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VIA ELECTRONIC MAIL

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**Re: Comments on Municipal Storm Sewer Systems WPDES
Permit No. WI-S050075-1, General Permit to Discharge Under
the Wisconsin Pollutant Discharge Elimination System.**

Dear Mr. Rortvedt:

Thank you for the opportunity to comment on the Wisconsin Department of Natural Resources' Proposed Wisconsin Pollutant Discharge Permit ("WPDES") Permit No. WI-S050075-1 ("Proposed MS4 Permit" or "Proposed Permit"). Midwest Environmental Advocates, Inc. is a nonprofit environmental law center that provides technical assistance and legal representation to communities and groups working to protect the public's right to clean air and water. We are submitting these comments on our own behalf and on behalf of the Sierra Club, John Muir Chapter.

A. The Proposed Permit Must Require Compliance with Water Quality Standards.

The DNR is required to issue WPDES permits with requirements that ensure authorized pollutant discharges comply strictly with state and federal water quality standards. Wis. Stat. § 283.31(3). The DNR may not issue a WPDES permit unless the permit contains conditions sufficient to meet water quality standards. *Id.*; 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.4(i).

However, Section 1.3 of the Proposed Permit states that compliance with water quality standards will be addressed by adherence to general narrative-type storm water discharge limitations and implementation of storm water management programs and practices. The Proposed Permit does not explicitly require that storm water discharges not cause or contribute to a violation of water quality standards, including designated



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uses, existing uses, and narrative and numeric criteria. This does not meet the requirements of Wis. Stat. § 283.31(3).

Although Section 1.4 prohibits a permit holder from discharging a specified list of substances in amounts that may have unreasonable effect on receiving water quality or aquatic life, it is not clear what constitutes “an unreasonable effect.” Section 1.4 appears to consist of narrative water quality criteria identified, in part, in Wis. Admin. Code 102.04(1)(a). If so, this further suggests that the Proposed Permit should make clear that water quality standards, including narrative criteria, may not be violated. This appears to be a simple drafting oversight that can be easily corrected.

COMMENT: The WPDES permit must explicitly require compliance with water quality standards, and should require periodic ambient water quality monitoring to coincide with wet weather events to measure compliance with water quality standards.

B. The Proposed Permit Provides No Means of Verifying that Water Quality Standards Are Being Attained.

There is no process for DNR to determine whether water quality standards have been violated. Section 1.3 simply states that if the DNR finds a violation of water quality standards, it may require that the permittee “develop and implement an action plan to adequately address the identified water quality concern” or submit data to show that there is no water quality standards violation. (Proposed Permit, Section 1.3) Section 2.7.1 requires, “to the maximum extent practicable,” a 20% reduction in the annual average mass of total suspended solids in runoff, but does not provide a process for determining whether the 20% reduction will maintain water quality standards. (Proposed Permit, Section 2.7.1)

COMMENT: To ensure that the WPDES permit will meet water quality standards, the WPDES permit should require periodic ambient water quality monitoring beneath outfalls to coincide with wet weather events. This is needed to demonstrate the BMPs identified in the WPDES permit are sufficient to meet the goals of the Clean Water Act.

C. The DNR Must Prepare a Reasonable Potential Analysis to Determine Whether Water Quality Standards Will Be Violated, or Whether Water Quality Based Effluent Limitations Will Be Needed to Meet Water Quality Standards.

Not only must industrial discharges comply strictly with water quality standards, the DNR is required to issue a permit with requirements that ensure industrial discharges comply strictly with water quality standards. Wis. Stat. § 283.31(3). However, the DNR may not simply tell a discharger *not to* violate water quality standards, (which it has not done in the Proposed Permits) but must also tell the dischargers *what to do* to comply with water quality standards by providing permitting requirements that (if followed) will ensure industrial discharges comply strictly with water quality standards.

The U.S. Environmental Protection Agency (“US EPA”) has provided a regulatory scheme that NPDES permitting authorities must follow to ensure that WQBELs are developed and included in WPDES permits for discharges containing pollutants at levels that will cause, or have the reasonable potential to cause, or contribute to an excursion above WQSS.

Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the [DNR] determines, are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard . . .

40 C.F.R. section 122.44(d)(1)(i).

This “Reasonable Potential Analysis” (“RPA”) is required to determine whether the conditions of a general permit are sufficient to meet water quality standards, including numeric water quality criteria. If not, then an individual permit is necessary with additional conditions to meet numeric water quality criteria. 40 C.F.R. § 122.44(d)(1)(iii) – (iv).

If the DNR has not established a numeric water quality criterion for a specific pollutant which causes, or has a reasonable potential to cause, or contribute to an excursion above the narrative water quality criteria specified in Section 1.4, the DNR must establish effluent limitations using either (1) calculated numeric water quality criteria which will attain and maintain applicable narrative water quality criteria and will fully protect the designated use; (2) establish effluent limitations on a case by case basis using US EPA water quality criteria and other relevant information, or; (3) establish effluent limitations for an indicator parameter provided the Proposed Permits identify which pollutants are intended to be controlled. 40 C.F.R. § 122.44(d)(1)(vi)(A) - (C).

COMMENT: The DNR must apply a RPA to determine whether there may be a violation of water quality standards, and whether an individual permit and additional WQBELs may be need to meet water quality standards.

D. The Proposed Permit Should Establish Criteria For Determining When a Permit Condition is Not Appropriate.

Section 2 of the Proposed Permit establishes permit conditions, but allows the DNR to issue a written determination that “a condition is not appropriate under the circumstances.” The Proposed Permit does not state any criteria for determining when a permit condition would be inappropriate. Further, removing permit conditions constitutes a modification under Wis. Stat. § 283.53 that “individualizes” the WPDES permit and requires public notice and comment. Wis. Stat. § 283.53(2)(b) and (c); Wis. Stat. § 283.39(1).

COMMENT: The Proposed Permit should remove this provision as it is really something that requires an individual permit.

E. Construction Site Pollutant Control Provisions Should Require Compliance with Water Quality Standards and Antidegradation Requirements to Ensure the Protection and Restoration of High Quality and Impaired Waters.

Section 2.4 requires that the permittee develop a program to reduce sediment delivery from construction sites. However, there is no clear antidegradation requirement to determine whether high quality waters, such as Outstanding Resource Waters and Exceptional Resource Waters, will need additional protections to maintain their high quality. There is also no requirement to install additional measures to prevent the further degradation of waters on the 303(d) list for sediment and erosion. Section 2.4 treats all waters as the same, although this is not the case in Wisconsin. Designations such as Outstanding Resource Waters and Exceptional Resource Waters represent beneficial uses that must be protected in order to meet water quality standards. Wis. Stat. § 283.31(d); Wis. Admin. Code § NR 102.05(1)(a)(prohibiting lowering of water quality except in limited instances).

The findings required under Wisconsin's antidegradation policy can only be made on a case-by-case basis, and is impossible to apply in the context of general permits. *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp.2d 732 (S.D. W.Va. 2003). In *Ohio Valley Environmental Coalition*, the court held that the review of requests to lower the quality of high quality waters is necessarily location-specific and requires public participation; as a consequence, it cannot be done at the time a general permit is issued, but must be done at the time new individual discharges are proposed. *Id.* at 737.

COMMENT: To ensure that Wisconsin's highest quality waters are not unnecessarily degraded, storm water discharges to those waters should be excluded from the general permit. Instead, individual permits should prohibit discharges of storm water pollutants and include requirements to ensure that the zero discharge standard will be met. These include Outstanding Resource Waters, Exceptional Resource Waters, and waters on which Wisconsin tribes have federally recognized treaty rights to hunt, gather, and fish.

F. The Storm Sewer Map Should Include Additional Information on Receiving Waters.

COMMENT: Section 2.8 requires the creation of a storm sewer map. However, the storm sewer map should include the identification of outfalls and overlays for designated uses, impaired waters, Total Maximum Daily Loads, Outstanding Resource Waters, Exceptional Resource Waters, wetlands, the presence of endangered or threatened species and historical use of the property.

CONCLUSION

Thank you for the opportunity to comment on the Proposed Permit. I look forward to your written response.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



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