

**Examples of New Small Community MS4 Permit Provisions
Not Found in Adopted NPDES Rules or Statute**

Provision 2.1.1(a) prohibits any discharge from “causing or contributing” to any water quality standard exceedance thereby creating immediate exposure to citizen suits and eliminating allowable schedules of compliance.

“The permittee shall reduce the discharge of pollutants such that discharges from the MS4 do not cause or contribute to an exceedance of water quality standards.”

Analysis: This provision does not exist in the NPDES rules and violates federal provisions allowing schedules of compliance. Moreover, under EPA’s existing interpretation, the mere presence of a pollutant of concern (regardless of cause – e.g., natural occurrence or degree of significance) is grounds for claiming permittee is “causing and contributing” and therefore subject to additional pollution reduction requirements. This is also contrary to 40 CFR 122.44(d) which requires the permit writer to demonstrate, not presume, that a water quality-based limit is required and necessary level of control to ensure standards compliance.

Provision 2.1.2(a)-(b) specifies no new development may occur that increases any pollutant loading (or flow) anywhere in the MS4 system absent antidegradation review.

“Any increased discharge (including increased pollutant loadings) through the MS4 to waters of the United States is subject to New Hampshire antidegradation regulations. The permittee shall comply with the provisions of N.H. Code Admin. R. Part Env-Wq 1708.04 and 1708.06 including information submittal requirements and obtaining authorization for increased discharges where appropriate.”

Analysis: This provision mandates State antidegradation rule compliance review under the MS4 program for all individual local land use planning and development decisions. No existing NPDES rules require this assessment. This new provision violates CWA statutory scheme that only imposes a Maximum Extent Practical (“MEP”) standard on the overall MS4 community and exceeds statutory authority by seeking to regulate the every individual component of MS4 decision making, rather than the overall discharge. The Act does not give EPA authority to federalize local land use planning determinations via the federal antidegradation policy.

Provision 2.2.2(a)-(e) creates a presumption that more restrictive MS4 remedial measures are required if the MS4 discharges upstream of a listed impaired water and the pollutant is contained in MS4 discharge.

If there is a discharge from the MS4 to a water quality limited waterbody where pollutants typically found in stormwater (specifically nutrients (Total Nitrogen or Total Phosphorus), solids (Sedimentation/Siltation or Turbidity), bacteria/pathogens (Enterococcus, fecal coliform, or Escherichia Coli), chloride (Chloride), metals (Cadmium, Copper, Iron, Lead or Zinc) and oil and grease (Oil Slicks, Benzo(a) pyrene (PAHs)) are the cause of the impairment and there is not an approved TMDL, or the MS4 is located in a town listed in Part 2.2.2.a.-e. the permittee shall comply with the provisions in Appendix H applicable to it.”

Analysis: This provision is expressly contrary to adopted NPDES rule (40 C.F.R. § 122.44(d)) that mandates EPA, as the permit writer, is responsible for confirming (with evaluations/analyses) the need to regulate a discharge more restrictively and ignores that other factors may be responsible for the impairment (e.g., natural weathering (aluminum), agricultural sources causing bacteria exceedance).

Provision 2.1.1(d) creates an impossibly strict compliance schedule (60 days) for addressing any newly discovered water quality standard or permit condition violation associated with the discharge:

“[I]f a pollutant in a discharge from the MS4 is causing or contributing to a violation of applicable water quality criteria for the receiving water, the permittee shall, as expeditiously as possible, but no later than 60 days of becoming aware of the situation, reduce or eliminate the pollutant in its discharge such that the discharge meets applicable water quality criteria.”

Analysis: This provision has no basis in federal law and improperly negates state schedule of compliance authority.