March 31, 2010

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Office of Ecosystem Protection
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Attn: Thelma Murphy (murphy.thelma@epa.gov)

RE: Draft NPDES General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts North Coastal Watersheds (2010)

The National Association of Home Builders ("NAHB") appreciates this opportunity to provide comments on the *Draft NPDES General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems ("MS4s") in Massachusetts North Coastal Watersheds,* hereafter referred to as the "Draft Permit." NAHB is a trade association representing more than 175,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the new housing units projected for 2010.

NAHB members must comply with federal, state and local stormwater regulations. The Draft Permit includes provisions for municipalities to develop construction stormwater management regulations which construction site operators will ultimately have to meet. Builders must comply with the ordinances set up for construction stormwater management and post-construction stormwater management in new development and redevelopment. Builders must also comply with the state or EPA Construction General Permit, depending on the authorized permitting authority in that state. The Draft Permit will impact the construction industry's ability to comply with jurisdictional runoff control requirements and to meet other obligations to build homes. NAHB is hereby providing comments on the Draft Permit because of its impact on the home building industry in the Massachusetts North Coastal watershed. The first section discusses our statutory and constitutional concerns with the Draft Permit (Legal Comments); the second section discusses our concerns regarding the cost, feasibility, and implementation of the Draft Permit (Regulatory Comments).

## Legal Comments

### A. The Draft Permit incorrectly uses the term "discharge"

Clean Water Act ("CWA" or the "Act") section 402 provides EPA with the authority to issue permits for the discharge of pollutants into navigable waters from point sources. This Draft Permit was specifically issued pursuant to section 402(p)(6), which allowed the Agency to develop regulations for small MS4s.[1] Furthermore, the Act provides that the term "discharge" if unqualified means the "discharge of a pollutant," and that a "discharge of a pollutant" is the "addition of any pollutant to navigable waters from any point source."[2]

NAHB is concerned that the Draft Permit inaccurately utilizes the term "discharge." For example, the draft permit provides "[f]or purposes of this permit, an increased discharge is a discharge of stormwater directly *into* the MS4 or from the MS4 . . .."[3] Because the term "discharge" is unqualified in this statement, it means the "addition of any pollutant to *navigable waters* . . .."[4] Yet, the Agency has used the term to describe pollutants entering the MS4. As illustrated by the need for a permit, an MS4 is not a navigable water, but a "point source."[5] To clarify the permit for the regulated community, NAHB suggests that the Agency not use the term "discharge" to describe stormwater or pollutants that enter the MS4 (a point source) and only use "discharge" to describe pollutants that leave the MS4 and enter navigable waters.

### B. The Draft Permit improperly regulates local land use decisions.

The Draft Permit improperly requires small MS4s to impose local land use restrictions on third parties, contrary to the Act's policy to protect local government authority to regulate land use, and upending the traditional balance between federal and state authority. Because the Act expressly protects state and local authority to regulate land use, the local land use restrictions in the Draft Permit are inconsistent with the Act's policy to respect state and local authority. Furthermore, EPA's imposition of land use restrictions improperly intrudes upon the bedrock principles of federalism and disrupts the federal-state balance of power.

Defying longstanding principles of federal restraint, the Draft Permit requires MS4s to impose land use controls on construction site operators that release stormwater to an MS4. For example, the Draft Permit requires MS4s to "have written procedures for site plan review."[6] Furthermore, the MS4 must develop a construction site stormwater runoff control program ("construction site program") that evaluates "low impact design and green infrastructure."[7] The MS4 operator must then "encourage" the site operator "to incorporate these practices into the site

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[1] *Environmental Defense Center v. Environmental Protection Agency*, 344 F.3d 832, 841-43 (9th Cir. 2003).

[2] 33 U.S.C. §§ 1362(16), (12).

[3] Draft Permit Term 2.3.1 at 18 (emphasis added).

[4] 33 U.S.C. § 1362(12) (emphasis added).

[5] A point source is a "discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . ." 33 U.S.C. § 1362 (14).

[6] Draft Permit Term 2.4.5.3(e) at 38.

[7] *Id.*

design."[8] Essentially, the Draft Permit requires small MS4 operators to evaluate land use plans and dictate site design for local construction sites – a land use determination beyond the traditional expertise of a small MS4 operator. These conditions improperly allow MS4s, and by extension EPA, "to function as a *de facto* regulator of immense stretches of intrastate land – an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board."[9]

This land use restriction is contrary to the Act's policy that protects traditional local government powers. The CWA acknowledges that state and local governments – not Congress or the EPA – have primary authority to regulate land use: "It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States . . . to plan the development and use* (including restoration, preservation, and enhancement) *of land* and water resources . . . ."[10] Indeed, the Supreme Court has long recognized that the "[r]egulation of land use . . . is a quintessential state and local power," and therefore should not be exercised by the federal government.[11] Courts ordinarily require a "'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state [and local] authority."[12] That authorization is not evident in the Act, which instead cautions the Agency to respect state and local government authority to exercise their traditional land use and zoning powers.[13]

By forcing MS4s to impose land use requirements on third parties, EPA also risks invading basic principles of dual sovereignty embedded in the Tenth Amendment of the U.S. Constitution.[14] EPA cannot, without violating the Tenth Amendment, compel MS4s to implement the CWA by usurping land use powers traditionally exercised by local planning commissions and zoning boards.[15] Allowing EPA to exercise broad authority over local land use "would result in a significant impingement of the States' traditional and primary power over land and water use."[16]

**C. The Draft Permit improperly dictates the content of local ordinances.**

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[8] *Id.*

[9] *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

[10] 33 U.S.C. § 1251(b) (emphasis added).

[11] *Rapanos*, 547 U.S. at 738; *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 174 (2001) ("regulation of land use [is] a function traditionally performed by local governments ") (quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

[12] *Rapanos*, 547 U.S. at 738; *SWANCC*, 531 U.S. at 172-73.

[13] 33 U.S.C. § 1251(b).

[14] U.S. Const. Amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States").

[15] *See Printz v. United States,* 521 U.S. 898, 932-33 (1997) ("The Federal Government may not compel the States to enact or administer a federal regulatory program."); *see also United States v. Lopez,* 514 U.S. 549, 561, n. 3, 564 (2000) ( "[s]tates possess primary authority for defining and enforcing the criminal law."); *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 720 (1994) (the CWA preserves traditional state authority to allocate water rights among users).

[16] *SWANCC*, 531 U.S. at 174 (holding that the Migratory Bird Rule exceeded EPA authority under the CWA).

EPA's Draft Permit usurps the local legislative process by dictating the specific text of the ordinances regulating small MS4s. Neither the CWA nor EPA's implementing regulations allow the Agency to dictate specific terms for the local ordinances that are designed to further compliance with an MS4 permit. Because the Draft Permit requires that specific text be incorporated in the ordinances, the Draft Permit also raises significant federalism and constitutional concerns. This kind of overreaching is impermissible under the U.S. Constitution, or, at the very least, presents an appropriate opportunity for the Agency to exercise restraint and defer to local expertise in crafting local regulation. Finally, by dictating the content of local ordinances, the Draft Permit undercuts judicial policy that traditionally affords localities with broad latitude to develop their own ordinances.

EPA regulations require MS4s to "[u]se an ordinance or other regulatory mechanism to" implement various aspects of the small MS4 stormwater permit program, but the regulations do not – and cannot – allow EPA to dictate the specific text of the ordinance.[17] Intruding on the federal-state balance of power, the Draft Permit requires that the ordinance include several of the Stormwater Management Standards under the Massachusetts Wetlands Protection Act, even if the site is not subject to these standards under state law.[18] Furthermore, the Draft Permit prescribes how the MS4 is to maintain its own infrastructure – including suggestions of escrow accounts and contracts. These requirements exceed EPA's authority under the Act and raise significant federalism and constitutional concerns.

As discussed, the CWA recognizes, preserves, and protects the primary responsibilities and rights of states and local governments, which traditionally includes the authority to draft their own local ordinances.[19] Indeed, Section 101(b) shows a clear desire to avoid "readjust[ing] the federal-state balance" of power or raising "significant constitutional and federalism questions . . . ."[20] By dictating the content of the local ordinances, EPA is intruding on a quintessential function of local governments – the authority to draft their own local ordinances. This intrusion on local government functions is contrary to the Act's policy that protects traditional local government powers.

In addition, by requiring specific text in local ordinances, EPA also risks invading basic principles of dual sovereignty embedded in the Tenth Amendment, in which the states retain their rights to exercise their traditional legislative powers in the interest of public health and welfare. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States."[21] The Constitution does not delegate local ordinance enactment to the federal government. Nor does it

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[17] *See, e.g.,* 40 C.F.R. §§ 122.34(b)(3)(ii)(B), 122.34(b)(4)(ii)(A), 122.34(b)(5)(i), and 122.34(b)(5)(ii).

[18] Draft Permit Term 2.4.6.4. at 39 ("The ordinance [shall contain] Standards 3, 4, 5, and 6 of the Massachusetts Stormwater Management Standards, regardless of the proximity of the development to resources areas or their buffer zones under the Massachusetts Wetlands Protection Act.").

[19] 33 U.S.C. § 1251.

[20] *SWANCC*, 531 U.S. at 174.

[21] U.S. Const. Amend. X.

allow EPA to "commandeer[] the legislative processes of the States [or local governments] by directly compelling them to enact and enforce a federal regulatory program."[22]

Indeed, under the Tenth Amendment, the federal government cannot compel states or local governments to include specific terms in ordinances.[23] Yet, the draft permit essentially commandeers the local government's legislative process by dictating specific text for the local ordinances governing MS4 stormwater programs.[24] Given the scope of the draft permit's intrusion on local legislative processes, it is appropriate for the Agency to exercise restraint and to defer to local expertise in drafting its own local ordinances.[25]

Finally, courts historically grant municipalities' wide latitude in enacting or amending ordinances in the areas of health, human services, police protection, and public safety.[26] The draft MS4 permit, which allows EPA to hijack the local government legislative process by dictating the content of local ordinances, would undercut this policy.[27]

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[22] *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn*., 452 U.S. 264, 288 (1981)).

[23] *See Printz,* 521 U.S. at 932-33 ("The Federal Government may not compel the States to enact or administer a federal regulatory program."); *United States v. Lopez,* 514 U.S. 549, 561, n.3, 564 (2000).

[24] *Hodel*, 452 U.S. at 288; *Printz,* 521 U.S. at 932 ("where, as here, it is the whole object of the law to direct the functioning of the State executive, and hence to compromise the structural framework of dual sovereignty," then the program runs afoul of the very principle of federalism).

[25] Under the Tenth Amendment, Congress may "encourage," but not "coerce," states and municipalities to implement federal programs without violating the principle of dual sovereignty. *New York*, 505 U.S. at 166-68. The federal government can "encourage" a municipality to comply with the federal program by giving it an alternative to compliance that does not offend the constitutional guarantee of federalism. *Id*. at 175-76. Here, EPA's draft permit compromises the basic principle of dual sovereignty by directing local governments to enact specific ordinances that regulate third parties. *Printz,* 521 U.S. at 932 ("the federal government may not force the States to regulate third parties in furtherance of a federal program. "). The MS4 has an alternative to the draft general permit (*i.e.,* an individual NPDES permit), but the alternative requires MS4s to "put their projects on hold and run [the Agency's] individual-permit gauntlet." *NAHB v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1280 (D.C. Cir. 2005). This intrusion on local authority offends traditional principles of federalism, detrimentally affects MS4s' day-to-day operations, and "directly affects the investment and project development choices of those whose activities are subject to the CWA . . . ."

[26] *See, e.g., Worcester Sand & Gravel Co. v. Bd. of Fire Prevention Regulations*, 510 N.E.2d 267, 269 (Mass. 1987) (upholding blasting regulation as proper exercise of local authority to protect public safety and refusing to "substitute [court's] judgment for that of the [local fire prevention] board"); *Arthur D. Little, Inc. v. Comm'r of Health and Hosp.*, 481 N.E.2d 441, 454-55 (Mass. 1985) (holding that a local prohibition on testing, storage, transportation, and disposal of chemical warfare agents was an acceptable exercise of traditional local police powers).

[27] *See also State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1981) (courts should construe local regulation "with reasonable latitude in light of the broad language of the general welfare clause" that authorizes local regulation); *County of Morrison v. Wheeler*, 722 N.W.2d 329, 342 (Minn. App. 2006) (granting municipality wide latitude to amend ordinance regulating adult establishments); *Attaya v. Town of Gonzales*, 192 So.2d 188, 192 (La. Ct. App. 1966) ("In this area the courts have historically recognized that a wide latitude exists in legislative bodies at all levels of government to determine the necessity for protecting the health, safety and general welfare of the people."); *Town of Nutley v. Forney*, 283 A.2d

## Regulatory Comments

### A. The Draft Permit imposes costly measures to meet the numeric limits for phosphorous

The Draft Permit imposes costly requirements for the Phosphorous Control Plan ("PCP"), fails to provide adequate guidance on Best Management Practices ("BMPs"), and stretches the already limited resources of municipalities. The Draft Permit outlines the permittee's responsibility to develop a PCP which must describe measures necessary to reduce the amount of phosphorous in discharges from its MS4 to the Charles River. The PCP must also show measures that must be taken to achieve consistency with the Waste Load Allocation for the phosphorous loadings published in the Final TMDL for Nutrients in the Lower Charles River Basin.[28] The PCP is a very exhaustive plan that must also include a legal analysis. It is not evident that EPA has conducted an economic assessment of the cost associated with developing such a plan for each community.

The PCP requirements in the Draft Permit are resource intensive and EPA has not provided the necessary guidance for BMPs. Builders and developers implement measures to control erosion from construction sites. However, the Draft Permit does not clearly identify the additional BMPs that may be required in the PCP beyond the BMPs implemented to control erosion and sediment. The BMPs should be simple and consistent to avoid confusion and to remain cost effective. In the past, EPA has issued a memorandum[29] outlining the appropriateness of an iterative, adaptive management BMP approach to meet permit limits from TMDLs. This type of approach allows for the implementation of structural and non-structural BMPs measures to meet TMDLs Waste Load Allocations. Therefore, EPA should develop model guidance on BMPs that can be implemented to meet the phosphorous reduction requirements. Otherwise, the PCP will require intensive community-level analysis that will overwhelm the already overstretched resources of municipalities.

Nationally, the budgetary shortfall faced by state and local governments is significant. A recent survey that the Environmental Council of the States published on March 23, 2010, showed that staff positions have been eliminated in several states and many are being held vacant due to budget limitations in the current fiscal year. Several states also said they expect further staff reductions in 2011. Given the limited resources in state and local governments, EPA should provide assistance by simplifying the measures necessary to meet the various permit requirements and providing guidance and educational assistance to permittees.

### B. Duplicative requirements at the state and local level can be streamlined by automatically approving Qualifying Local Programs (QLPs)

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142, 146 (Essex County Ct. 1971) (municipality is "entitled to wide latitude in its efforts at necessary municipal regulation").

[28] Draft Permit Section 2.2.1. D.

[29] *See, e.g.,* USEPA, Memorandum entitled "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs"(Nov. 22, 2002).

Stormwater discharges from construction sites located in Massachusetts are regulated directly by the EPA Construction General Permit (CGP), in addition to the regulatory mechanisms established by the local communities. The CGP and the MS4 permit are both designed to control stormwater discharges from construction sites through the selection, design, implementation and maintenance of BMPs. The goals of erosion and sediment control do not differ between the state and local programs, and thus many of the requirements of the CGP overlap significantly with the MS4 permit. According to the Draft Permit, an ordinance or regulatory mechanism for the control of sediment and erosion was a requirement of the 2003 MS4 Permit and should have been effective by May 1, 2008. The Construction Site Stormwater Runoff Control requirements overlap[30] with EPA's stormwater construction permit program.

The Draft Permit does not adequately define the process for becoming a Qualifying Local Program (QLP). EPA fully supports the goals of a QLP as outlined in a Memorandum[31] which outlines the goals of a Qualifying Local Programs for Construction Site Stormwater Runoff, and the requirements that have to be fulfilled by MS4s to be recognized as a QLP. EPA should allow municipalities to be automatically designated as Qualifying Local Programs once they file a notice of intent, develop a stormwater management plan, and promulgate an ordinance for stormwater controls that meets the permit's requirements. Unless the process to be a QLP is automated, it will be a long process for localities to become QLPs. The benefit of having QLPs for construction site operators is it allows a "one-stop shopping" for erosion and sediment control measures through the local government, instead of processing permits through both the state and local governments. NAHB urges EPA to recognize the 84 communities subject to the Draft Permit as QLPs without imposing additional paperwork requirements.

At a minimum, EPA should develop a step-by-step procedure for QLP designation. EPA should also provide a checklist that MS4s can use to assess whether the programs are eligible to automatically be considered a QLP. Some states are effectively using the QLP provision and EPA should review procedures being used by different states and adopt them in this watershed. EPA should provide incentives to localities that become QLPs.

### C. EPA should provide educational and outreach materials to the MS4s

NAHB commends EPA for making education a priority, as outlined in the Public Education and Outreach Section of the Draft Permit.[32] It is important to educate the regulated entity on the changes in this permit cycle and the overall expectations under the new permit. EPA should however take the lead in providing educational materials that can easily be tailored in the different regions, instead of requiring each community to develop separate educational materials. Providing guidance to the communities will also ensure that the level of education being provided in the different communities meets a certain standard and reaches a large audience of regulated entities and end consumers.

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[30] Draft Permit Section 2.4.5.

[31] *See, e.g.,* USEPA, Memorandum entitled "Qualifying Local Programs for Construction Site Stormwater Runoff" (May. 8, 2006)

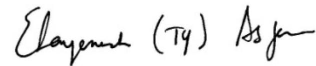
[32] Draft Permit Section 2.4.2.

## Conclusion

NAHB commends EPA Region 1 for developing a permit that considers and plans for water quality impacts at the watershed level. However, NAHB urges EPA to address the Draft Permit's inaccurate use of the term "discharge," as well as its intrusion on the traditional balance between federal and local government authority. In addition, duplicative and confusing requirements at the local, state and federal level and the lack of adequate funding for local governments will affect the construction and development industry's ability to satisfactorily comply with the stormwater runoff control regulations that will be imposed by the MS4s subject to the Draft Permit. EPA is in a unique position to adopt a permit to alleviate the underlying concerns while upholding the goals of the program and ensuring compliance of the industries that operate in the North Coastal Watershed. The resulting permit changes will lead to a more efficient stormwater runoff control program, better environmental protection and ultimately cost effective measures being taken by the MS4s to meet their permit obligations.

Thank you for the opportunity for NAHB to review and provide comments on the *Draft NPDES General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts North Coastal Watershed.* We hope these comments will be helpful to you in your review and in your future considerations. If you have any further questions or comments regarding NAHB's review, please contact me at easfaw@nahb.org or 202-266-8124 or Holli Feichko at Hfeichko@nahb.org or 202-266 8335.

Sincerely,



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