



Feb 23, 2022

*Submitted via electronic mail to:* [DEQWPBPublicComments@mt.gov](mailto:DEQWPBPublicComments@mt.gov)

Montana DEQ  
Water Quality Division  
Water Protection Bureau  
PO Box 200901  
Helena, MT 59620

Re: Comments on PN-MT-22-02, Proposed MSGP for Stormwater Discharges  
Associated with Industrial Activity

Dear DEQ:

Upper Missouri Waterkeeper submits this comment letter on its and its members' behalf concerning the reissuance of the proposed MSGP for Stormwater Discharges Associated with Industrial Activity, as noticed in Public Notice No. MT-22-02. Public comments are due by 11:59pm on February 24, 2022.

Upper Missouri Waterkeeper is a Montana not-for-profit clean water advocacy organization. Waterkeeper uses law, science, and economics to implement strategies that protect and restore fishable, swimmable, drinkable water and community health throughout the 25,000 sq. miles of Montana's Upper Missouri River Basin. Water quality issues are central to that mission, and Waterkeeper is engaged in several efforts to address stormwater pollution in Montana.

These comments address the following aspects of the proposed MPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (hereinafter the 'proposed permit' or 'proposed MSGP'): (I) Public Involvement & Access to Information; (II) Technology-Based Effluent Limits; (III) Water Quality Based Effluent Limits; (IV) Monitoring & Reporting Requirements.

#### **I. Public Involvement and Public Access to Information**

The proposed permit impermissibly limits meaningful public participation. We are glad to see that DEQ is moving to require electronic filing of the NOI in the proposed MSGP. But by not requiring that the SWPPP also be made available electronically, the proposed MSGP impermissibly curtails the public's ability to inform itself of the risks of activities or enforce the Clean Water Act. Public access to information about discharges that may affect waters that citizens use for fishing, swimming, drinking, or aesthetic purposes are crucial to, and a fundamental tenant of, effective environmental protection. Citizen action is a "proven enforcement tool" that "Congress intended [to be used...] to both spur and supplement

government enforcement actions.”<sup>1</sup> In particular, the proposed MSGP’s failure to provide an opportunity for public comment on each of the facility’s Storm Water Pollution Prevention Plan (SWPPP) along with the Notice of Intent (NOI) contravenes the CWA’s unambiguous requirements that “[a] copy of each permit application and each permit issued [under section 402] shall be available to the public,” 33 U.S.C. § 1342(j). Further, all monitoring data, reports, and plans required to be filed with DEQ pursuant to the permit and/or SWPPP should be posted electronically for the public to access.

#### **A. Stormwater Pollution Prevention Plans Should be Online and Publicly Accessible**

The proposed permit should require concurrent public availability and opportunity for comment on the NOI and SWPPP, both of which should be posted electronically on DEQ’s website. Because the proposed permit fails to ensure an opportunity for the public to review and comment on SWPPPs, citizens may be precluded from legally challenging the sufficiency of SWPPPs. Instead, citizens will be limited to enforcing the procedural requirements of developing a SWPPP and having it on file.

Under Section 1.2.1 ‘New Authorizations’ a facility or operator seeking coverage under the MSGP must submit a complete application package that includes a SWPPP. The applicant’s compliance with this prerequisite to the filing of its NOI should be clearly demonstrated by requiring the applicant to post online an electronic copy of the SWPPP that is has developed and implemented. The inclusion of general information from the applicant’s SWPPP in the NOI does not suffice to demonstrate that the applicant has in fact developed and implemented a SWPPP that complies with requirements of the proposed MSGP. Requiring the applicant to provide a link to an online copy of its SWPPP would allow both DEQ and the public to examine the SWPPP and make a determination as to whether the SWPPP complies with the requirements of the proposed MSGP and the CWA. Only those MSGP applicants who request and receive an exclusion for the purposes of fully enclosed facilities should be excused from a requirement that their SWPPPs be publicly available online.

As a minimum acceptable alternative, applicants who do not provide a URL linking to an electronic copy of their SWPPP must be required to produce to members of the public, upon request, a copy of the SWPPP and such applicants should be subject to a sixty-day waiting period before their discharges are covered under the MSGP in order to allow time for DEQ and the public to obtain and review a copy of the SWPPP.

We note that presently Section 3.3 ‘SWPPP Availability’ the permittee is required to retain a copy of the SWPPP on premises, and DEQ “may provide access to portions of the SWPPP to a member of the public upon request.” DEQ may not qualify the public’s fundamental right to review and provide comments upon SWPPPs. Either section 3.3’s discretionary language must be changed and DEQ itself provide direct access to SWPPPs, ideally through posting online, or the revisions suggested above regarding SWPPP availability should be made. The public cannot be made to perform a tedious and indefinitely drawn-out formal records request for documents to which it is squarely entitled as part of the MPDES permit process and mandatory public participation and citizen enforcement provisions of the federal CWA.

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<sup>1</sup> CWA Amendments of 1985, Senate Environment and Public Works Comm., S.Rep. No. 50, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 28 (1985).

This comment regarding the need for the applicant's SWPPP to be online and readily available relates to several sections of the proposed MSGP and NOI, as follows:

- Proposed MSGP Section 3.2 'Modifications and Updates' – *The permittee must modify the SWPPP whenever necessary to address any of the triggering conditions for corrective action in Part 2.7. Changes to the SWPPP document must be made in accordance with the corrective action deadlines in Part 2.7.3, and must be signed and dated by the SWPPP Administrator or the permit signatory (Part 4.18).*
  - We note that citizen enforcers cannot make the conclusion of a need for corrective action without having had the opportunity to review the SWPPP, which requires that the SWPPP be publicly available online.
  - We also object to the following Section 3.2 language as implicating both public participation and citizen enforcement: *The SWPPP must be maintained and kept up to date to reflect current site conditions. SWPPP modifications or updates are not required to be submitted to the Department unless specifically requested by the Department.*
    - Modifications or updates must be submitted to the Dept and made immediately available to the public. Without the public, much less DEQ, understanding modifications of terms of the SWPPP, enforcement of applicable terms are meaningless. DEQ should strike this offending language from the permit.
- For both new applications and renewals under the MSGP we note that it will be more efficient and produce better outcomes if a SWPPP is publicly available online at the outset. As requested above, in the alternative DEQ should require a 60-day waiting period before coverage under the permit becomes effective for those facilities that fail to provide an online URL SWPPP in their NOI to allow sufficient time for interested parties to obtain and review the facility's SWPPP.
- We further note that the list of additional information to be included in the NOI should include an electronic copy of the facility's engineered site plan, including at a minimum elements of Section 3.1.5 (site map) and Section 3.1.6 (areas with potential pollutants).

### **B. All Monitoring Data, Reports, and Plans Should be Online and Publicly Accessible**

The proposed permit's failure to ensure public availability of monitoring data further curtails public participation and citizen enforcement. All monitoring data, reports and plans required to be filed with DEQ pursuant to the permit and/or SWPPP should be posted electronically for public access. This comment regarding the need for the applicant's monitoring data, reports and plans to be online and readily available to DEQ and the public relates to several sections of the proposed MSGP:

- Section 2.7 Corrective Actions
  - We note that permittees should be required to post corrective action documentation online and such documentation should be readily available to DEQ and the public in order to demonstrate that corrective action has been taken and facilitate a review of the adequacy of the corrective action.
- Section 2.9.3 Annual Report
  - We note that each facility's annual report should be publicly available online.
- Section 2.6.2 Benchmark Monitoring and/or Section 2.9.1 DMRs
  - We note that benchmark monitoring sample results and/or DMRs should be publicly available online.

## II. Technology Based Effluent Limits

Although EPA and to a lesser extent DEQ have been issuing MSGP for industrial stormwater since 1992, neither have promulgated numeric effluent limitation guidelines for stormwater discharged from the industries covered by this permit, as required by Section 301 of the CWA. DEQ has set effluent limits under this permit on the basis of its best professional judgment. But the non-numeric effluent limits selected for the proposed MSGP are essentially the same lacking requirements that have failed to adequately control discharges of pollution from industrial facilities under previous iterations. The MSGP has not been shown to adequately control pollution discharges from industrial facilities. Routine exceedances of benchmarks, non-compliance with non-numeric housekeeping or inadequate corrective requirements are some of the continued issues. DEQ should use the multitude of data points of pollution concentrations in industrial stormwater available to the agency from its own databases to establish numeric effluent limits for different industrial stormwater discharges. Doing so is both feasible and essential to carrying out duties under the CWA.

### **A. The Draft MSGP Relies Almost Entirely on Non-Numeric Effluent Limits and Self-Evaluation By Permittees. DEQ and EPA Have Considerable Evidence That This Permitting Approach is Ineffective and Deeply Flawed, and Fails to Comply with the Clean Water Act**

The technology based effluent limits included in this permit, as in previous iterations, are almost entirely non-numeric and rely heavily on the permittee to select control measures for itself. The MSGP also leaves it to permittees to determine for themselves whether those control measures are in fact meeting the permit's effluent limits. Without numeric limits, this is a task that is challenging for even a neutral observer. DEQ provides benchmarks and indicators that a permittee may use to determine whether it is meeting the BAT standard, but exceedances are specifically noted in the permit as not constituting violations.

The MSGP requires only that permittees review their performance if their discharges exceed benchmarks, and corrective action is only triggered by the rolling average of 4 most recent quarterly benchmark monitoring values. In essence, a potential year's worth of polluting activities before any corrective action would even be considered. The MSGP leaves permittees free to decide for themselves that, notwithstanding triggering the rolling quarterly average benchmark or 7 narrow conditions under Sections 2.7.1, 2.7.2, that they are nonetheless in compliance with the BAT/BCT standard as applicable and need not take any further action.

There is substantial evidence that this permitting approach – self evaluation by permittees using non-numeric effluent limits as the metrics of performance – is ineffective. Has DEQ performed an audit of its monitoring files of all entities covered by the MSGP to assess, cumulatively, whether in fact routing benchmark exceedances occur while annual reports are submitted stating they have reviewed their SWPPP and concluded no modifications are required? How many facilities state in their reports that they are taking corrective action, yet continue to exceed benchmarks? In commentors experience, it is relatively rare to find a permittee that has reported past exceedances but corrected them on its own. Typically, improvements only occur with the involvement of the regulator or citizen enforcement.

The National Research Council produced an incredibly critical review of the EPA's industrial stormwater general permit, which contains similar provisions to DEQ's. The 2009

report entitled “Urban Stormwater Management in the United States”<sup>2</sup> can be summarized as regards industrial stormwater briefly: industrial facilities are highly concentrated sources of pollution, especially toxic metals and organic toxics, and permitting programs are not currently able to adequately monitor pollution in stormwater associated with industrial activity, let alone able to ensure that this source of pollution is adequately controlled.<sup>3</sup> Among the many problems identified by the National Research Council with the industrial stormwater MSGP, the following are most glaring:

- Industrial facilities are significant sources of toxicants: heavy metals and organic toxics. For example, in sampling drawn from EPA’s MS4 monitoring and input into the National Stormwater Quality Database, the absolute highest metal concentrations in discharges were observed in industrial areas, and the median metal concentrations in industrial areas “were about three times the median concentrations observed in open-space and residential areas.”<sup>4</sup>
- General permits need clear and enforceable terms because agencies do not have adequate resources for sophisticated site-specific oversight. “Federal and state NPDES permitting authorities do not presently have, and can never reasonably expect to have, sufficient personnel to inspect and enforce stormwater regulations on more than 100,000 discrete point source facilities discharging stormwater.”<sup>5</sup> Therefore, “stormwater discharges would ideally be regulated through . . . strict limits on both the quantity and quality of stormwater runoff into surface waters, and rigorous monitoring of adjacent waterbodies to ensure that they are not degraded by stormwater discharges.”<sup>6</sup>
- The NRC concluded that the industrial stormwater monitoring program suffers “from (1) a paucity of data, (2) inconsistent sampling techniques, (3) a lack of analyses of available data and guidance on how permittees should be using the data to improve stormwater management decisions, and (4) requirements that are difficult to relate to the compliance of individual dischargers.”<sup>7</sup>
- The effluent limits in the MSGP “have not been updated to reflect the best available technology relevant to pollutants of most concern.”<sup>8</sup>
- “There is limited information available on the effectiveness and longevity of many SCMs [structural control measures], thereby contributing to uncertainty in their performance.”<sup>9</sup> Agency reliance on SCMs without the backstop of numeric effluent limits is questionable.
- “The lack of rigorous end-of-pipe monitoring, coupled with EPA’s failure to use flow or alternative measures for regulating stormwater, make it difficult for EPA to develop enforceable requirements for stormwater dischargers. Radical changes to the current regulatory program[] appear necessary to provide meaningful regulation of stormwater dischargers in the future.”<sup>10</sup>

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<sup>2</sup> National Research Council, *Urban Stormwater Management in the United States*, at vii, National Academies Press (2009) (“USM”).

<sup>3</sup> USM at 329-332.

<sup>4</sup> USM at 183.

<sup>5</sup> USM at 11.

<sup>6</sup> USM at 3.

<sup>7</sup> USM at 329.

<sup>8</sup> USM at 282.

<sup>9</sup> USM at 1-2.

<sup>10</sup> USM at 10.

## B. DEQ Should Include Numeric Effluent Limitations In This MSGP

Numeric limits are required in a NPDES permit where practical. EPA has always understood that the CWA expressed a Congressional preference for clear, uniform, national and numeric effluent limits where feasible. In fact, in the early CWA case of *NRDC v. Costle*, EPA took the position that if it could not set numeric effluent limits in NPDES permits, then it could not set effluent limits at all.<sup>11</sup>

Section 304(b) of the CWA requires that agencies set effluent limits that “identify, *in terms of amounts* of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable.” And Section 304€ makes clear that, at least in the case of toxic pollutants, numeric effluent limits are the preferred control strategy while best management practices and other control measures are intended only as supplementary limits on pollution.

Following the text of the Act, EPA’s regulations state that control measures (such as best management practices) are to be included in NPDES permits when “numeric effluent limitations are infeasible; or the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes of the CWA.” 40 CFR § 122.44(k)(3)-(4). If it is feasible to develop numeric effluent limitations then DEQ must do so and include these numeric limits in the MSGP.

DEQ’s Fact Sheet implicitly claims that development of numeric effluent limitations was infeasible. *See* Part VII Effluent Limits, Section A. This rationale has worn thin. DEQ, and its partner EPA, have allegedly been gathering representative stormwater samples and considering how to deal with the inherent variability of stormwater discharges in setting numeric effluent limits since at least 1985. Now, in 2022, it is time for DEQ to take the data it has amassed and use it to establish numeric effluent limits in this MSGP.

DEQ has access to all the data that it needs to set numeric effluent limits. States that require stormwater sampling as a condition of their MSGP like Montana maintain this data in electronic form and provide sampling results to EPA for inclusion in national databases. Since the National Research Council issued its report in 2008, we note that both DEQ and EPA have integrated enforcement and water pollution monitoring databases into a unified framework. With its expertise and hundreds, if not thousands, of observations of stormwater pollutant concentrations from industrial sites DEQ is well-positioned to establish numeric effluent limitations for industrial sectors under this MSGP. We note as but one example that DEQ can use both its internal database and EPA’s ECHO database to access thousands of individual parameters from at least 381 permittees under DEQ’s MSGP.

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<sup>11</sup> “EPA’s implicit premise is that . . . it is still necessary to articulate any limitation in terms of a numerical effluent standard.” *NRDC v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977). The D.C. Circuit also noted that Congress expected EPA to “develop[] guidelines and corresponding uniform numeric effluent limitations” by certain dates. *Id.* at 1379 (emphasis added).

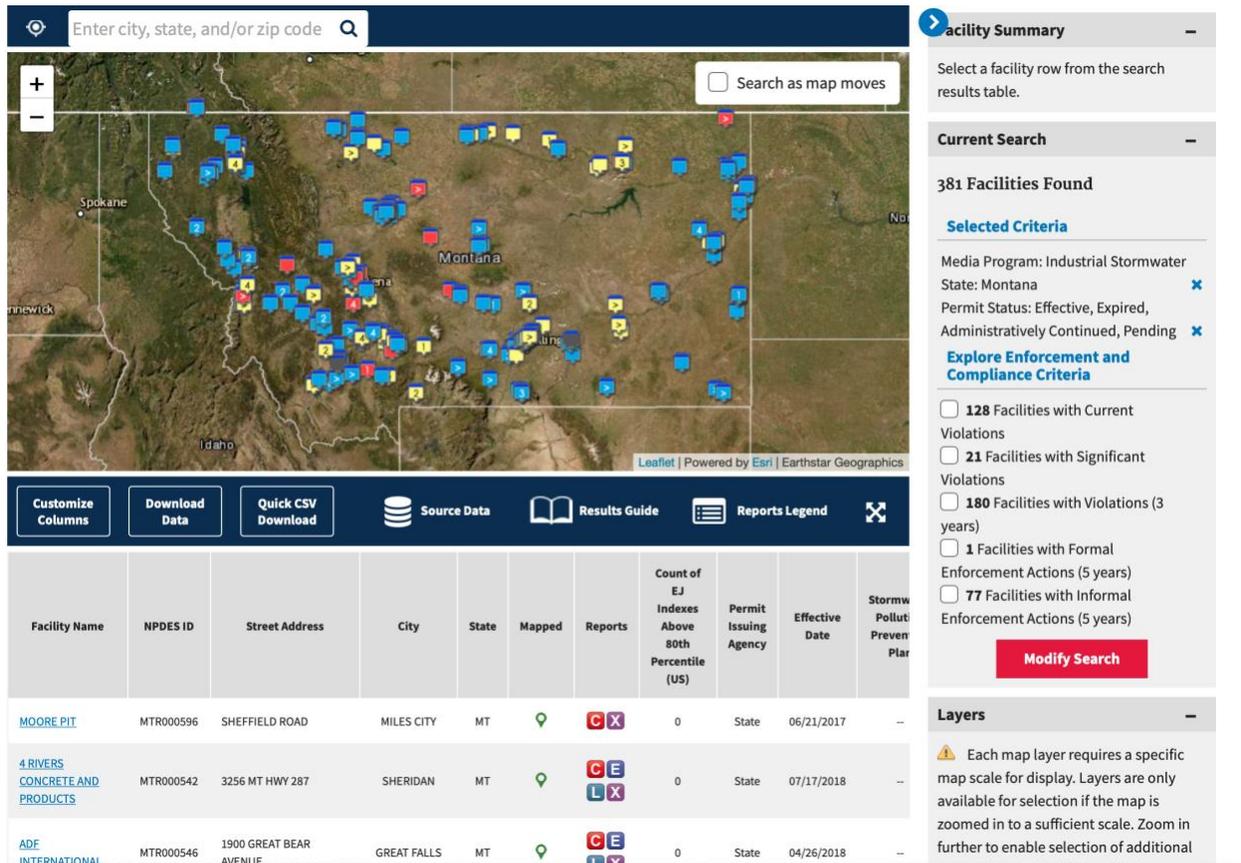


Photo 1: Screenshot of EPA’s ECHO Database mapping industrial stormwater permittees and violations across the state of Montana.

If DEQ wishes, it can draw on hundreds if not thousands of samples taken from scrap recyclers, cement plants, marinas, asphalt pavement plants, and every other industrial sector covered under the MSGP.

In short, data concerning stormwater permit efficacy is readily available, but DEQ has not performed the work needed to translate this data into the basis for numeric effluent limitations. Since the NRC’s 2009 report DEQ has modernized its data collection systems and is now in a position to finalize this MSGP by completing the analysis, deriving average effluent concentrations, and establishing the more considerate regulations that the NRC calls for – i.e., numeric limits. DEQ’s failure to consider all the stormwater sampling data it can access before issuing the draft MSGP, and failure to use this larger pool of information to generate robust and numeric effluent limitations, are both arbitrary, capricious, an abuse of discretion, and not in accordance with DEQ’s duty under the CWA to set numeric effluent limitations unless infeasible.

To the extent DEQ remains concerned about how variability in stormwater samples affects numeric effluent limits, those concerns can be addressed and resolved. The NRC explained to EPA what it, and state agencies, must specifically do better monitor individual industries, control variability, and determine effluent limits for industrial categories.<sup>12</sup> This includes more frequent sampling at high-risk industrial sites and better sample collection

<sup>12</sup> USM at 257, 280-300, 329-333.

methods, including the use of flow-weighted composites or other composite samples.<sup>13</sup> Any reservations about some facilities finding it difficult to meet numeric effluent limits are not warranted. BAT standards are designed to require the level of performance achieved by the best performers in an industry, not to be met by all of the facilities in an industry (or even by all ‘well run’ facilities.) In addition, DEQ can use statistical cut-offs (i.e. removal of outliers) to set numeric limits, DEQ has the ability to subdivide the industrial facilities covered by this permit into subcategories to facilitate establishment of numeric limits, and DEQ also has authority to issue fundamentally different factors variances to facilities who can establish that their circumstances are so unique that they legitimately cannot meet a numeric effluent limit.<sup>14</sup> Or DEQ could allow such dischargers to seek coverage under individual permits. At the very least, DEQ could convert its existing benchmarks to effluent limitations.

### **C. DEQ Must Carry Out a BAT Analysis and Establish TBELs Based on the Results**

Regardless of whether EPA adopts national effluent limitations and guidelines, industrial stormwater discharges must be subject to effluent limitations, expressed in MPDES permits, that require a reduction in pollution based on the degree of control achievable through use of the Best Available Technology Economically Achievable (BAT), including, where feasible, the complete elimination of pollutant discharge.<sup>15</sup> In the absence of national guidelines, DEQ must set effluent limits in the permit on the basis of its best professional judgment.<sup>16</sup> These BAT effluent limits must be expressed clearly in the MPDES permit itself.<sup>17</sup> And the agency must consider the same statutory factors for developing BAT effluent limits in this single permit that EPA would apply in setting national effluent limits and guidelines.<sup>18</sup>

In seeking out the best available technology that is economically achievable, EPA must consider the best state of the art practices in the industry and beyond. “Congress intended these [BAT] limitations to be based on the performance of the single best-performing plant in an industrial field.”<sup>19</sup> The average performer within a category of dischargers, even a “well-run” facility, is not representative of BAT. “[R]ather than establishing the range of levels in reference

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<sup>13</sup> *Id.*

<sup>14</sup> See 33 U.S.C. § 1311(n), 40 C.F.R. § 125.30-32 (establishing procedures for “fundamentally different factors” variances from otherwise applicable effluent limitations).

<sup>15</sup> See 33 U.S.C. §§ 1311(b)(2)(A) (“such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds . . . that such elimination is technologically and economically achievable for category or class of point sources”). Since the record shows that nearly all industrial stormwater discharges contain at least some toxic or non-conventional pollutants, and since the BAT standard is more stringent than the BCT standard, this discussion is framed exclusively in terms of BAT.

<sup>16</sup> See 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3.

<sup>17</sup> *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2d Cir. 2002), *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993) (TBELs must be included in a NPDES permit).

<sup>18</sup> See *Natural Res. Def. Council*, 863 F.2d at 1425; *Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 928-29 (5th Cir. 1998); see also 40 C.F.R. §§ 125.3(c)-(d).

<sup>19</sup> *Chem. Mfrs. Ass’n v. EPA*, 870 F.2d 177, 226 (5th Cir. 1989).

to the average of the best performers in an industrial category, the range should, at a minimum, be established with reference to the best performer in any industrial category.”<sup>20</sup>

A technology is considered “available” where there is, has been, or could feasibly be use within an industry. Courts have explained that even where “no plant in a given industry has adopted a pollution control device which could be installed does not mean that the device is not ‘available,’” thus ensuring that industry cannot game the system by all agreeing to not adopt the latest, best pollution control technology.<sup>21</sup> A discharger of pollutants may also be required to transfer a particular technology that has been used in another context where the transfer is practicable.

Likewise, a technology is “economically achievable” under the BAT standard if it is affordable for the best-run facility within an industry.<sup>22</sup> BAT should represent a commitment of the maximum resources economically possible to the ultimate goal of eliminating all polluting discharges.”<sup>23</sup> “[T]he reasonableness of what is ‘economically achievable’ should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology - without regard to cost.”<sup>24</sup>

There are three major steps that DEQ must take to develop technology based effluent limits in the MSGP. The first step is to identify candidate BAT technologies.<sup>25</sup> The second step is to consider statutory and regulatory mandated factors in order to evaluate the technological feasibility and economic achievability of the candidate technologies.<sup>26</sup> The third step is to derive effluent limits that represent that degree of reduction – expressed in terms of amounts achievable through the application of BAT technologies.<sup>27</sup> The limits must be expressed numerically, unless numeric limitations are infeasible, in which case they may be expressed narratively.<sup>28</sup>

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<sup>20</sup> American Paper Institute, 543 F.2d at 346 (emphasis added). See also American Meat Institute v. EPA, 526 F.2d 442, 462-463 (7th Cir. 1975); American Frozen Food Institute, 539 F.2d at 120-21.

<sup>21</sup> Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 636 (2d Cir. 1976).

<sup>22</sup> See, e.g., Reynolds Metals Co. v. EPA, 760 F.2d 549, 562 (4th Cir. 1985); Tanner’s Council of Am. v. Train, 540 F.2d 1188, 1191-92 (4th Cir. 1976).

<sup>23</sup> Natural Res. Def. Council v. EPA, 863 F.2d 1420, 1426 (9th Cir. 1988) (quotations omitted); see also EPA v. Nat’l Crushed Stone Ass’n, 449 U.S. 64, 74-75 (1980) (if a discharger of pollutants can afford the best available technology, then it must meet, and should not be allowed a variance from, stringent BAT limits).

<sup>24</sup> American Frozen Food, 539 F.2d at 120-21.

<sup>25</sup> Best Conventional Pollutant Control Technology; Effluent Limitations Guidelines, 51 Fed. Reg. 24974, 24976 (July 9, 1986).

<sup>26</sup> 33 U.S.C. § 1311(b)(2)(E); 33 U.S.C. § 1311(b)(2)(B).

<sup>27</sup> See 40 C.F.R. § 122.44(k)(3).

<sup>28</sup> 40 C.F.R. § 122.44(k)(3).

DEQ has not engaged in the required analysis to establish TBELs. Nowhere in the Draft Permit or Fact Sheet does DEQ identify candidate technologies, explain its consideration of the required factors, or derive numeric or narrative limits. Instead, DEQ puts this responsibility on permittees. This attempt to push responsibility for BAT analysis down onto permittees is illegal. It is also logically impossible. How is a permittee expected to meet the rigorous BAT analysis standard set by Congress – to review candidate technologies, to identify the level of performance achieved by the very best of their peers?

TBELs must be established by the permitting authority not the permittee, and must be contained within the MPDES permit issued to the permittee.<sup>29</sup> Once DEQ establishes a clear BAT effluent limit, the agency may leave the selection of control measures to achieve the limit up to the permittee. But the duty to consider what control measures are “best” for the industry rests squarely with DEQ. As a practical matter, to allow for the development of BAT effluent limits, Waterkeeper suggests that DEQ consider replacing the multi-sector general permit with sector-specific general permits.

At the very least, we suggest that DEQ break the very large class/category of “discharges of stormwater associated with industrial activity” into smaller groups within the MSGP and begin setting BAT effluent limits in this manner. This could take the form of sector-specific classes or categories of industrial discharges, for example, the industrial sectors identified in the MSGP. DEQ might also consider identifying separate and somewhat overlapping classes of discharge defined by structure or function, for example: “discharges of industrial stormwater from galvanized metal roofs and other galvanized surfaces, including HVAC systems,” “discharges of industrial stormwater from paved surfaces sealed with coal tar,” or “discharges of industrial stormwater from areas associated with vehicle maintenance.” EPA has singled out and studied pollution concerns related to many such structural/functional categories of industrial stormwater in guidance documents over the years.

#### **D. The MSGP Should Incorporate EPA-Approved BMPs for Particular Industrial Sectors and DEQ Should Clarify that these BMPs Are All Economically Available and Technologically Achievable for Particular Sectors**

Until DEQ conducts the mandatory BAT/BCT analysis above, DEQ should ensure that permittees are in fact applying BAT before permittees claim that they cannot further minimize discharge. To that end, DEQ should clarify in the permit that the various guidance documents and “menus” of BMPs that the EPA has worked so hard to develop over the years for different industrial sectors are lists of economically available and technologically achievable technologies for that sector. This means that the EPA-recommended structural and non-structural measures are by definition “available” for the particular industrial sector at issue and, as such, must be applied by permittees in those sectors whose previous efforts have fallen short of meeting the benchmarks. Thus, if a permittee finds that housekeeping BMPs or other cheap, non-structural BMPs fail to bring a discharge into line with benchmarks, the permittee should be required to

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<sup>29</sup> See 33 U.S.C. §§ 1311, 1342 (requiring, respectively, the development of BAT limits and their inclusion in NPDES permits, and requiring that NPDES permits be issued by EPA or state permitting authorities in accordance with the requirements of Section 301), see also 40 C.F.R. §§ 122.44(a)(1) (NPDES permits “shall include . . . technology-based effluent limitations and standards”); 125.1 (technology based treatment requirements are imposed “in permits” under Section 301 of the Act); and 125.3 (“Permits shall contain” technology based limits).

turn to more expensive structural BMPs that EPA has already determined are available for their industry, rather than seeking a waiver.

For example, EPA has produced a series of “Industrial Stormwater Fact Sheets” tailored to different industrial sectors covered under the MSGP. To choose one at random, the Fact Sheet for Sector E (Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing Facilities), like the other fact sheets in this series, lists a wide range of BMPs that a concrete plant or gypsum factory might use to control pollution in discharges associated with storage, handling, and mixing of materials, and vehicles on site.<sup>30</sup> These BMPs range from “cover material storage pile with a tarp or awning” to “[i]ninstall sediment basins, silt fence, vegetated filter strips, or other sediment removal measures downstream/downslope.” Installing sediment basins can cost tens of thousands of dollars; a tarp or awning can be purchased for \$19.99 at most hardware stores. The temptation for a permittee to buy a tarp and call it a day is obvious.

In addition, DEQ should make clear in the permit that both tarps and sediment basins – and all of the recommended BMPs in between – are technologically available and economically achievable for the industry. Therefore, if a tarp proves insufficient to reduce the concentration of pollutants in the facility’s discharge to benchmark levels, the permittee must progress through increasingly more complex available technologies, including installation of sediment basins, until benchmarks are met; no waiver is available to a permittee who has not exhausted all of the BMPs that already identified for their industry.

To implement this suggestion, we request that DEQ:

- Include a requirement for any covered facility that is required to conduct a review to continue its corrective action process until it has either met benchmarks or has exhausted all of the BMPs that EPA identifies as available for the industrial sector.
- To ensure that permittees progress through their available options in a timely manner and select sufficiently aggressive BMPs, EPA should specify that exceeding benchmarks a second time, i.e. after corrective action is taken, is a violation of the permit.
- As regards required benchmark monitoring, DEQ should specify that it is a violation of the permit for any permittee to conclude its corrective action process with a determination “that no further pollutant reductions are technologically available and economically practicable and achievable in light of best industry practice” without having first exhausted all of the BMPs that EPA has identified as available for the industrial sector.

### **III. Water Quality Based Effluent Limits**

#### **A. Statutory Background**

The Clean Water Act requires each state to adopt Water Quality Standards (“WQSs”) for all waters within its boundaries and submit them to the U.S. Environmental Protection Agency (“EPA”) for approval. (33 U.S.C. §§ 1311(b)(1)(C), 1313.) WQSs include maximum permissible pollutant levels that must be sufficiently stringent to protect public health and enhance water quality, consistent with the uses for which the water bodies have been designated. (33 U.S.C. §

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<sup>30</sup> See EPA Office of Water, Industrial Stormwater Fact Sheet Series; Sector E: Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing Facilities, EPA-833-F-06-020, available at [www.epa.gov](http://www.epa.gov).

1313(c)(2)(A).) WQSs provide the reference point “to prevent water quality from falling below acceptable levels.” (PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology (1994) 511 U.S. 700, 704 [quotation omitted].) States also must identify as impaired any water bodies that fail to meet water quality standards. (33 U.S.C. § 1313(d).)

For impaired waters, states must establish TMDLs, which set a daily limit on the discharge of each pollutant necessary to achieve water quality standards. (Id. § 1313(d)(1).) The TMDL “assigns a waste load allocation (WLA) to each point source, which is that portion of the TMDL’s total pollutant load, which is allocated to a point source for which a NPDES permit is required.” (Communities for a Better Env’t v. State Water Res. Control Bd. (2005) 132 Cal.App.4th 1313, 1321 (emphasis in original).) Critically, federal law requires that “once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the WLA’s in the TMDL.” (Id., at 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B).) According to EPA, which oversees implementation of the CWA, “[w]here the TMDL includes WLAs for stormwater sources that provide numeric pollutant load . . . the WLA should, where feasible, be translated into numeric [water quality-based effluent limitations] in the applicable stormwater permits.”<sup>31</sup>

NPDES permits must ensure that discharges of stormwater associated with industrial activity do not cause or contribute to a violation of water quality standards. See 33 U.S.C. § 1311(a); 1313; 1341(a); 1342(p). Renewal permits—like the proposed MSGP, at issue—may not contain weaker standards than those contained in the previous permit, except under limited circumstances. See 33 U.S.C. § 1342(o); 40 C.F.R. § 122.44(l). Federal and state law additionally require implementation of an antidegradation policy, that mandates that existing water quality in navigable waters be maintained unless degradation is justified by specific findings. (See, 40 C.F.R. § 131.12(a)(1).)

Every NPDES permit must require the discharger to conduct monitoring sufficient to assure compliance with its permit limits. Id. § 122.44(i)(1) (every permit “shall include” monitoring “[t]o assure compliance with permit limitations”); see also 33 U.S.C. § 1342(a)(2) (“The Administrator shall prescribe conditions for such permits to assure compliance with the requirements” of the statute). This monitoring must be “representative” of the discharges being regulated: “All permits shall specify . . . [r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity.” 40 C.F.R. § 122.48(b). “Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.” Id. § 122.41(j)(1), see also § 122.44(i)(5).

Finally, the CWA requires that NPDES Permits, Permit Applications, Notices of Intent (“NOI”) to discharge pursuant to an NPDES Permit, or other documents that contain the substantive information about how a permittee will comply with effluent limitations of the Permit must be publically available, 33 USC §1342(j); and subject to public hearing and comment, before the Permit can be approved.<sup>32</sup>

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<sup>31</sup> Memorandum from James A. Hanlon and Denise Keehner, U.S. EPA, to Water Management Division Directors, Regions 1 – 10, re: Revisions to the November 22, 2002 Memorandum “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs, November 12, 2010, (“EPA Hanlon Memo”) at 3.

<sup>32</sup> 33 USC §1342(a)(l); See also Environmental Defence Center v. EPA, 344 F.3d 832; 854-856 (9th Cir. 2003) (programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the level required by the Clean Water Act); see also Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 498-504 (2d Cir. 2005)

## **B. DEQ Has Not Completed the Reasonable Potential Analysis Needed to Establish WQBELs**

As noted above, NPDES permits must ensure that discharges of stormwater associated with industrial activity do not cause or contribute to a violation of water quality standards. See 33 U.S.C. § 1311(a); 1313; 1341(a); 1342(p). EPA regulations require DEQ to ensure that every NPDES permit includes effluent limitations to control the discharge of all pollutants that have the “reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1)(i).

To discharge this duty, DEQ must decide whether the pollution generated at a facility has the “reasonable potential” to cause environmental harm by using “procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.” 40 C.F.R. § 122.44(d)(1)(ii). A permit writer’s determination based on these federally mandated procedures is commonly called a “reasonable potential analysis.” Reasonable Potential Analysis (“RPA”) is required in all NPDES Permits. See 40 CFR § 122.44(d)(1)(i). The RPA is a defined, detailed process, and is required to be included in the Fact Sheet of the NPDES Permit. Id; See Also NPDES Permit Writers Manual, pp 6-12 to 6-23 (US EPA, Sept 2010).

The process of conducting a Reasonable Potential Analysis forces a permit writer to determine which pollutants likely are present in the discharge. But DEQ did not conduct a reasonable potential analysis in developing this permit. As a consequence, the MSGP relies on an illogical set of parameters to gauge the performance of MSGP permittees. As the National Research Council explained in its analogous review of EPA’s MSGP:

EPA selected the benchmark analytical parameters for industry subsectors to monitor using data submitted by industrial groups in 1993 as part of their group applications. The industrial groups were required to sample a minimum of 10 percent of facilities within an industry group for pH, TSS, BOD5, oil and grease, COD, TKN, nitrate plus nitrite nitrogen, and total phosphorous. Each sampling facility within a group collected a minimum of one grab sample within the first 30 minutes of discharge and one flow-weighted composite sample. Other nonconventional pollutants such as fecal coliform bacteria, iron, and cobalt were analyzed only if the industry group expected it to be present. Similarly, toxic pollutants such as lead, copper, and zinc were not sampled but rather self-identified only if expected to be present in the stormwater discharge. As a result of the self-directed nature of these exercises, the data submitted with the group applications were often incomplete, inconsistent, and not representative of the potential risk posed by the stormwater discharge to human health and aquatic life. EPA has not conducted or funded independent investigations and has relied solely on the data submitted by industry groups to determine which pollutant parameters are appropriate for the analytical monitoring of an industry subsector. Thus, there are glaring deficiencies; for example, the only benchmark parameter for asphalt paving and roofing materials is TSS, even though current science shows that the most harmful pollutants in stormwater

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(failing to provide for permitting authority review and public participation of effluent limitations developed by permitted dischargers is a violation of the Clean Water Act).

discharges from the asphalt manufacturing industry are polycyclic aromatic hydrocarbons (compare Table 2-5 with Mahler et al., 2005).<sup>33</sup>

To correct the “glaring deficiencies” criticized by the National Research Council, DEQ should conduct a Reasonable Potential Analysis before issuing a final permit. DEQ should begin with a complete review on a sector by sector basis of the different pollutants likely to be present in discharges of stormwater associated with industrial activity.

DEQ must then revise the MSGP’s monitoring requirements to require monitoring in each sector for all pollutants likely to be present and with reasonable potential to be discharged at high concentrations. Commenters request that DEQ add at least the following parameters to the MSGP’s monitoring requirements:

- PAHs: Monitoring for PAHs at all industrial facilities that have applied pavement sealant (see below)
- Zinc: Monitoring at all industrial facilities, because of the prevalence of zinc in discharges from uncoated galvanized metal surfaces, including roofs;
- Iron: Monitoring at all industrial facilities because its widespread occurrence and high oxidation rate make it a very useful indicator of broader pollution concerns.
- BOD, COD, and Total Nitrogen: monitoring at all facilities in order to flag the possible release of a wide variety of pollutants that contribute to low dissolved oxygen, which is perhaps the most common impairment in the country. Additionally, these parameters are helpful in identifying illicit discharges to stormwater outfalls and discharges from improperly maintained septic systems.
- Mercury: monitoring at auto salvage yards because of the presence of mercury switches
- PCBs: monitoring at scrap metal facilities because of the presence of scrapped equipment with a higher likelihood of PCB contamination
- Volatile and Semi-Volatile Organic Compounds: Monitoring at all industrial facilities, because of the prevalent use of VOC’s and Semi-VOCs including but not limited to acetone and toluene.

### **C. The Proposed MSGP Fails to Include Sufficient Monitoring to Assure Compliance with Water Quality Standards.**

Section 2.3.2 of the proposed MSGP sets out the requirements related to discharges to impaired waters.

Reading Sections 2.3.2 and 2.5-2.6 together, it appears DEQ proposes to require monitoring on every storm event that results in an actual discharge from the site. We are uncertain what is intended by the clarifier “actual discharge.” If DEQ means for this phrase to mean “a discharge capable of sampling under EPA sampling requirements,” it should say so and remove the ambiguity. If DEQ intends some other quantitative measurement, it should describe such qualifier here as presently the “actual discharge” trigger is ambiguous to commenters. Conversely, in 2.5.5 it appears DEQ qualifies the monitoring frequency to require sampling at least once per quarter, per annum. We presume these two frequency requirements operate such

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<sup>33</sup> USM at 281-282.

that the most prescriptive is the baseline (e.g., monitoring must occur in response to any precipitation event).

We are concerned that there is no discussion of any additional monitoring required for discharges to waters listed as impaired pursuant to Section 303(d) of the Act as necessary to “ensure compliance” with water quality standards. In fact, for impaired waters with TMDLs, DEQ requires no sampling other than the actual discharge and/or quarterly sampling requirement, and the onus is placed on the permittee to describe why requirements in its SWPPP are sufficient to satisfy any applicable WLA. As described above, the public has no opportunity to comment on the adequacy of an individual SWPPP and those terms are reviewed by DEQ after a permittee has filed and gained coverage under the MSGP NOI. Doing so is contrary to public participation requirements of the Act. We encourage DEQ to require additional representative monitoring for all dischargers with the potential to discharge stormwater containing pollutants of concern to an impaired or TMDL waterway.

We also note that impairment designations by DEQ’s monitoring team usually require statistically significant sample sizes to assure defensible data sets capable of determining compliance with water quality standards, usually more than a dozen samples. There is no narrative or description of how DEQ’s monitoring requirements are alleged to assure that a facility is not causing or contributing to water quality exceedances, or to evaluate whether a facility is complying with the WLA assigned to it.

#### **D. DEQ should clarify that permitted discharges under the MSGP must be in attainment with ambient water quality standards**

Because of long-standing confusion by permittees, DEQ should clarify that Section 2.3.1 ‘Water Quality Standards’ of the MSGP requires the concentrations and mass of pollutants in permitted discharges to be restricted at or below the water quality criteria applicable to the receiving water body. On its face the language of the MSGP seems to make this clear. The MSGP states that

“Storm water discharges regulated under this permit must be controlled as necessary to meet applicable numeric and narrative water quality standards. A storm water discharge associated with industrial activity must not cause or contribute to an exceedance of applicable water quality standards.”

This statement has only one subject – discharges – which should make it clear that it is the discharges themselves that must meet applicable water quality standards. Nonetheless, both experience and the record for this permit show that permittees do not accept that their discharges must meet water quality standards at the point of discharge and, in practice, routinely discharge stormwater that exceeds applicable water quality standards but fail to take corrective action.

The MSGP is also confusing in this respect because it states that benchmark exceedances are not violations of the permit and allows permittees who have exceeded benchmarks to conclude that no further pollutant reductions are technologically available and economically practicable and achievable in light of best industry practice to meet the technology- based effluent limits or are necessary to meet the water-quality-based effluent limitations in Part 2 of this permit. Yet in most cases, the benchmarks that permittees violate are equivalent to or many times higher than applicable state water quality standards.

Waterkeeper requests that DEQ please clarify the Permit so that discharges permitted under the MSGP must be controlled such that the concentrations and mass of pollutants in the permitted discharge are at or below the water quality criteria applicable to the receiving water body.

### **E. Deferral of Reasonable Potential Analysis and Development of Water Quality Based Effluent Limits Until After Issuance of the Permit Violates the Public Participation Requirements of the Act**

The MSGP materials explain that upon NOI and SWPPP submission, DEQ will implicitly evaluate the facility and the receiving water(s), and determine whether additional WQBELs will be required to be consistent with the WLA, where it exists, or to comply with applicable WQS. However, neither the proposed MSGP or Fact Sheet describe: (1) the data that would be considered (would it consist of past sampling, future annual sampling, MS4 sampling, receiving water samples, upstream sampling, or something else?); (2) what the analysis would consist of (simple comparison of end of pipe sampling to WQS, modeling, or something else?); (3) the timing of the analysis and any additional WQBELs; or (4) how a determination of the effectiveness of the additional measures would be conducted.

The analysis which DEQ proposes to potentially conduct some time in the future, on a site-site basis, is in fact the Reasonable Potential Analysis required in all NPDES permits. See 40 CFR § 122.44(d)(1)(i). The RPA is a defined, detailed process, and is required to be included in the Fact Sheet of the NPDES permit. *Id. See also* NPDES Permit Writers Manual, p 6-23. The additional measures to ensure compliance with TMDL WLA and/or WQS which DEQ may (or may not) impose represent the actual meat of the permit requirements for dischargers to impaired waters – and yet those measures, or even how those measures might be developed, are nowhere articulated in the proposed MSGP. Further, any additional monitoring to evaluate compliance via these measures is also left to the indeterminate future.

These proposed provisions therefore leave the RPA analysis, the WQBELs, and the monitoring program, for at a minimum all industrial stormwater discharges to impaired waters, entirely to the discretion of DEQ, with no deadline for completion, no public input, and no hearing process. This deferral of required elements of this NPDES permit, delegation to staff, and elimination of public process are clearly inconsistent with the requirements of the Act. *See* 33 USC § 1342(a)(1); *Environmental Defense Center v. EPA*, 344 F.3d at 856. Specifically, we note that the following provisions of the proposed MSGP grant an impermissible degree of discretion to EPA:

- No additional monitoring or discussion of monitoring necessary for discharges to impaired waters to assure compliance with WQS. At minimum a rationale must be provided to support a finding that the BMPs under the MSGP are adequate to satisfy the Act.
- 2.3.2.2 – discharges to an impaired waterbody with an approved tmdl - “Permittees will be informed if any additional controls are necessary for discharges to protect beneficial uses or to be consistent that the assumptions of any available TMDL wasteload allocation. Such additional controls must be identified within the permittees SWPPP. In certain cases, the Department may find coverage under an MPDES individual permit necessary.”
- 2.3.1 – “If at any time the permittee becomes aware, or the Department determines, that the discharge causes or contributes to an exceedance of applicable water quality

standards, the permittee must take corrective action as required in Part 2.7 and document the corrective actions as required in Parts 2.7.3.4, 2.8, and 2.9.3....On a case-by-case basis, permittees will be informed if any additional controls are necessary for discharges to meet water quality standards; such additional controls must be implemented and identified within the SWPPP.”

#### **IV. Monitoring and Reporting Requirements**

##### **A. DEQ Should Improve the MSGP’s Monitoring Requirements and Increase the Frequency of Sampling**

In order to adequately monitor compliance with the permit’s effluent limits, as required by Section 402 of the Clean Water Act,<sup>34</sup> DEQ must increase the frequency of sampling and stop relying solely on grab sampling. The National Research Council suggested that agencies could significantly improve monitoring programs through reliance on continuous sampling methods that are flow weighted and continue for the duration of a rain event.”<sup>35</sup>

We point out the tension between what we understand to be the monitoring requirement under the MSGP for all permittees to do sampling at every precipitation event (including snowmelt) and the most authoritative discussion of industrial stormwater variability of which we are aware, that of the NRC commissioned by EPA. In its review of EPA’s stormwater permitting, the NRC found that stormwater data, in particular data from industrial sites, are highly variable. “[V]ariability comes from various sources, including intrinsic variability given the episodic nature of storm events, analytical methods that are more variable when applied to stormwater, and sampling technique problems and error.”<sup>36</sup>

Even if DEQ requires permittees to adopt improved sampling methods, the NRC concluded that the intrinsically higher variability of stormwater discharges means that a greater number of samples must be collected to support analysis and management decisions.<sup>37</sup> “Industrial sites should conduct monitoring so that a sufficient number of storms are measured over the life of the permit for comparison to regional benchmarks.”<sup>38</sup> Based on analysis of existing stormwater data, the NRC suggested that EPA should require around forty samples to adequately characterize discharges from medium risk industrial facilities over the course of a permit, or eight samples per year, in order to establish a statistically valid estimated median concentration for various pollutants. While the NRC suggested that this number could be reduced depending on the variability observed in the first 10-15 samples, this still requires far more sampling to get accurate measurements than the four samples that DEQ asks permittees to obtain under the MSGP.

However, we note that this concern over sampling frequency may be misplaced if we have misconstrued the monitoring requirements to in fact require monitoring at every precipitation event capable of measurement (including snowmelt). Conversely, if the MSGP

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<sup>34</sup> See also 40 C.F.R. §§ 122.44(i)(1) (every permit “shall include” monitoring “[t]o assure compliance with permit limitations”), 122.48(b) (“All permits shall specify . . . [r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity.”).

<sup>35</sup> USM at 7-8.

<sup>36</sup> USM at 283.

<sup>37</sup> USM at 284.

<sup>38</sup> USM at 330.

requirement is to gather a maximum of four samples per annum, then such a requirement is not adequate to “yield data which are representative of the monitored activity” or to assure compliance with the permit’s technology and water quality based limitations.<sup>39</sup> If only four samples annually are in fact required, DEQ’s adoption of those sampling requirements in light of their established inadequacy would be unlawful, arbitrary, capricious, and an abuse of permit writing discretion.

We therefore request that DEQ make more clear required monitoring and specifically frequency and type under the MSGP.

### **B. More Frequent Sampling is Economically Practicable**

Waterkeeper strongly supports the adoption of the National Research Council’s suggestion that any site identified as high or medium risk should be required to sample stormwater discharges with far greater frequency than the four samples per year called for in the MSGP. Waterkeeper believes it is economically practicable for permittees to engage in more frequent and improved monitoring, including the use of auto samplers to gather composite, flow-weighted samples.

In its report to EPA, the National Research Council included cost estimates, in 1993 dollars, for different kinds of automatic sampling equipment, all of which are superior to the current grab samples taken by permittees. The prices given include \$2,889 (about \$4,250 in 2013 dollars) for a time-based composite sheet flow sampler that could be installed in a driveway, for example, and \$16,052 (about \$24,000 in 2013 dollars) for a flow-weighted composite auto-sampler.<sup>40</sup> Based on our experience, many accredited labs will run an EPA test method 8270 scan on a mailed stormwater sample for less than \$200, with discounts available for multiple samples.

Both the one-time and recurrent costs are quite affordable compared to the costs of other stormwater control measures implemented by permittees. For example, commenters have observed small to medium-sized industrial facilities spending tens or even hundreds of thousands of dollars to create permanent barriers, settling basins, and other structural control. Relative to the costs of other BMPs, the improved monitoring requirements are proportionate and reasonable.

### **Other Comments**

We note that the MSGP is silent as regards control of stormwater via infiltration methods. Generally, encouraging the infiltration of runoff in urban areas is preferable to rapidly discharging large volumes of stormwater into aquatic ecosystems. But many MSGP covered facilities generate contaminated runoff containing dissolved pollutants that can form plumes in groundwater. Management of runoff in this situation must be carefully controlled. A primary concern here is how DEQ plans to address and control dissolved pollutants in discharges from MSGP facilities that are deliberately infiltrated to ground. Presumably, DEQ does not think it appropriate for permittees to infiltrate stormwater containing water soluble organic pollutants or

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<sup>39</sup> 40 C.F.R. § 122.48(b); see also *id.* § 122.44(i)(1) (every permit “shall include” monitoring “[t]o assure compliance with permit limitations”).

<sup>40</sup> See USM at 295.

metals that could form a contaminant plume if a facility overlies underground sources of drinking water, or if a facility is close to a surface water and discharges into groundwater that is directly hydrologically connected to that surface water.

To control infiltration risks, DEQ should require permittees to use the results of their pollutant characterization efforts in their SWPPP to analyze the likelihood that any infiltrated stormwater is contaminated with soluble pollutants, DEQ should establish clear numeric thresholds for such dissolved pollutants, and should require as a non-numeric technology based effluent limitation that permittees not use infiltration as a control measure for discharges whose concentration of dissolved pollutants exceeds or is likely to exceed the thresholds.

In addition, EPA's long-standing and court-approved interpretation of the Clean Water Act is that the Act applies "to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water."<sup>41</sup> Accordingly, where a permittee chooses to manage polluted stormwater by infiltrating it into groundwater that is directly hydrologically connected to surface waters, DEQ should clarify in the permit, or in its response to comments, that the infiltration system in question is an outfall. As such, discharges to the infiltration system are subject to monitoring requirements like any other outfall.

Finally, we specifically draw DEQ's attention to its ongoing duty to act in an anticipatory and preventative fashion to protect and restore Montana's water quality under the Montana Water Quality Act and citizens' constitutional rights to a clean and healthful environment. Although the substantive portion of this comment letter references federal requirements under the CWA, those requirements are directly applicable to Montana through the MWQA, and DEQ must implement baseline requirements thereof and, we would argue, go a step further to make findings showing how, on the basis of record evidence, the MSGP will assure compliance under both the CWA and MWQA. Without such findings and affirmative demonstrations the noted inadequacies herein take on the flavor of substantive violations of both state and federal law. Therefore we strongly encourage DEQ to amend its MSGP as requested herein as doing so represents affirmative steps by the agency to increase collective pollution control requirements and effectuates the purposes of Montana's constitutional imperatives to a clean and healthful environment.

## **V. Conclusion**

For the above stated reasons, Upper Missouri Waterkeeper urge DEQ to address the many shortcomings of the proposed MSGP as drafted and to issue a revised draft as soon as possible. We particularly urge DEQ to address the permit's major defects by adding provisions that will ensure legally-required public involvement and public access to information; compliance with water quality standards; safeguards against discharges to impaired waters; and bolstered monitoring and reporting requirements.

We thank DEQ for its careful consideration of these comments.

Respectfully-

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<sup>41</sup> See EPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001). See also *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020).



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