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March 29, 2019

VIA EMAIL  
DNRSWPERMITS@wisconsin.gov

Storm Water Program  
c/o Suzan Limberg WT/3  
WI Department of Natural Resources  
P.O. Box 7921  
Madison, WI 53707-7921

RE: Comments re MS4 WPDES Permit, No. WI-S050075-3

Dear Ms. Limberg:

On behalf of the League of Wisconsin Municipalities (the League), we are submitting the following comments on the reissuance of the Municipal Separate Storm Sewer Systems (MS4) Wisconsin Pollutant Discharge Elimination System (WPDES) permit, No. WI-S050075-03.

The League is made up of 189 cities and 402 villages in Wisconsin. Some of these communities have MS4 responsibilities and will be significantly impacted by the reissuance of the MS4 WPDES permit. The League greatly appreciates the opportunity to comment on the reissuance of this permit. The League has the following comments and concerns.

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## **1. Compliance Schedules**

### ***A. Section 3 Compliance Schedules***

Section 3 of the MS4 permit requires compliance by March 31, 2020, with a number of permit terms. These include development and submittal to the Department of the following: a public education and outreach program; a public involvement and participation program; an illicit discharge detection and elimination program; a construction site pollutant control program; a post-construction storm water management program; and a municipal storm water management facility inventory and maintenance plan. This schedule is impractical for municipalities.

Municipal budgets for the 2020 calendar year are adopted in the fall of 2019. This provides municipalities with a very short timeframe (January – March 2020) to comply with all of the requirements cited above, which is simply not feasible in most cases. The League recommends spacing out these permit requirements over the full term of this MS4 permit, for example 12, 18, and 24 months after the date of permit issuance or moving the compliance dates for each requirement to March 31, 2021.

### ***B. Total Maximum Daily Load (TMDL) Specific Compliance Schedule***

In coordination with Section 3.1, appendices A, B, and C of the MS4 permit provide a schedule for compliance with TMDLs that were approved prior to May 1, 2014, between May 1, 2014 and May 1, 2019, and after May 1, 2019 respectively.

With respect to Appendix C, which pertains to TMDLs that are approved after May 1, 2019, the permit requires TMDL compliance steps to begin twelve months after the approval date of the TMDL. However, the TMDL Guidance for MS4 Permits states that “[o]nce EPA has approved a TMDL that contains permitted MS4s, the next permit issued must contain an expression of the WLAs [waste load allocations] consistent with the assumptions and requirements contained in the TMDL.” TMDL Guidance for MS4s (October 20, 2014), pg. 2 (Emphasis added.) As currently drafted, the MS4 permit requires municipalities to begin planning for and taking steps toward compliance with a TMDL that has not yet been EPA approved. Appendix C should be either removed or the dates revised so as to require MS4s to begin planning for and implementation of WLAs in the next permit reissuance.

In addition, sections B.4.2.b and B.4.2.c. should be revised. As a practical matter, municipalities would be completing these requirements simultaneously. Thus, both provisions should be completed at the later date currently contained in the MS4 permit. The League recommends

that section B.4.2.b. be revised as follows: “By March 31, 2022, the permittee shall ....” If the Department retains Appendix C, then the League recommends for the same reason that sections C.4.2. and C.4.3 should be revised to be completed at the same date.

We also note that the reference in Section C.1 should be to 1.5.2.c, rather than 1.5.1.c.

## **2. Redevelopment Concerns**

Sections A.5.3.a., B.4.3.a, and C.4.3.b all contain notes stating that “reductions that occur through redevelopment activities ... may provide the most economical and practical method toward eventually achieving the reduction goals.” This note implies that pollution reductions through stricter local re-development pollution control ordinances could result in achievement of WLA reduction targets on a reachshed basis. However, given that many TMDL total phosphorus WLAs have reduction levels greater than 60% from a no controls condition, this is not a realistic expectation. Even if 100% of the land were eventually redeveloped, a phosphorus reduction level of 60% or greater would be needed, and thus infiltration or filtration would be required on every site. Unless the redevelopment proposes to convert existing development into stormwater ponds, this level of pollutant reduction is not technically or physically feasible. These notes are misleading and should be removed.

## **3. Flexibility in Compliance Options**

While the League is appreciative of the fact that the MS4 permit appendices provide a number of paths for TMDL compliance, additional flexibility is necessary to allow municipalities to pursue their most effective options for compliance. The League sees two areas in particular where additional flexibility should be added.

First, in section 2.1.2, the permit should provide a category for “Other” in the table. MS4s should be provided with opportunity for creativity and innovation with respect to public education and outreach efforts in order to pursue options that are most effective for any particular community.

Second, in section A.5.3., DNR should require the completion of only a subset of the options outlined in section A.5.3.a.-g., and add an option f. that would allow an MS4 to undertake “other activities as approved by DNR.” This would allow MS4s to optimize deployment of resources to those activities that are most likely to result in pollution reduction. For example, it may be that an MS4 is evaluating installation of three new structural BMPs rather than one and believes this is the best use of its resources to achieve pollution reduction. This MS4 should be able to

count each of those structural BMPs towards permit compliance without also expending resources to less viable options.

#### **4. New MS4 Discharges**

##### ***A. ORWs and ERWs***

As written, section 1.4.2 appears to prohibit any new land development activity within an MS4 area. This section does not appear to recognize that a new MS4 discharge should be allowed if the MS4 can compensate for any increase in pollutants at a reachshed level and the net pollutant load is equivalent to background. The Department should clarify this language to provide that a new MS4 discharge would be allowed if sufficient pollutant control is provided to protect the ORW or ERW concentration level. The League suggests the following additional language: “The new MS4 discharge of pollutants is allowed if the new MS4 discharge concentration and load are both less than the current undeveloped discharge concentration and load from the same property.”

##### ***B. Impaired Waters***

Similarly, section 1.5.3 also appears to prohibit any new land development activity within an MS4 area and does not sufficiently recognize that a new MS4 discharge should be allowed if the MS4 can compensate for any increase in pollutants at a reachshed level and the net pollutant load is equivalent to background. The Department should clarify this language to provide that a new MS4 discharge would be allowed if sufficient pollutant control is provided such that the discharge would not degrade impaired water body concentration levels. The League suggests the following additional language: “The new MS4 discharge of pollutants is allowed if the new MS4 discharge concentration and load are both less than the current undeveloped discharge concentration and load from the same property.”

#### **5. References to Agriculture**

As explained in Section 1.12.2 of the MS4 permit, a permitted MS4 is not responsible for controlling practices or pollutants generated by agriculture. However, there are references in the permit that suggest MS4 permittees are responsible for controlling practices attributable to agriculture (see Section 1.9). Any such reference to responsibility over agriculture should be removed from the MS4 permit.

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**6. TMDL Compliance and Implementation for Bacteria WLAs**

Section B.5.2 requires the permittee to develop a “bacteria source identification and elimination plan.” As currently stated, this provision is unclear. The Department should provide further explanation as to its expectations on this requirement.

Best regards,

STAFFORD ROSENBAUM LLP

A handwritten signature in blue ink, appearing to read "Paul G. Kent".

Paul G. Kent

Vanessa D. Wishart

PGK/VDW:mai

cc: Curt Witynski, League