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VIA ELECTRONIC AND FIRST CLASS MAIL

November 2, 2015

Newton Tedder
US EPA—Region 1
5 Post Office Square—Suite 100
Mail Code OEP06-4
Boston, MA 02109-3912

RE: Comments to September 1, 2015 Draft NH MS4 Permit

Dear Mr. Tedder:

These comments are submitted on behalf of the City of Rochester, NH ("Rochester") to the Environmental Protection Agency's ("EPA") Notice of a Re-Opening of the Public Comment Period on Select Sections of the Draft Small Municipal Separate Storm Sewer System (MS4) NPDES General Permit - New Hampshire (hereafter "NH MS4 Permit") published for public comment in the Federal Register on September 1, 2015, and found at http://www.epa/gov/region1/npdes/stormwater/MS4 2013 NH.html. Rochester appreciates the opportunity to submit these comments.

Introduction/Reservation of Rights

As an initial matter, Rochester notes that it previously submitted comments on the original draft of the NH MS4 Permit by letter dated August 14, 2013, in which it incorporated by reference comments submitted by the New Hampshire Stormwater Coalition ("Coalition"), to the February 12, 2013 draft NH MS4 Permit. Rochester incorporates those comments herein to the extent such comments may apply to the sections of the NH MS4 Permit published on September 1, 2015. Moreover, Rochester is also participating in the broader NH municipal coalition's comments submitted under cover letter from the law firm of Sheehan, Phinney, Bass + Green dated November 2, 2015. Rochester's comments set forth below are in addition to such comments.

Rochester notes that there are a number of issues in play, both in NH and nationally, that impact its ability to provide complete comments on the NH MS4 Permit. Such issues include, but are not necessarily limited to, the ongoing uncertainty regarding which 303(d) list will be in effect when the permit is finally issued as there are major differences between the approved 2012 list and the proposed Draft 2014 list, particularly for water bodies into which Rochester discharges. Most notably, the 2012 list removes or downgrades the status of the bacteria impaired waters

(currently listed in Appendix F and based on the 2010 list). The proposed 2014 list also delists many of the nitrogen impaired waters that were listed in the 2009 amendment to the 2008 list. Finally, the newly introduced term "water quality limited waterbodies," appears to allow other water bodies to be added during the permit term that are not currently listed. Neither the process nor the criteria used in determining whether other water bodies will be considered "water quality limited" is set out. These issues raise a great deal of concern and uncertainty as to future efforts and costs that will be required to comply with this draft permit.

In light of the uncertainties referenced above, as well as the ongoing uncertainty regarding the overall jurisdiction of the Clean Water Act and EPA's Waters of the US Rule, Rochester is limited in its ability to fully assess the impact of the NH MS4 Permit and the outstanding technical issues associated with the changes to the NH MS4 Permit only recently proposed. Rochester hereby reserves the right to submit additional/supplemental comments on all or any portions of the NH MS4 Permit to the extent necessary, applicable, and/or allowed by law.

Request for Hearing

Rochester hereby requests the EPA hold a public hearing on the September 1, 2015 draft changed sections of the NH MS4 Permit in accordance with 40 C.F.R. §124.12 and other applicable law, particularly given the significant degree of public interest in this permit and these changes.

Request for Incorporation of Comments into the Administrative Record

Rochester hereby requests that EPA incorporate its comments into the official administrative record for the issuance of the NH MS4 Permit.

Comments

For the reasons stated herein, Rochester objects to the issuance of the NH MS4 Permit as proposed. The proposed NH MS4 Permit will impose significant burdens and costs on both Rochester and its citizens, without adequate scientific or legal basis and without any reasonably clear evidence that such burdens/costs will in fact result in any meaningful improvement to the waters into which Rochester discharges and/or downstream waters, given, inter alia, the presumptions of impacts to such waters and the continued unregulated non-point discharges into such waters. Therefore, and as further set forth below, Rochester believes that the NH MS4 Permit is both technically and legally flawed and requests that EPA withdraw the draft or modify it consistent with these comments.

Rochester's below comments are organized as follows. General comments are provided first, followed by comments on specific permit sections and appendices.

I. General Comments:

- Costs – The costs to Rochester and other municipalities to implement the NH MS4 Permit requirements are considerable. Resources at the municipal level are scarce, and

there is currently no federal or state funding, of which Rochester is aware, to assist in compliance efforts. Compliance obligations should be balanced with the municipalities' ability to accomplish necessary stormwater discharge reductions while not experiencing economic hardship. In its Preamble to the Phase II SW regulations addressing storm water discharges from small MS4s, EPA stated "[o]ther factors [to be considered] may include MS4 size, climate, implementation schedules, **current ability to finance the program**, beneficial uses of receiving water, hydrology, geology, and **capacity to perform operation and maintenance**." (Highlighting added.) 64 FR 68722 at 68775-68776 (December 8, 1999). EPA should make modifications throughout the NH MS4 Permit to take into consideration affordability and practicality for implementation.

- Compliance Schedules – In addition to the factors to be considered as set forth above, EPA should also provide greater flexibility in the manner in which SW requirements are to be implemented, including an adaptive schedule for doing so. The State of New Hampshire now has in place a regulatory framework that allows for an extended timeline in the form of a Compliance Schedule that may be incorporated into an NPDES permit. A Compliance Schedule may extend the compliance deadlines beyond the 5-year term of a permit. Without incorporation of a Compliance Schedule, the draft MS4 Permit may place municipalities in immediate violation of some of the restrictive prohibitions in the permit. Extended Compliance Schedules that allow implementation to go beyond 5 years should be considered.

- Administrative Burden - The NH MS4 Permit imposes considerable administrative burdens on Rochester and other municipalities, including considerable reporting, sampling, investigative fieldwork and "public education" obligations, among others. Administrative reporting and tracking obligations should be consolidated and streamlined. EPA should develop outreach materials and modeling tools to share with municipalities to assist in meeting these obligations. Such considerations are consistent with EPA's stated approach cited in the preamble cited above.

- The NH MS4 Permit Represents a Significant Change in Applicable Standards - The Clean Water Act (§402(p)(3)(b)), as well as EPA's and NH's Stormwater ("SW") program (administered by EPA under 40 CFR §122.34) generally apply the "maximum extent practicable" ("MEP") standard to SW reduction requirements, which has long been the standard governing municipal responsibility for SW management. The NH MS4 Permit uses terms like "maximum extent feasible," "where feasible," and where "possible." It also requires implementation of strict controls "if they can be incorporated." (See, for example, §2.1.1(d), §2.3.6(a)(ii), §2.3.6(b)(ii), §2.3.6(f)(ii), and §2.3.6(c) of the NH MS4 Permit.) These phrases are undefined in the regulations and appear to impose obligations beyond "practicable;" such obligations are therefore contrary to law. The NH MS4 Permit should be revised to make clear that the MEP standard, through the implementation of Best Management Practices ("BMPs"), defines the municipal obligations under the NH MS4 Permit.

- Misapplication of Discharge Standards - The NH MS4 Permit further misapplies CWA standards when it refers to the "elimination" of discharges that "cause or contribute to an

exceedance of water quality standards ("WQS")" (see for example §2.1.1(d) and 2.2.2(d)) rather than imposing the use of BMPs under the MEP standard. As such, the use of this standard effectively eliminates the concept of BMPs in the SW program and effectively requires the actual elimination of certain discharges. In addition, it appears to remove any impracticability standard. This is well beyond any conceivable MEP standard. Moreover, the use of the phrase "cause or contribute" also shifts the standard beyond the SW BMP-based program and imposes more of an "effluent limitations" permit program that is applied unilaterally to all "water quality limited water bodies" regardless of other source contributions, pollutant transport mechanisms and the nature or priority of the impairment status. Finally, SW regulations require nothing beyond "minimum control measures" where a TMDL is not in place (e.g., 40 CFR §122.34(b)). The NH MS4 Permit goes well beyond this standard.

- The NH MS4 Permit Ignores Listing Categories - Virtually all of the 303(d) listings, and draft listings of waters into which Rochester discharges list the sources of impairment as "unknown" and as "low priority." The NH MS4 Permit ignores these limitations in the listings and treats all of the municipal sources as if stormwater clearly causes the impairment and all are equal/immediate priorities. The assumed contribution to impairment and the equal treatment of all discharges is contrary to both fact and law. The NH MS4 Permit must be revised to recognize the lack of information regarding certain impairments and the low priority of certain of the listings. It must also provide additional time for discharges such as Rochester's to comply in light of these listing categories.

- Lack of Flexibility – The CWA SW program is intended to provide flexibility to MS4s to design appropriate BMPs using MEP concepts in an iterative process. In its Preamble to the Phase II SW regulations addressing storm water discharges from small MS4s, EPA made very clear that the SW program is to be both flexible and iterative.

> "EPA has intentionally not provided a precise definition of MEP to allow **maximum flexibility** in MS4 permitting. MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis. EPA envisions that this evaluative process will consider such factors as conditions of receiving waters, specific local concerns, and other aspects included in a comprehensive watershed plan. Other factors may include MS4 size, climate, implementation schedules, **current ability to finance the program**, beneficial uses of receiving water, hydrology, geology, and **capacity to perform operation and maintenance**. The pollutant reductions that represent MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process. … EPA envisions application of the MEP standard as **an iterative process**. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. … EPA envisions that this process may take two to three permit terms." (Highlighting added.) 64 FR 68722 at 68775-68776 (December 8, 1999) (See also EPA's final rule on SW applications a 55 FR 47990, 48990-48991 (November 16, 1990) – "The language of CWA section

> 402(p)(3) contemplates that, because of the fundamentally different characteristics of many municipalities, municipalities will have permits tailored to meet particular geographical, hydrological, and climatic conditions.")

The NH MS4 Permit removes all flexibility and the iterative nature of SW permits and imposes a "one size fits all" approach, contrary to law.

- Use of Outdated Information - The NH MS4 Permit assumes impairments and the need for stringent controls without consideration of current data or recently implemented remediation programs. By way of example, the listing of bacteria impaired waters in Appendix F is out of date. Moreover much of the data relied on to initially list these water bodies is quite old (more than 10 years old in some cases) and does not meet the water quality objectives of NH's most recent CALM. Finally, it fails to take into account actual work to reduce discharges that has already been completed in certain waters and has been recognized by the NH Bacteria TMDL Report (e.g., Axe Handle Brook-Howard Brook). EPA's use of this outdated information significantly undermines the assumptions on which the NH MS4 Permit is based.

- Inappropriately Allows other Water Bodies to be Considered "Water Quality Limited" Outside of the NHDES 303(d)/CALM Assessment Process Creating Uncertain Future Changing Conditions - The NH MS4 Permit incorporates additional requirements to address the listing of additional "impaired waters" or the addition of "water quality limited" waters during the term of the permit. (See for example §2.2.2(a)(i)(2), §2.2.2(b)(i)(2) and §2.2.2(c), (d) and (e).) Such language would potentially, and automatically, require significant changes to a permit during the pendency of the permit term. This is inconsistent with the manner in which most NPDES permits are implemented. While a typical NPDES permit may be modified based on changed conditions or changed regulations, such modifications require specific actions that may be appealable. (See for example 40 C.F.R. §122.62.) No such process is required here. To the contrary, the NH MS4 Permit provides no process to request removal of unnecessary controls should waters be delisted, determined no longer to be impaired, or determined to have improved during the term of the permit. The NH MS4 Permit should contain language making it clear that permit requirements will not automatically change during the course of the permit term, and that changes may be implemented through the process of permit amendment, consistent with law.

II. Section specific comments:

- §2.1.1.c – This section of the NH MS4 Permit uses the term "water quality limited water body" (WQLWB) for the first time and is not clearly defined. Its use is repeated a number of times thereafter. WQLWB is a term that is not defined in the CWA or applicable regulations. It is however defined in §2.2.2 of the NH MS4 Permit more broadly than the terms "water quality limited segment" which is specifically defined and has specific regulatory significance (See 40 C.F.R. §130.2). Its use could impose requirements on waters not yet determined to be impaired based on limited data, or even waters that have been or may be delisted. Moreover, its use could potentially allow EPA to disregard the settlement agreement Rochester entered into with NH, dated April 2014

that was based on the "Joint Peer Report of Peer Review Panel" commissioned by Coalition members and NHDES, dated February 13, 2014, which found little support for the assumption that eel grass loss in the Great Bay is directly related to nutrient inputs.

- §2.1.1.d – requires that certain discharges be "eliminated" w/in 60 days – a potentially impossible/illegal standard. There is also no consideration of other discharges that may be causing most or even all of the problem. Elimination of such MS4 discharges could be required even for fractional contributions to alleged impairments and even where no contribution is proven. Such "elimination" goes far beyond the MEP standard, and the minimum controls, that should apply to such discharges. Its application in the NH MS4 Permit is therefore contrary to law.

- The change of wording in §2.2.1(d), (e), and (f) appears, without explanation, to exclude non-traditional and transportation MS4s, where the wording used in §2.2.2 (a) specifically includes these other MS4 permittees. The wording in all sections should be consistent to avoid confusion. Such inconsistency may have the effect of imposing disparate requirements on other MS4s, while ignoring the contribution of such excluded MS4s.

- §2.2.2.a/b – refers to WQLWB for nitrogen/phosphorus. Such reference clearly attempts to impose requirements on waters beyond those listed on the 303(d) list. More importantly, this seems to assume actual impairment. Peer reviewers who assessed such potential listing disputed such assumptions and there is no proof, Rochester contends, of such impairment in most cases. NHDES' Draft 2014 303(d) list recognizes the uncertainties raised by the peer review and proposes delisting or downgrading the water quality status to Insufficient Information- Not Potentially Supporting (3-PNS), which is considerably different from a Category 5 listing of an impaired water body.

- §2.2.2.a.i.2 – requires reductions if the permittee "becomes aware" during the permit term that the water into which it discharges is impaired (or presumably is a WQLWB). This changes permitting requirements mid-permit, which is contrary to law. The term "becomes aware" is not defined. The impaired waters status should be based on the §303(d) listing assessment process, which is presumably based on certain data quality assurance and control standards. See also general comment above.

- §2.2.2.c – there is confusion over bacteria/pathogen requirements. It is unclear how the requirements for 2.2.2.c (water quality limited water bodies) dovetails with the 2.2.1 requirements for water bodies with approved TMDL's on page 3 of the permit. One cannot reasonably determine what measures may be needed for stormwater since the NH Statewide Bacteria TMDL Report did not provide estimates of bacteria contributions by source(s) nor did it provide a breakout of target allocations for various sources. Moreover, the TMDL Report did not account for site specific sources such as time of travel, flow conditions or dilution in the area streams, which are major factors in developing TMDL allocations consistent with EPA guidance. Any such requirements should be clarified and unified. Also, since the recently approved 2012 NHDES 303(d) list delisted many of the various bacteria impaired waters located in Rochester, the list of

bacteria impaired waters included in Appendix F (currently based on the 2010 list) is out of date and needs to be corrected.

- §2.3.6 – states the objective for new development is to "mirror" pre-development hydrology and "improve hydrology and reduce SW" for re-developed sites. Rochester believes such standards are ambiguous and may not be achievable at any reasonable cost. Moreover, such a standard is clearly beyond MEP and is therefore unlawful.

- §2.3.6.a.ii (a) requires Low Impact Development ("LID") to the maximum extent "feasible." Rochester believes such a requirement is not reasonably achievable. Moreover, such a standard is clearly beyond the MEP standard and beyond applicable law.

- §2.3.6.a.ii (b) contains ambiguous requirements for salt/snow storage areas on new/re-development sites. By way of example, it requires "no untreated discharge" and fails to define "treatment of stormwater." Such requirements may not be reasonably achievable and are clearly beyond MEP and applicable law.

- §2.3.6.a.ii(d) applies NH Alteration of Terrain (AoT) regulations (NH Code of Administrative Rules § Env-Wq 1500) to all new and redeveloped sites, well beyond the current regulatory threshold that requires only sites disturbing more than 50,000 sf or 100,000 sf of area, depending on location, to comply with these regulations. The overly broad statement of the application of these regulations is therefore contrary to law.

- §2.3.6.a.ii(e) – imposes a requirement to "retain" or "treat" all runoff regardless of effect. Such requirement is ambiguous and well beyond the scope of the SW MEP standard and applicable law.

- §2.3.6.a.ii(f) – the language of this section is confusing in distinguishing how the proposed 10 percent threshold applies to redevelopment and road widening, and appears "arbitrary and capricious" as no basis for these thresholds was provided. Presumably, as written, any road widening (unclear if this includes repaving work) that increases the road width by 10 percent or any redevelopment, involving more than 1 acre, that increases the impervious area by 10 percent or more, would be required to fully meet all of the AoT stormwater management requirements. This standard is well beyond what is required by the AoT regulations and is inconsistent with the recommended guidelines included in the DES and Southeast Watershed Alliance Model Stormwater Management Ordinance/ Regulations, which relies on MEP principles for redevelopment and has been adopted by many NH communities. It also imposes a requirement to "improve existing conditions" for virtually all redevelopment and all roadway widening where the impervious area and road width increases are less than 10 percent. The imposed standard, "improve SW where feasible" is ambiguous and undefined. These provisions are overly broad and may capture many re-paving projects. Such provisions are beyond the scope of MEP and beyond applicable law.

- §2.3.6.c – requires extensive reports on street design and incorporates LID "if it can be" incorporated. Such requirements are ambiguous, beyond the scope of the SW reduction requirements in applicable regulations and beyond MEP standards and applicable law.

- §2.3.6.d – requires the conduct of broad feasibility studies to implement all green infrastructure possibilities. Such requirements are unlikely to be reasonably achievable and clearly beyond MEP and applicable law.

- §2.3.6.e – requires an extensive inventory of all permittee-owned properties that "could be" retrofitted with BMPs. This requirement contains ambiguous terminology (e.g., "could be") and is clearly beyond the scope of MEP. Moreover, it removes all flexibility afforded to the municipality to determine the most cost-effective alternatives. Modifications to other municipal activities and practices such as fertilizer use, sewer extensions and wastewater treatment could provide equal or greater pollutant load reductions. Finally, such a requirement is unlikely to be reasonably achievable and beyond applicable law.

III. Appendix H comments:

- Appendix H/§I/II creates a number of new housekeeping requirements for municipalities with respect to nitrogen and phosphorus. Such requirements unlawfully simply *assume* such sources are causing impairment. By way of example, Section I.1.a.i requires use of slow-release fertilizers, proper management of grass cuttings and leaf litter (including a prohibition on blowing organic waste onto impervious surfaces) and increased sweeping of all streets/roads in a municipality twice per year. Such requirements create significant burdens of municipalities (e.g., not all roads are paved and therefore able to be swept), and are unable to be reasonably achieved. Moreover, such requirements ignore the fact that a municipality may determine that there are other more effective and cost effective solutions and they remove flexibility on municipalities contrary to law.

- §I.1.b.i – requires a nitrogen source report that may not be reasonably achievable and is based on unsubstantiated assumptions regarding nitrogen impacts to the Great Bay Estuary.

- §I.1.1.c – requires the permittee to evaluate all permittee-owned properties for structural BMP retrofit opportunities within 5 years. This is highly prescriptive and may not be necessary if other nitrogen control strategies can be demonstrated to show similar reductions through other structural or non-structural measures, including offsets provided by additional treatment for redevelopment projects. Requiring that only stormwater retrofit opportunities be considered is likely to add unnecessary costs, be infeasible and is beyond MEP and applicable law.

- Under the NH MS4 Permit, the only way to "waive" out of many of the requirements mentioned above is through extensive and expensive sampling to

show - to EPA's satisfaction - "no measurable amount of nitrogen/phosphorus" in discharges. (See for example §I.2.) Such a requirement unlawfully shifts the burden to the permittee to comply with an impossible (e.g., "no measurable amount") standard. Such requirements are well beyond MEP and are contrary to law.

- Appendix H/§III - §3.i.2 requires the designation of any catchment discharging to a water that has been determined to be impaired for bacteria/pathogens as a problem/high priority that requires significant upgrades. These provisions impose arbitrary and ambiguous requirements in that they are undefined and assume such catchments contribute to such impairment. Municipalities should be provided flexibility to utilize their local knowledge and knowledge of their own systems to undertake the most cost effective approaches to reductions of such discharges. In addition, the only mechanism to waive out such requirements is to prove – to EPA's satisfaction – that there is no measurable discharge of such pollutant. Particularly in the case of bacteria/pathogens, such standard is impossible, and therefore arbitrary and capricious. One visiting goose would cause an inability to waive out of these requirements. Moreover, there is a confused overlap between the requirements of Appendix F and Appendix H. One applies to waters with TMDLs, while the other does not even require listing. These requirements are well beyond MEP and applicable law and ignore the concepts of BMP and flexibility. This requirement also ignores recent data and implemented improvements in these waters.

IV. Appendix F comments:

- Appendix F recommends implementation on a watershed basis, suggesting that more specific watershed plans be developed, where appropriate, to focus and prioritize appropriate restoration measures. Although this language allows greater flexibility in allocating resources and selecting effective measures, which we applaud, it is inconsistent with municipal-specific requirements set forth throughout the permit.

- Appendix F requires the implementation of enhanced BMPs. By way of example, one significant requirement is the illicit discharge section (A.1.i.2), which requires the designation of all catchments draining to any waterbody impaired for bacteria or pathogens as either "Problem Catchments" or "High Priority" and the implementation of a strident, prescribed Illicit Discharge Detection and Elimination ("IDDE") program. This "one-size-fits-all" approach assumes that SW is the primary source and ignores other significant factors involved with bacteria source contributions. This could impose considerable and unnecessary administrative and financial burdens for municipalities to meet the prescribed completion schedule for IDDE investigations without considering other potential source contributions. Such requirements may not be feasible and are beyond MEP and applicable law.

- Unlike Appendix H, Appendix F does not provide a mechanism to demonstrate that the MS4 discharges are not impacting receiving waters. This is particularly important for

bacteria impaired waters since the statewide bacteria TMDL report did not provide any estimates of source contribution. The NH MS4 permit assumes that SW is a major source of bacteria, which is likely *not* to be the case in many areas. Reasonable provisions to "test out" should be incorporated.

- The list of bacteria impaired water bodies needs to be corrected as it based on the 2010 303(d) list and the recently approved 2012 303(d) list delisted many of these water bodies due to a lack of sufficient information, particularly for water bodies located in Rochester.

Rochester appreciates the opportunity to provide these comments and looks forward to further revisions of the NH MS4 Permit consistent with these comments. Please call me at 603-332-4096 if you have any questions or if additional detail would be helpful.

Sincerely,

John B. Storer, P.E.
Director of Public Works

cc: Daniel Fiztpatrick, City Manager
Terence O'Rourke, City Attorney
Michael Bezanson, City Engineer
Attorney Steve Miano
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