



Association of Idaho Cities
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January 10, 2019

Mr. John Cardwell
Idaho Department of Environmental Quality, Lewiston Regional Office
1118 F Street
Lewiston, ID 83501

Re: Draft Idaho 401 Certification of the November 2018 Moscow Area Draft MS4 Phase 2
NPDES Permit #IDSO28398

Dear Mr. Cardwell,

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 (Permittee). The Idaho Department of Environmental Quality (DEQ), Lewiston Regional Office has certified that the proposed Permit fulfills Idaho's 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,

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
Loren Moore, DEQ State 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 Idaho 401 Certification. AIC understands that the Permittee 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. AIC seeks to support the Permittee in these efforts because many of the Idaho MS4 Permittee is 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 Permits

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 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 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 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 2.5.4).
- Recognizing that some of the Permittee is 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 Permittee review (See Section 3.3, emphasis added).
- Recognizing that some of 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).

Further, AIC supports a number of aspects of the Idaho 401 certification and wishes to draw attention to a few in particular:

- The affirmative statement that “...if the Permittee complies with the terms and conditions imposed by the Permit along with the conditions set forth in this water quality certification, then there is **reasonable assurance** the discharge will comply with the applicable requirements of Sections 301,302,303,306, and 307 of the Clean Water Act, the Idaho Water Quality Standards (WQS) (IDAPA 58.01.02), and other appropriate water quality requirements of state law.” (page 1, emphasis added)
- The affirmative statement that “The implementation of a comprehensive stormwater management program which includes targeted pollutant reduction activities and pollutant assessment and monitoring in each impaired AU by the City of Moscow, is consistent with the Paradise Creek and South Fork Palouse River TMDLs.” (page 3)

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 and the DEQ’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, as presented to the EPA in our January 10, 2019 comment letter, AIC believes the final Permit should include an affirmative statement regarding the achievement of the MEP standard by inserting the following paragraph into Section 2.1, “Compliance with Water Quality Standards:”

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))

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.

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 that 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 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 constitutes the Idaho-authorized schedule of compliance.

AIC 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,
- 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

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>