implements stormwater controls for infrastructure that flows into the Permittees' jurisdictions.

Schedule of Compliance - Permit Effective Date and Requirements Associated with the Phase 2 Remand Rule

AIC supports the Permittee's request that the Permit become effective on October 1, 2019, the start of the Permittees' fiscal year(s). This start date was previously discussed during the development of the Idaho MS4 General Permit and would provide much needed opportunities for planning the funding for the new requirements in the Permit. The deadlines for the MOUs and the development and public review of alternative controls should also be revised based on an October 1, 2019 effective date.

While the EPA may strive to have the effective date of December 31, 2018, AIC notes that this is not possible at this time given the current public review schedule and response to comments time provisions.

Further, given the financial burdens and affordability considerations, AIC urges the EPA to adopt the time lines provided for all other first-time MS4 Permittees regarding when the six (6) minimum control measures will be in force. That is, AIC requests that the deadline for these mostly programmatic measures be set for 4.5 years following the effective date of the permit; concurrent with re-application deadline.

Regarding how the proposed Permit addresses the Phase 2 Remand Rule:

- AIC supports EPA Region 10's proposal to address the Phase 2 MS4 Remand Rule requirements by applying Option 2 – the "Two-Step Approach
- AIC urges EPA to provide a generous implementation time line, including a reasonable amount of time to develop the Alternative Controls (i.e., based on the most complex alternative controls). Specifically, AIC suggests that submission of the Alternative Controls, Monitoring Assessment Plan, and Pollutant Reduction Activities should be required to be submitted submitted 2 years following the effective date of the permit. This request would then provide for these alternative controls to be understood 2.5 years prior to when the 6 minimum control measures would be required to be in place (i.e., 4.5 years following the permit's effective date).

Compliance with Water Quality Standards

AIC urges EPA to revise Part 5 and replace these requirements with the suggested language below in order to be consistent with EPA's guidance and intent associated

with the concepts of TMDL development, adaptive management, and MS4 participation in these programs. The proposed Permit text does not meet EPA's decisions, guidance, or intent associated with the management of stormwater. Even though discharges permitted under the proposed permit are not governed by a TMDL at this time, the permit should still recognize that future TMDLs will establish requirements and pathways to achieving water quality standards. Therefore, meeting the terms of part 4 relating to the MS4's contribution to achieving water quality standards (e.g., the Idaho portion of the Spokane River) should provide for adaptive management. Furthermore, any requirement that includes the preparation of a separate adaptive management plan from a TMDL and Implementation Plan would create redundancies and significant regulatory risk to the Permittees. Bottom line: if there is impairment, then a TMDL needs to be developed, and an Implementation Plan with adaptive management can then be developed. AIC believes that the approach provided below aligns with the overall strategy of using the TMDL as the vehicle to achieve Water Quality Standards (WQS).

5 REQUIRED RESPONSE TO EXCURSIONS ABOVE IDAHO WATER QUALITY STANDARDS

While improved water quality is the expected outcome, the Permittee's obligation is to implement BMP's designed to protect the receiving water quality to the maximum extent practicable (MEP). Compliance with conditions of the final permit shall constitute compliance with §402(p)(3)(B)(iii) of the Clean Water Act and adequate progress toward compliance with Idaho's receiving water standards for this permit term. That is, 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.

Excursions to Idaho Water Quality Standards (WQS) are addressed through the process of identifying impaired waters and developing Total Maximum Daily Loads (TMDL) for pollutants of concern. EPA and IDEQ expect attaining WQS will only be achieved through reduction from point and nonpoint source contributors identified in an approved TMDL. When subject to an approved TMDL, the Permittee will be considered in compliance with the TMDL when the Permittee complies with the conditions of this permit, including developing and implementing appropriate BMPs within the six (6) minimum measures to address the TMDL to the maximum extent practicable (MEP) and participating in activities identified in the Implementation Plan. While improved water quality is the expected outcome, the

Permittee's obligation is to implement BMP's designed to protect the receiving water quality to the maximum extent practicable (MEP).

EPA and DEQ have determined that water quality standards are not being achieved as identified on the 303d List and are yet to be addressed by an approved Total Maximum Daily Load (TMDL) and Implementation Plan. Since discharges from the MS4 are to a waterbody subject to an approved TMDL, as identified in Part 2.6.2, the Permittees are subject to the requirements of Part 4 of this Permit. A Permittee's compliance with applicable requirements and BMP implementation within this Permit and applicable to it will constitute the required response and compliance with the Permit.

Provisions the Allow Pollutant Credit Trading or Permit Modifications

AIC recommends that the Permit affirmatively provide for the development and application of pollutant credit trading. AIC suggests referring to the 2014 Hayden Area Sewer Board NPDES Permit No.: ID0026590 for relevant definitions and considerations.

Polychlorinated Biphenyls (PCB) Monitoring and Laboratory Methods with Compliance Implications (Washington and/or Tribal)

AIC asserts that PCB Testing Method 1668C and monitoring should not be required in any Idaho NPDES permit:

- The list of Pollutants of Concern inappropriately includes PCBs for the Spokane River, including the Washington "portion downstream of" the Idaho/Washington border (See Section 4.3.2). The Idaho Statewide Phase 2 MS4 General Permit attempted to identify that Idaho Permittees were "Affected Permittees" under the Washington PCB pollutant load reduction plans. AIC, the City of Post Falls, and others submitted comments addressing this issue on two separate occasions, first on December 1, 2016 and later on April 21, 2017. AIC respectfully asserts that the Permittees are incorrectly categorized as being impacted by the Washington PCB pollutant load reduction plans.
- The 2014 Idaho Integrated Report places the Spokane River – Coeur d'Alene Lake to Post Falls Dam[2] (assessment unit length of 9.04 miles, page 23 of 63) into Category 5 (i.e., requiring a TMDL to be developed) for Cadmium, Lead, Phosphorus (Total), and Zinc. The plain absence of PCBs as a listed parameter for this assessment unit must be taken into consideration by the EPA in the development of the final permit's monitoring requirements. That is, there are no 'Affected Permittees,' implied or otherwise, in Idaho for any PCB TMDL nor impairment listing at this time.

[2] https://www.deq.idaho.gov/media/60179654/idaho-2014-integrated-report.pdf

- According to the proposed Permit's Fact Sheet (see page 57), EPA is inserting PCB monitoring and pollutant reduction requirements for water bodies without an approved TMDL, and without determining whether the Permittees' discharge pollutant(s) in amounts that cause, have reasonable potential to cause, or contribute to excursions above the pertinent water quality standards (i.e., Idaho, Washington, etc.). EPA regulations and guidance require TMDLs or a reasonable potential analysis before imposing permit conditions of this type (See 40 CFR § 122.44(d)(1) and the U.S. Environmental Protection Agency, NPDES PERMIT WRITERS'MANUAL at 6-23.
- The proposed Permit states, "For purposes of this PCB monitoring effort, Post Falls Highway District should follow the provisions for data validation and blank censoring in Section 4.2.2 of the Spokane River Regional Toxics Task Force Quality Assurance Project Plan (Task Force QAPP)" (See Section 6.2.6.4). AIC does not believe it is appropriate to require the use of the SRRTTF QAPP procedures for data validation and blank censoring. The Task Force QAPP produces semi-quantitative analysis due to the extremely low levels of PCBs being measured. The Permittees may want to conduct an analysis which is intended to produce a quantitative result, and treat blank censoring differently. If PCB monitoring and pollutant load reduction efforts are required in the future, AIC requests that the Permittees be provided the option of developing their own QAPP.
- As of August 2018, the EPA is now reconsidering the PCB water quality standards it approved for Washington in 2016 in response to a petition which urges the EPA to overturn the federal limits – limits that are stricter than previous rules developed by those proposed by Washington and set goals and treatment standards that are higher than anywhere else in the nation.[3] These rules affect permits for discharging point sources into Washington's water bodies.
- In a December 3, 2018 ruling on a similar manner in *Maine v. Wheeler*, the US District Court held that several intervening events "present a reasonable basis for the EPA to have 'doubts about the correctness of its decision.'"[4] In part, this ruling was based on EPA's decision to "change and not defend" the 2015 decision.[5]
- In light of these developments, AIC urges the EPA to remove PCB monitoring until at future time when the water quality criteria and associated impairments in receiving water bodies are better understood.
- Any monitoring requirements for PCBs must use only EPA-approved test methods included in 40 CFR 136. Method 608 is the only EPA-approved method for PCBs under the Clean Water Act. Method 1668C has never been approved by EPA, for very sound scientific and technical reasons as described below. Moreover, the legal basis for using only approved methods in the context of a regulatory process such as an NPDES permit was recently affirmed by

[3] http://www.spokesman.com/stories/2018/aug/26/trump-administration-will-review-pollution-rules-a/
[4] https://cdn.ymaws.com/idahocities.org/resource/resmgr/water/ipdes/epa2018_2149.pdf
[5] https://cdn.ymaws.com/idahocities.org/resource/resmgr/water/ipdes/epa2018_1405a.pdf

Washington State Supreme Court, specific to PCB methods 608 and 1668C. On August 30, 2018, the court affirmed the following: "Ecology's use of Method 608 in the SIM permit is consistent with the plain meaning of the statutory language in question, RCW 90.48.520. Nothing in the language of the statute requires Ecology to use unreliable and unapproved testing methods to ensure compliance with the law." (See Puget Sound Keeper v. State of Washington, Department of Ecology, and State of Washington Pollution Control Hearings Board). [6]

- AIC has identified a number of other complications regarding the use of the non-approved method 1668C for Idaho Permittees. Specifically, there are substantial scientific problems with the 1668C method, and with EPA's assessment of the method, that must be resolved before this method can be defensibly imposed as a binding requirement on the Permittees:
    - David Blye, an expert on analytical testing methods with Environmental Standards, Inc. ("ESI"), prepared a report in 2010[7] (incorporated here by reference) to assess the scientific validity of Method 1668C, and to review EPA materials that document the technical basis for the method. This review raises substantial issues concerning the Method and the adequacy of EPA's technical support for approval of the Method.
    - EPA has not adequately addressed the ubiquitous nature of background contamination that plagues Method 1668C. Further, as evident from the historical blank data from EPA's Interlaboratory Validation Study, several laboratories reported method blank levels on the order of 25-100 ppq which further reduces the reliability and confidence of the method to detect "real" analyte response in environmental samples at the 50-100 ppq level. This is of primary concern in the context of the implied regulatory compliance requirements in the proposed permit. AIC suggests that one way to address the blank contamination problem is to set any results with this issue to PCB concentration of "zero."
- The use of the 1668C method will increase dischargers' testing costs considerably:
    - Dischargers that are currently subject to PCB testing requirements generally use the method that EPA has approved for that purpose, Method 608. That test can be conducted by many accredited laboratories around the country. Many dischargers are able to conduct these tests reliably in their own labs. Therefore, the costs for testing using 608 are reasonable, and even in those situations where frequent testing is required, the overall testing costs are manageable for most dischargers. Method 1668C, though, is another matter. There are only a few labs that are accredited to run this test – and, as documented in the ESI Report, there are questions about whether all of those labs are capable of running the test in a manner that will be acceptable for

[6] https://cdn.ymaws.com/idahocities.org/resource/resmgr/water/ipdes/puget_soundkeeper_v._stat___.pdf

[7] https://cdn.ymaws.com/idahocities.org/resource/resmgr/water/ipdes/esi1668Creport122110.pdf

regulatory compliance purposes. Dischargers will have to send their samples to a small number of labs; costs to have this testing done are already high, and would be expected to rise as more dischargers are forced to use these services.

- Costs to small municipalities and highway districts would be particularly difficult to bear. Dischargers are generally finding that new permits require more frequent monitoring, of more parameters, and EPA needs to consider those costs in combination with the testing costs that would result from approval of Method 1668C. Requiring use of that method would likely result in these dischargers, particularly smaller ones, having to expend on PCB testing more than what they spend on testing for all other parameters in their permits.

Based on these issues and considerations, AIC urges that EPA remove all PCB monitoring and pollutant load reduction requirements, including Method 1668C testing requirements, from the permit.

Language Not Directly Applicable to Stormwater Permits

The text in the Draft Permit includes language copied from wastewater permits that is not suitable or relevant to stormwater. AIC urges the EPA simplify Parts 7 so that only the language directly applicable to stormwater permits be included in the final permit. There is precedence for not including these provisions in MS4 permits. These sections are not included in Montana Phase 2 General permit, precisely because they do not apply to stormwater permits.

The permit language can be simplified to address stormwater responsibilities. This could be done by removing parts 7.6, 7.7, and 7.11. Section 2.8 in the fact sheet states that there are provisions in Part 7 that do not apply to MS4s. If the provisions do not apply to the discharge permit, they should be removed.

AIC cites as examples EPA's (2008) TMDLs to Stormwater Permits Handbook that clearly states the differences between stormwater and wastewater and the need for unique and distinct permit language.

Therefore, AIC requests that EPA remove parts 7.6, 7.7, and 7.11 in their entirety.

AIC proposes removing the last two bullets in section 7.9 in order for this section to be applicable to stormwater noncompliance reporting.

AIC also proposes alternative language for section 7.10 that could be interpreted in light of a stormwater treatment system could be replaced with text that applies to an MS4 and clarifies the actions required by the Permittee. The following text, adapted from the Eastern Washington Phase 2 general MS4 permit, is directly applicable to

stormwater and would be more suitable for this permit. AIC recommends the EPA use the following as a replacement for the language in the proposed Permit:

- The Permittees are prohibited from intentionally bypassing stormwater from all or any portion of a stormwater treatment BMP as long as the design capacity of the BMP is not exceeded unless the following conditions are met.
    - Bypass is: (1) unavoidable to prevent the loss of, personal injury, or severe property damage or (2) necessary to perform construction or maintenance-related activities essential to meet the requirements of the Clean Water Act (CWA); and
    - There are no feasible alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated stormwater, or maintenance during normal dry periods.