



Association of Idaho Cities
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January 10, 2019

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: Moscow Area Draft MS4 NPDES Permit #IDS028398

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 City of Moscow. 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 Permittee, 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,

A handwritten signature in black ink, appearing to read 'Jess Harrison'.

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
John Cardwell, IDEQ Lewiston Regional Office
AIC Stormwater Technical Task Force (Includes the City of Moscow)

Attachment



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General Comments

AIC appreciates the opportunity to comment on the proposed individual Phase 2 MS4 Permit (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 Versus General Permits

The EPA was previously working on a statewide General Permit that would cover all Phase 2 regulated 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 Moscow 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 carefully reconsider the decision to develop multiple individual permits rather than a statewide Phase 2 MS4 General Permit. There are many compelling reasons that support a statewide General Permit approach, including but not limited to the following:

- 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

If EPA believes that issuing individual permits reduces EPA's overall work load, AIC respectfully asserts that we intend to develop and submit detailed comments on each and every permit, individual or general; which will result in a possibly greater overall workload for EPA staff.

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 Permittee regarding a feasible time line for the schedule of program development and compliance elements (See Schedule on page 2 or 67, and numerous other places in the proposed Permit).
- Providing the affirmative statement that "If the Permittee comply with all the terms and conditions of this Permit, it is presumed that the Permittee is 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 Permittee provided by Idaho law and providing for progress reports as a compliance pathway where limited regulatory mechanisms are available (See Section 2.5.2).
- Recognizing that the Permittee does not have legal authority over some types of private property and revising Permit requirements accordingly (See Section 3.1.4).
- Construction site plans for projects disturbing ***one or more acres*** for Permittee review (See Section 3.3, emphasis added).
- Recognizing that the Permittee is 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 Permittee has 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).

Permit Effective Date

AIC supports the Permittee’s request that the Permit become effective no earlier than on October 1, 2019, the start of the Permittee’s 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 development and public review of Alternative Control Measures should also be revised based on a later effective date.

Given the financial burdens and affordability considerations, AIC supports EPA’s adoption of a time line that provides 4.5 years for implementation updates to the six (6) minimum control measures. 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 the re-application deadline.

Submission Deadlines

It is important that all dates throughout the Permit will be valid regardless of when the Permit becomes effective. Therefore, AIC supports how the final Permit will list one-time submission deadlines according to the number of days following the “effective date” of the final Permit. AIC also suggests the final Permit order the submittal schedule by submission deadline in a summary in order to help dischargers in reliably submitting all of the required reports.

Schedule of Compliance

Regulated small MS4 operators are required to obtain a NPDES Permit, implement a comprehensive stormwater management and monitoring program, and use BMPs to reduce pollutants of concern in stormwater discharges to the maximum extent practicable.

AIC appreciates EPA's commitment 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 should include an affirmative statement regarding that achievement of the MEP standard by inserting the following paragraph into Section 2.1, "Compliance with Water Quality Standards:"

To ensure that the Permittee's activities achieve timely compliance with applicable water quality standards, the Permittee 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 shall constitute the authorized schedule of compliance.

AIC supports 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 Permit:

- 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,
- 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

Requirements Associated with the Phase 2 Remand Rule

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

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)

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

submission of the Alternative Controls, Monitoring Assessment Plan, and Pollutant Reduction Activities should be required to be 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).

AIC and the Permittee suggest adding the following after the 3rd paragraph in Section 2.6.4 "Recognition of Alternative Control Measures:

EPA recognizes integrated planning as a way that municipalities can realize efficiencies in improving receiving water quality by sequencing investments so that the highest priority projects come first. This approach can also lead to more sustainable and comprehensive solutions, such as green infrastructure, that improve water quality and provide multiple benefits that enhance community vitality. Terms identifying this as a possibility, along with EPA's guidance document referenced, should be included to recognize integrated planning within the guidelines set forth by EPA.

Information Supporting Water Quality Trading

AIC recommends that the Permit affirmatively provide for the development and application of pollutant credit trading. AIC suggests referring to the 2016 State of Idaho Water Quality Trading Guidance.⁵ AIC perceives that this may require that addition of a new Section 2.7 and suggests the following:

Any water quality trading used to meet the conditions of this Permit shall be in compliance with EPA's Water Quality Trading Policy (dated January 13, 2003), any applicable EPA trading guidance, and the 2016 IDEQ Water Quality Pollutant Trading Guidance. If such provisions allow trading with pollution sources, water quality trading provisions may be included in a manner consistent with proposed Alternative Control Measures.

Information Supporting Integrated Planning

AIC recommends that the Permit affirmatively provide for EPA's 2012 Integrated Municipal Stormwater and Wastewater Planning Approach Framework.⁶ AIC perceives that this may require an addition of a new Section (i.e., 2.8).

Suggested language for Section 2.8, "Information Supporting Integrated Planning:"

⁵ <http://www.deq.idaho.gov/media/60179211/water-quality-trading-guidance-1016.pdf>

⁶ https://www3.epa.gov/npdes/pubs/integrated_planning_framework.pdf

Any integrated stormwater planning activities used to meet the conditions of this Permit shall be in compliance with EPA's Integrated Municipal Stormwater and Wastewater Planning Approach Framework (dated June 5, 2012) and any applicable EPA Integrated Planning guidance. If an integrated planning approach were to be implemented, it may be undertaken if information related to the integrated plan is submitted and approved by EPA and IDEQ.

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 Section 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 Sections 7.6, 7.7, and 7.11. Section 2.8 in the fact sheet states that there are provisions in Section 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 Sections 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 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 Permittee is 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

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

AIC asserts that PCB Test Method 1668C or Method 8082 should not be required in any Idaho NPDES Permit:

- The list of Pollutants of Concern includes PCBs for the SF Palouse River (Washington portion) (See Table 4.3) based on a Washington State 2007 TMDL for PCBs. These monitoring requirements have been included to ensure discharges from the Moscow Area MS4 are in compliance with law.
- 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. AIC understands that, because of the compliance implications, monitoring requirements for PCBs must use only EPA-approved test methods included in 40 CFR 136:
 - The legal basis for using only approved methods in the context of a regulatory process such as an NPDES Permit was recently affirmed by 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*).⁷
- AIC has identified a number of other complications regarding the use of the non-approved method 1668C for Idaho Permittee. 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 Permittee:
 - David Blye, an expert on analytical testing methods with Environmental Standards, Inc. ("ESI"), prepared a report in 2010⁸ (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.

⁷https://cdn.ymaws.com/idahocities.org/resource/resmgr/water/ipdes/puget_soundkeeper_v_stat.pdf

⁸<https://cdn.ymaws.com/idahocities.org/resource/resmgr/water/ipdes/esi1668report122110.pdf>

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 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 PCB monitoring and pollutant load reduction requirements, especially the use of Method 1668C testing requirements, from the final Permit.

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 - 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.