



November 2, 2018

Via email

Stormwater and Construction Permits Section
Attention: Newton Tedder
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Mail Code OEP06-4
stormwater.reports@epa.gov

Re: Public Notice on the contents of the Town of Merrimac's Notice of Intent (posted on October 5, 2018), 4 School Street, Merrimac, MA 01860 (NPDES Permit No. MAR041209))

Dear Mr. Tedder:

Conservation Law Foundation ("CLF")¹ submits these comments for consideration by the Environmental Protection Agency ("EPA") on the Notice of Intent ("NOI") for the Town of Merrimac.

I. EPA is prohibited from granting authorization to discharge under the 2016 MS4 General Permit because the Permit is unlawful under the Clean Water Act's anti-backsliding requirements. *See* 33 U.S.C. § 1342(o).

Because the 2016 Massachusetts Small MS4 General Permit ("2016 Permit")² is in violation of Section 402(o) of the Clean Water Act, EPA cannot lawfully authorize the Town of Merrimac to discharge into the Cobbler Brook, Lake Attitash, Merrimack River, and East Meadow River. The Clean Water Act ("CWA") anti-backsliding³ provision prohibits permits from having less stringent effluent limitations than the previous permit. *See* 33 U.S.C. § 1342(o). "The permit must include requirements that ensure the permittee implements, or continues to implement, the minimum

¹ CLF is a 501(c)(3) nonprofit, member-supported organization dedicated to the conservation and protection of New England's environment. CLF has long worked to protect the health of New England's waterways, including promoting effective regulations and strategies to reduce and minimize the significant impacts of stormwater pollution. CLF has over 5,100 members, including over 2,900 members in Massachusetts. CLF is incorporated under the laws of Massachusetts with its principal place of business at 62 Summer Street, Boston, MA 02110.

² *See* U.S. Env'tl. Prot. Agency, *Final 2016 Massachusetts Small MS4 General Permit* (2016), <https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/final-2016-ma-sms4-gp.pdf>.

³ Anti-backsliding "refers to statutory and regulatory provisions that prohibit the renewal, reissuance, or modification of an existing NPDES permit that contains effluent limitations, permit conditions, or standards less stringent than those established in the previous permit." U.S. Env'tl. Prot. Agency, *NPDES Permit Writers' Manual*, at 7-2 (Sept. 2010), https://www3.epa.gov/npdes/pubs/pwm_chapt_07.pdf.

control measures.”⁴⁰ CFR § 122.34(6). Further, section 402(o)(3) of the CWA is a safety clause that provides an absolute limitation on backsliding:

This section of the CWA prohibits the relaxation of effluent limitations in all cases if the revised effluent limitation would result in a violation of applicable effluent guidelines or water quality standards, including antidegradation requirements. Thus, even if one or more of the backsliding exceptions outlined in the statute is applicable and met, CWA section 402(o)(3) acts as a floor and restricts the extent to which effluent limitations may be relaxed. The requirement affirms existing provisions of the CWA that require effluent limitations, standards, and conditions to ensure compliance with applicable technology and water quality standards.

U.S. Env'tl. Prot. Agency, *NPDES Permit Writers' Manual*, at 7-4 (Sept. 2010), https://www3.epa.gov/npdes/pubs/pwm_chapt_07.pdf. In violation of Section 402(o) of the CWA, the 2016 Permit both omits provisions previously included in the 2003 Small MS4 General Permit (“2003 Permit”) and contains less stringent effluent limitations than the 2003 Permit.⁴ The Town of Merrimac was previously authorized to discharge under, or automatically designated as a Small MS4 under the 2000 or 2010 census and therefore subject to, the more stringent 2003 Permit. Permitting the Applicant via an NOI submitted under the 2016 Permit would cause and/or exacerbate existing violations of applicable effluent guidelines and water quality standards, threaten the health of the environment, the Cobbler Brook, Lake Attitash, Merrimack River, and East Meadow River’s users, and is in violation of the Clean Water Act.

II. Effluent limitations, permit conditions, and standards included in the 2016 Permit are less stringent and therefore in violation of the anti-backsliding provisions of the CWA.

The effluent limitations, permit conditions, and standards (including water quality-based effluent limitations (“WQBELs”)) in the 2016 Permit are less stringent than those in the 2003 Permit and are therefore the 2016 Permit is in violation of Section 402(o) of the CWA. In EPA’s Response to Comments on the 2016 Permit, EPA stated the following about including WQBELs in the 2016 Permit: “the 2003 permit included WQBELs, and it would be inconsistent with anti-backsliding provisions of the CWA to now withdraw such provisions from this permit.” U.S. Env'tl. Prot. Agency, *MA MS4 General Permit Response to Comments*, at 52 (Apr. 4, 2016), <https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/rtc-2016-ma-sms4-gp.pdf>. EPA has therefore concluded that Section 402(o) is fully applicable to the 2016 Permit. However, despite EPA’s acknowledgment of the applicability of Section 402(o), the 2016 Permit eviscerates the WQBELs included in the long-applicable 2003 Permit and therefore the 2016 Permit cannot lawfully be utilized to grant permit coverage to any applicant submitting an NOI where such applicant was subject to the 2003 Permit.

⁴ See U.S. Env'tl. Prot. Agency, *2003 General Permit for Storm Water Discharges from Small MS4s*, (2003), https://www3.epa.gov/region1/npdes/permits/permit_final_ms4.pdf.

The 2003 Permit prohibited “[d]ischarges that would cause or contribute to instream exceedance of water quality standards. The storm water management program must include a description of the BMPs that will be used to ensure that this will not occur.” 2003 Permit, Part I.B.2.k, at 5. In a clear example of prohibited backsliding, the 2016 Permit dramatically weakens this prohibition by substituting a presumption of compliance with water quality standards so long as permittees comply with the minimal management practices and long compliance timeframes set forth in Appendices F and H. No NOI can be lawfully approved under the less stringent requirements of the 2016 Permit.

Further, the 2003 Permit ensured that the stormwater management program included “a section describing how the program will control the discharge of the pollutants of concern and ensure that the discharges *will not cause* an instream exceedance of the water quality standards.” 2003 Permit Part I.C.2, at 5 (emphasis added). This discussion must specifically identify control measures and BMPs that will collectively control the discharge of the pollutant(s) of concern. Pollutant(s) of concern refer to the pollutant identified as causing the impairment. To assure that permittees would not cause water quality standard violations, the 2003 Permit further required that “[t]he permittee must determine whether storm water discharges from any part of the MS4 contribute, either directly or indirectly, to a 303(d) listed water body.” 2003 Permit Part I.C, at 5.

Under the 2003 Permit the Applicant was legally obligated to meet these substantive requirements long ago. The 2016 Permit purports to eliminate the requirement that permittees must ensure the discharges will not cause an instream exceedance of the water quality standards, does not require permittees to specifically identify control measures and BMPs that will collectively control the discharges of pollutants to meet this standard, and purports to vastly relax the compliance timeframe required in the 2003 Permit. Permitting the submitted NOI under the 2016 Permit would be in direct violation of Section 402(o) of the CWA.

III. The extension of compliance schedules in the 2016 Permit is in violation of the anti-backsliding provisions of the CWA.

The 2016 Permit vastly relaxes the compliance schedules mandated in the 2003 Permit by expressly creating longer and weaker implementation schedules. Compliance schedules are effluent limitations, and case law supports the conclusion that issuing an extension of a compliance schedule is indeed less stringent⁵ in violation of the CWA’s anti-backsliding provisions.

- i. Appendices F & H relaxation of compliance schedules is in violation of the anti-backsliding provisions of the CWA.*

The compliance schedule and timeframe in the 2003 Permit was absolutely clear, yet in a blatant example of backsliding, the 2016 Permit’s Appendices F and H purport to delay the compliance schedule clock by years. Specifically, permittees were required to comply with all aspects of the

⁵ See *Citizens for a Better Env’t—Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1120 (9th Cir. 1996) (holding that the modification of a compliance schedule about to come into effect violates the anti-backsliding provisions of the CWA); see also *Pub. Interest Research Grp. of N.J., Inc. v. N.J. Expressway Auth.*, 822 F. Supp. 174, 178, 185 (D.N.J. 1992) (holding a relaxing of interim and final effluent limitations to be an ineffective modification of a permit).

2003 Permit by the expiration date of the 2003 Permit. The 2003 Permit requires that “[a]ll elements of the storm water management program must be implemented by the expiration date of this permit.” *Id.* 2003 Permit Part II.A.2, Part III.A.2. The 2003 Permit became effective on May 1, 2003 and expired at midnight five years from the effective date on May 1, 2008.

Throughout Appendix F and H the 2016 Permit resets the clock on implementation of measures to meet Total Maximum Daily Loads (“TMDLs”) and pollutant reduction requirements in impaired waters without a TMDL by *decades*; weakens pollutant load reduction requirements; and weakens the Illicit Discharge Detection and Elimination (“IDDE”) minimum control measures by crediting (or subtracting) IDDE work upfront, rather than giving pollutant reduction credit as the IDDE work is accomplished, all of which constitutes a weakening of the requirements of the 2003 Permit and is in violation of the anti-backsliding provisions. 2016 Permit Appendix F, Appendix H. EPA cannot lawfully grant the Applicant authorization to discharge pursuant to the dramatically less stringent compliance schedules included in the 2016 Permit.

- ii. *The extension of System Mapping is in violation of the anti-backsliding provisions of the CWA.*

The 2016 Permit purports to provide a two-year time extension for mapping “outfalls and receiving waters” that “was required by the MS4-2003 permit.” *See* 2016 Permit Section 2.3.4.5. In EPA’s Response to Comments on the 2016 Permit, EPA stated the following about System Mapping in the 2016 Permit: “Outfall mapping was a requirement under the 2003 MS4 permit, and EPA notes that the mapping of all outfalls for existing permittees was to be done by 2008.” U.S. Env’tl. Prot. Agency, *MA MS4 General Permit Response to Comments*, at 156 (Apr. 4, 2016), <https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/rtc-2016-ma-sms4-gp.pdf>; *see also id.* at 168 (“Please note that outfall and receiving water mapping was required to be completed during the 2003 permit term, which expired in 2008.”); *see also id.* at 172 (“MS4 outfalls and receiving waters were required to be mapped under the 2003 permit.”); *see also id.* at 235 (“An outfall inventory and map was required under the 2003 permit and should have been completed by 2008 **so additional time for permittees covered under the 2003 Permit is not needed to locate outfalls** (new permittees are given additional time for this task).”) (emphasis added). Not only is EPA repetitively clear that the deadline for system mapping has passed and permittees do not *need* an extension, but providing a further extension under a new NOI with the 2016 permit (past the decade that has already lapsed) is in violation of the CWA anti-backsliding provisions.

- iii. *The extension of catchment investigations is in violation of the anti-backsliding provisions of the CWA.*

The 2016 Permit purports to provide extensions ranging from 18 months to 10 *years* on catchment investigations. *See* 2016 Permit Section 2.3.4.8. Authorization to discharge under such an extension is in violation of the CWA anti-backsliding provisions.

- iv. *The extension of Construction Site Stormwater Runoff Control is in violation of the anti-backsliding provisions of the CWA.*

The 2016 Permit purports to provide one-year time extensions for the development and implementation of a construction and site runoff control program “ordinance or regulatory mechanism that requires the use of sediment and erosion control practices at construction sites” “written [] procedures for site inspections and enforcement of sediment and erosion control measures;” and “written procedures for site plan review and inspection and enforcement.” 2016 Permit Section 2.3.5.c.i,ii,v, at 42–43. Authorization to discharge under such an extension is in violation of the CWA anti-backsliding provisions.

- v. *The extension of Post Construction Stormwater Management is in violation of the anti-backsliding provisions of the CWA.*

The 2016 Permit purports to provide a two-year extension for the development of the post construction SWMP. *See* 2016 Permit Section 2.3.6(a)(ii). Authorization to discharge under such an extension is in violation of the CWA anti-backsliding provisions.

- i. *The extension of Good House Keeping and Pollution Prevention is in violation of the anti-backsliding provisions of the CWA.*

The 2016 Permit purports to provide a two–year extension for the development of an infrastructure operation and maintenance program. *See* Section 2.3.7(a)(iii)(1). Authorization to discharge under such an extension is in violation of the CWA anti-backsliding provisions.

IV. The weakening of the TMDL requirements is in violation of the anti-backsliding provisions of the CWA.

- i. *The limitation of “Approved TMDLs” is in violation of the anti-backsliding provisions of the CWA.*

The 2016 Permit purports to limit *Discharges Subject to Requirements Related to an Approved TMDL* to “those that have been approved by EPA as of the date of issuance of this permit.” *See* 2016 Permit 2.2.1.a, at 16. In contrast, the 2003 Permit did not include this limitation, requiring compliance and necessary adoption of newly issued and “approved TMDLs.” *See* 2003 Permit Part I.D, at 5–6. Authorization to discharge under the 2016 Permit’s limitation to approved TMDLs is in violation of the CWA anti-backsliding provisions.

- ii. *The elimination of conditions for discharges subject to requirements for TMDLs is in violation of the anti-backsliding provisions of the CWA.*

The 2003 Permit prohibited:

[d]ischarges of any pollutant into any water for which a Total Maximum Daily Load (TMDL) has been established or approved by the EPA unless the discharge is consistent with the TMDL. This eligibility condition applies at the time of submission of the NOI. If conditions change after submission of the NOI, coverage

may continue provided the applicable requirements of Part 1.C. are met. In order to remain eligible for this permit, any limitations, conditions and requirements applicable to discharges authorized by this permit, must be incorporated into the storm water management program. This may include monitoring and reporting. Discharges not eligible for this permit, must apply for an individual or alternative NPDES general permit.

2003 Permit Part I.B.2(1), at 5. The 2016 Permit does not require a demonstration of consistency with the TMDL at the time of submission of the NOI despite the fact that numerous applicable TMDLs were established long ago. The 2016 Permit is also less stringent than the 2003 Permit in that it no longer requires incorporation of more stringent controls into the stormwater management program on an annual basis.

The 2003 Permit includes additional provisions to ensure compliance with TMDLs that were unlawfully omitted from the 2016 Permit and replaced with less stringent requirements in violation of Section 402(o) of the CWA. Specifically the 2003 Permit at Part I.D. at pp. 6–7 included the following: “If the MS4 is required to implement storm water waste load allocation provisions of the TMDL,” the 2003 Permit requires that “the permittee must assess whether the [waste load allocation (“WLA”)] is being met through implementation of existing storm water control measures or if additional control measures are necessary.” 2003 Permit Part I.D.3, at 6. The second half of the provision requires an affirmative determination regarding whether additional control measures are necessary if the WLA is not being met. Given the fact that the 2003 Permit was in effect for over 17 years, applicants seeking coverage should be readily able to refer to the assessments they have been completing and the additional controls necessary to implement applicable waste load allocations. Yet, the 2016 Permit fails to include a requirement for any such assessment of WLA compliance. Therefore, authorization to discharge under the 2016 Permit would be in violation of the CWA anti-backsliding provisions.

Furthermore, under the 2003 Permit, permittees were required to “[h]ighlight in the storm water management program and annual reports all control measures currently being implemented or planned to be implemented to control pollutants of concern identified in approved TMDLs. Also include a schedule of implementation for all planned controls. Document the assessment which demonstrates that the WLA will be met including any calculations, maintenance log books, or other appropriate controls. 2003 Permit Part 1.D.4. The 2016 Permit eliminates the requirement that both the SWMP and the annual reports must include compliance descriptions of *both* current and planned implementation control measures.

Finally, the 2003 Permit requirement that a permittee “document the assessment” that “the WLA will be met” in the stormwater management program and annual reports. In violation of the CWA anti-backsliding provisions, the 2016 Permit does not any requirement for an assessment that the WLA will met.

The 2016 Permit provides a dramatic example of prohibited backsliding under CWA Section 402(o). As a result, EPA cannot lawfully authorize dischargers under the 2016 Permit. In response to these comments and before granting authorization to discharge under the 2016 Permit, CLF requests that EPA: require all MS4’s that have submitted NOIs to rigorously document their

existing compliance status under the 2003 Permit through supplementation of their NOIs; deny coverage to all MS4s currently in non-compliance with the 2003 Permit; and require additional information in all NOIs consistent with all of the “effluent limitations, permit conditions, and standards” of the 2003 Permit including those set forth above as a requirement of processing any NOI under the 2016 Permit. In the absence of such corrective actions, EPA cannot lawfully approve any NOI submitted under the 2016 Permit by an MS4 that was covered by or subject to the 2003 Permit and all such NOIs must be denied.

CLF appreciates the opportunity to comment on the NOI submitted by the Town of Merrimac, and we urge EPA to consider CLF’s issues of concern.

Sincerely,



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