

March 11, 2011

Kate Renahan  
U.S. EPA – Region 1  
Office of the Regional Administrator  
5 Post Office Square, Suite 100  
Mail Code – ORA01-1  
Boston, MA 02109-3912

**Re: Draft National Pollution Discharge Elimination System (NPDES) General Permits for Small Municipal Separate Storm Sewer Systems (MS4) in Massachusetts Interstate, Merrimack and South Coastal Watersheds**

Dear Ms. Renahan,

The Coalition for Buzzards Bay (“The Coalition”) has reviewed the Draft National Pollution Discharge Elimination System (NPDES) General Permits for Small Municipal Separate Storm Sewer Systems (MS4) in Massachusetts Interstate, Merrimack and South Coastal Watersheds (“draft permit”) and offers the following comments. While the draft permit provides greater protection for impaired waters in the Buzzards Bay watershed than the existing 2003 General Permit, The Coalition urges EPA to strengthen several sections in the final permit. It is critical that the final permit ensure compliance with water quality standards and total maximum daily loads (“TMDLs”) in order to fulfill the objectives of the MS4 program.

The Coalition for Buzzards Bay is a membership-supported nonprofit organization dedicated to the restoration, protection and sustainable use and enjoyment of Buzzards Bay and its watershed. The Coalition works to improve the health of the Bay ecosystem for the public through education, conservation, research and advocacy. We represent more than 8,000 individuals, families, organizations, and businesses in Southeastern Massachusetts.

### **Areas of Coverage**

Under the draft permit, an MS4 is eligible for authorization if it meets the provisions described in section 1.2.1 and 1.9, including being located either fully or partially within an urbanized area. While the draft permit does state that “If the small MS4 is not located entirely within an urbanized area, only the portion of the MS4 that is located within the urbanized area is regulated, consistent with 40 CFR § 122.32 (a)(1),” making determining eligibility difficult, it does not define applicability based on distance from surface water bodies. The TMDLs issued for Cape Cod, however, have determined that stormwater systems serving impervious areas located more than 200 feet from the shoreline were assumed to travel initially into groundwater and have therefore categorized those discharges as nonpoint sources and included in the Load Allocation (LA).

Systems serving impervious areas located less than 200 feet from the shoreline were assumed to enter into surface waters and were categorized as point sources.

Appendix G lists all approved TMDLs within the coverage area of the permit and attempts to clarify what requirements the permit places on municipalities relative to TMDLs. The chart states that in many municipalities with an approved TMDL, the Waste Load Allocation (WLA) for nitrogen is “negligible.” This is unsupported by the TMDLs for Cape Cod<sup>1</sup> and the underlying technical reports for several reasons. First, the full stormwater contributions of nitrogen from MS4 systems should properly have been placed in the WLA of the TMDLs. Municipal stormwater systems on Cape Cod that collect and convey stormwater to surface waters are “municipal separate storm sewer systems” as that term is defined in EPA’s regulations, and are therefore point sources under the CWA that must be included in the WLA as a matter of law. 40 C.F.R. §§ 122.26(b)(16) & 122.32(a)(1); *see also*, 64 Fed. Reg. 68722, 68818-19 (Dec. 8, 1999). This is the case whether the MS4 conveys and discharges pollutants via groundwater aquifers, surface flow through discrete conveyances such as ditches or swales, direct piped discharges, or a combination of these conveyances. *See* CWA § 502(14), 33 U.S.C. § 1362(14) (“point source.”) Second, to the extent the WLA of the TMDLs is limited to a 200-foot distance from surface water bodies,<sup>2</sup> this distinction is not supported by facts on the ground and is contrary to EPA’s own mapping of MS4 areas of coverage for various municipalities associated with this MS4 permit reissuance. *See* <http://www.epa.gov/ne/npdes/stormwater/ma.html>. Third, Appendix G should clarify that the Cape Cod Nitrogen TMDLs provide no allocation for new growth. Thus, if any new MS4 impervious area is created, the additional nitrogen loading must be removed or offset on that basis alone. *See, e.g.*, Centerville TMDL, at 18. Finally, the chart is confusing, inconsistent, and apparently incorrect in that for some waterbodies, nitrogen is not listed in the column of enforceable WLA components (while other pollutants are listed in this column), or the word “negligible” appears but the word nitrogen does not.

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<sup>1</sup> Stage Harbor, Sulphur Springs, Taylors Pond, Bassing Harbor and Muddy Creek (Chatham) TMDLs for Total Nitrogen, approved by EPA Region 1 on June 21, 2006; Quashnet River, Hamblin Pond, Little River, Jehu Pond, and Great River (Waquoit Bay System) TMDLs for Total Nitrogen, approved by EPA Region 1 on Nov. 7, 2007; Great, Green, and Bourne Pond Embayment Systems TMDLs for Total Nitrogen, approved by EPA Region 1 on July 18, 2007; Popponesset Bay TMDLs for Total Nitrogen, approved by EPA Region 1 on Jan. 22, 2008; Pleasant Bay System TMDLs for Total Nitrogen, approved by EPA Region 1 on Oct. 24, 2007; Three Bays System TMDLs for Total Nitrogen, approved by EPA Region 1 on Feb. 13, 2008; Centerville River – East Bay System TMDLs for Total Nitrogen, approved by EPA Region 1 on Dec. 20, 2007; West Falmouth Harbor Embayment System TMDLs for Total Nitrogen, approved by EPA Region 1 on May 5, 2008; Phinney’s Harbor Embayment System TMDLs for Total Nitrogen, approved by EPA Region 1 on Feb. 5, 2008; Little Pond Embayment System TMDLs for Total Nitrogen, approved by EPA Region 1 on Mar. 3, 2008; Oyster Pond Embayment System TMDLs for Total Nitrogen, approved by EPA Region 1 on May 5, 2008; Nantucket Harbor Bay System TMDL for Total Nitrogen, approved by EPA Region 1 on May 12, 2009, and Stage Harbor/Oyster Pond, Sulphur Springs/Bucks Creek, Taylors Pond/Mill Creek (Chatham Southern Embayments) TMDL Re-Evaluations for Total Nitrogen, approved by EPA Region 1 on June 22, 2009.

<sup>2</sup> The TMDLs are predicated on a distance of 200’ from surface water bodies beyond which nitrogen from MS4 stormwater discharges is presumed to infiltrate and therefore not to reach the receiving waters covered by the TMDLs. *See, e.g.* Centerville River TMDL, at 18.

## **Requirement to Meet Water Quality Standards**

Section 2.1.1 of the draft permit provides that “Discharges shall not cause or contribute to an exceedance of applicable water quality standards (including numeric and narrative water quality criteria) for the receiving water. In the absence of information suggesting otherwise, discharges will be presumed to meet the applicable water quality standards once the permittee fully satisfies the provisions of this permit.” This presumption shifts the burden from the discharger, who under the statutory and regulatory scheme of the Phase I program must demonstrate that water quality standards are met. The final permit must remove this language which creates an illegal presumption of compliance and require all permittees to clearly show that they are meeting water quality standards.

Section 2.1.1 c. also provides a discharger with a 60-day grace period, after becoming aware of a discharge that causes or contributes to the exceedance of water quality standards, to eliminate the illegal discharge. This provision should be removed and replaced with language that requires illegal discharges to be immediately corrected, whether they are discovered by the discharger or the discharger is otherwise made aware, and only allow EPA to waive this requirement in extenuating circumstances on a case-by-case basis.

## **Discharges to Impaired Waterways With an Approved TMDL**

Section 2.2.1 defines “Approved TMDLs” for discharges from the permittee’s MS4 as “TMDLs that have been approved by EPA as of the effective date of the permit.” The Coalition urges EPA to also require compliance with any other TMDLs that are approved after permit coverage begins. Compliance with all TMDLs will ensure that the final permit achieves effluent limits that are protective of water quality for all impaired waters.

Additionally, section 2.2.1 e. ii. of the draft permit establishes a timeframe of no more than four years from the effective date of the permit for permittees in the Connecticut River Watershed, the Housatonic River Watershed, and the Thames River Watershed to implement practices to ensure that existing levels of nitrogen are maintained or decreased. Section 2.2.1 e. iii also requires a 10 percent reduction in nitrogen from out-of-basin sources and requires permittees to maintain or decrease current loads. These requirements should also be included in the final permit for permittees in the Buzzards Bay Watershed.

## **Increased Discharges to Impaired Waters with an Approved TMDL**

Section 2.3.1.2 requires a permittee seeking an increased discharge to an impaired water with an approved TMDL to first, identify and estimate a load for each pollutant for which a TMDL exists from each increased discharge and then, to implement additional Best Management Practices (BMPs) to assure that the increased discharge is not causing or contributing to a water quality standards violation and supports the achievement of the approved TMDL. The permittee must then identify in its annual report those BMPs that the permittee will implement and that will result in a net decrease in pollutant loading beyond that already required by the TMDL through enhanced control of an existing discharge or through offsets. This language should be strengthened in the final permit to require a quantitative approach and certification as to the

measures that have been taken by the permittee and the specific reductions that have resulted from those measures.

### **Outreach Regarding Septic Systems & Lawns**

The Coalition is pleased to see an extensive public education and outreach section included in the draft permit, especially with respect to septic systems. Specifically, the draft permit requires a small MS4 with greater than 50 percent of its residents on septic systems or a small MS4 subject to an approved TMDL for nitrogen to include maintenance of septic systems as part of its education program. Section 2.4.2 c. i. of the draft permit goes on to require MS4s in areas subject to an approved TMDL for either phosphorus or nitrogen to address the proper use of lawn fertilizer and alternatives to traditional fertilizers containing nutrients in their educational programs. The final permit should ban the use of lawn fertilizers in these areas in order to ensure that they do not contribute to the impairment of these already degraded waters.

### **DEP Stormwater Standards**

The draft permit increases the acreage threshold for new development and re-development projects from the standard established in the Draft General Permit for the Massachusetts North Coastal Watersheds. The North Coastal Draft General Permit requires new development and redevelopment projects of “one or more acres” to meet DEP Stormwater Standards #3 through #6 for new development and #7 for redevelopment. The draft permit weakens this standard by requiring the same stormwater standards for new development projects “that disturb one or more acres and upon completion results in two or more acres of impervious surface” and for redevelopment projects “that upon completion results in two or more acres of impervious surfaces.” The one or more acreage threshold should be restored in the final permit for both new development and redevelopment projects.

### **Conclusion**

Thank you for the opportunity to comment. The Coalition looks forward to working with EPA and the Commonwealth to strengthen the standards for small MS4 permittees in order to improve water quality throughout Buzzards Bay. Please feel free to contact us at anytime with questions or concerns.

Sincerely,



Mark Rasmussen  
President

Cc: MA Department of Environmental Protection