

**Response to Comments for NPDES General Permits  
NMR04000, NMR04000I, and OKR04000I**

September 29, 2006

As part of the public participation process, EPA provides the public with the opportunity to comment on proposed NPDES permits. If comments are received, the Agency evaluates the issues raised, modifies the final permit as appropriate, and prepares a summary of the Agency's responses to the comments. These general permits were publically noticed on September 9, 2003, (68 FR 53166) and a 45 day public comment period was provided. On April 4, 2006, (71 FR16775), the public comment period for the general permits was reopened for 30 days, in accordance with procedures at 40 CFR 124.14, for the limited purpose of accepting public comments on changes which had been made to the previously proposed general permits primarily, but not exclusively, to implement a decision by the United States Court of Appeals for the Ninth Circuit in Environmental Defense Center, et al. v. EPA, No. 70014 & consolidated cases (9<sup>th</sup> Cir., Sept. 15, 2003). This responsiveness summary addresses comments received during both public comment periods and is part of the Administrative Record on the Agency's final permit decision.

**Introduction**

For brevity, acronyms and abbreviated terminology have been used in this response to comments document whenever possible. The following acronyms were used frequently in this document: 9<sup>th</sup> Circuit Decision (9<sup>th</sup> Circuit Court of Appeal's ruling regarding the NPDES Phase II storm water regulations (64 FR 68722, December 8, 1999) in *Environmental Defense Center, Inc v. United States Environmental Protection Agency* (9<sup>th</sup> Cir., Jan. 14, 2003, vacated, substituted by 344 F.3d 832, 9<sup>th</sup> Cir., Sept. 15, 2003)), Act or CWA (Clean Water Act), BMP (Best Management Practice), EPA (Environmental Protection Agency), MEP (Maximum Extent Practicable), MS4 (Municipal Separate Storm Sewer System), NMED (New Mexico Environment Department), NPDES (National Pollutant Discharge Elimination System), Region 6 (EPA Region 6), SWMP (Storm Water Management Program), TMDL (Total Maximum Daily Load), and WQS (Water Quality Standards).

Unless otherwise stated, citations to 40 CFR refer to promulgated regulations listed at Title 40, Code of Federal Regulations and those to the Clean Water Act refer to 33 U.S.C. §1251 et seq.

**STATE/TRIBAL CONDITIONS FOR CERTIFICATION UNDER CWA SECTION 401**

Note: Comments that were not conditions for certification are addressed in the comments sections.

**New Mexico Environment Department (NMED)** provided certifications for the proposed permit on November 18, 2003, and June 23, 2006. The certifications did not contain conditions for certification.

**Pueblo of Isleta** provided certification for the proposed permit on November 20, 2003. The certification did not contain conditions for certification.

**Pueblo of Santa Clara** provided certification for the proposed permit on July 17, 2006. The certification did not contain conditions for certification.

**Pueblo of Acoma** provided certification for the proposed permit on June 2, 2006. The certification was conditioned on the permit requiring all MS4s on or bordering the Pueblo of Acoma either submit copies of NOIs and attachments to the Haaku Water Office at the time they are submitted to EPA (or provide written notice that they are filing an NOI and where a copy of the draft NOI is available) and that copies of the NOI, SWMP, and Annual Reports be provided to the Haaku Water Office upon request.

**Pueblo of Sandia** denied certification of the permit on July 14, 2006. Under 40 CFR 122.4(b), permit coverage cannot be provided where certification under CWA §401 has been denied. Parts 1.1 and 8.2.1 have been modified/added to indicate that permit coverage is not available for MS4 discharges within the jurisdiction of the Pueblo of Sandia. MS4s with discharges on the Pueblo of Sandia will need to obtain individual permits for those discharges.

## **COMMENTS FROM SEPTEMBER 9, 2003 COMMENT PERIOD**

### **Comments from Amigos Bravos**

#### **Comment No. 1**

The permit needs to include a well-defined process to enable the public to have input into whether or not the permit is working on an ongoing and discharger by discharger basis. Suggested language for implementing public involvement in SWMP effectiveness:

*“Section 5.2.2.6 The permittee shall have annual public meetings and comment periods upon completion of the draft annual report and monitoring results. The person responsible for implementing and revising the SWMP will review and incorporate public comments into SWMP implementation and necessary revisions to the SWMP.”*

This language would create a regular forum for public input into the SWMP process. This process should be ongoing as long as the discharger is covered under the permit. Adaptive management that includes public input is crucial to ensure the success of any program and is especially necessary for new programs such as the MS4 storm water control permit process.”

## **Response No. 1**

EPA agrees that public involvement and participation is critical to the success of a MS4s storm water management program and has modified the permit to enhance opportunities for public involvement and participation. The permit also implements the regulatory requirement for a public involvement and participation as one of the six minimum measures for small MS4 general permits (see 40 CFR 122.34(b)(2)). This minimum measure is addressed in Part 5.2 of the permit. In light of public comments and the holding in *Environmental Defense Center, Inc v. United States Environmental Protection Agency* (9<sup>th</sup> Cir., Jan. 14, 2003, vacated, substituted by 344 F.3d 832, 9<sup>th</sup> Cir., Sept. 15, 2003)<sup>1</sup>, EPA agrees that requirements for public participation and public involvement in the context of the both the NOI and SWMP would benefit from clearer and more definitive requirements. Note that the NPDES regulations remanded by the 9<sup>th</sup> Circuit have not yet been revised, so Region 6 is proceeding with final permit conditions designed, in part, to address the concerns raised in the Court's decision consistent with the April 16, 2004, Office of Wastewater Management guidance to NPDES Permitting Authorities entitled "Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s" (available online at <http://www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf>).

In developing an approach for use in the final permit, EPA has focused on six main objectives: 1) ensuring that the public will have the opportunity to review and comment on NOIs and SWMPs; 2) ensuring that the permit process provides the public with the opportunity to request a public meeting or public hearing once a Notice of Intent has been submitted; 3) ensuring that the public has the opportunity to review and comment on annual reports and ongoing development and implementation of the SWMP; 4) ensuring that the discharger has a mechanism to take into account and respond to the public's comments on the NOI and SWMP; 5) ensuring that the permit requirements can accommodate the differences in structure and authorities between the types of MS4 operators that will be using the permit (e.g., state, tribal, city, county, special district, federal, etc.); and 6) ensuring EPA would have sufficient time to review the NOIs before permit coverage was effective.

As proposed April 4, 2006, and in response to both comments received during the September 2003, comment period and the issues raised in the 9<sup>th</sup> Circuit Decision, a new Part 1.2.3 was added to the permit to provide for enhanced public access to and ability to comment on the NOI (and Storm Water Management Program (SWMP) which is attached or summarized as part of the NOI). The MS4 operator will be required to provide local notice, consistent with any federal/state/tribal/local public participation requirements, of the NOI at least sixty days prior to submittal to EPA. This will allow as many issues as possible to be resolved locally prior to submittal of the NOI. To accommodate the time MS4 operators will need to prepare the NOI and

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<sup>1</sup>“*We conclude that the EPA's ... failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore remand these aspects of the Small MS4 General Permit option so that EPA may take appropriate action to comply with the Clean Water Act.*”

then provide local notice, the deadline for NOI submittal will be April 1, 2007 (180 days from notice of designation for any MS4s designated after the permit is issued). Local notice of the NOI prior to submittal is an eligibility condition of the permit and supports the regulatory requirement for a public participation program (40 CFR 122.34(b)(2)). Due to the existing regulatory requirement for a public involvement/public participation program and the flexibility in the manner of the local public notice, this eligibility requirement is not expected to place a significant additional burden on permittees. A new Part 1.2.4 was also added to provide a mechanism for the MS4 operator to provide responses to any public comments received either by EPA or the MS4 operator in order to assist EPA in making decisions on whether or not to grant general permit coverage or require modifications of the MS4s SWMP prior to coverage. Authority for including general permit conditions that restrict eligibility and/or specify a time delay between submittal of an NOI and permit coverage is found at 40 CFR 122.28.

Especially during the first permit term, the SWMP will be a living document and the version available at the time the NOI is submitted is likely to consist largely of schedules to develop program elements rather than fully developed programs. In accordance with 40 CFR 122.34(a), the permit allows MS4 operators up to five years to have their SWMPs fully developed and implemented. Public access to, and ability to comment on, the SWMP, as Part of the NOI, was one of the issues addressed by the 9<sup>th</sup> Circuit decision. However, the SWMP will not be fully developed at the time the NOI is submitted, so a complete SWMP will not be available for review at the time the NOI is submitted. Coupling the 9<sup>th</sup> Circuits direction that the public be allowed to comment on the SWMP with the 40 CFR 122.34(b)(2) requirement for a public participation/involvement program, and taking into account the dynamic nature of the SWMP, supports the need for a mechanism for the public to have input on the SWMP as it develops and not only at the time the NOI is submitted.

Under Part 5.2.2 of the permit, the MS4 operator will have to have a program to accept and evaluate public input on development and implementation of the SWMP, but must then make decisions on whether or not to adopt recommendations on a case by case basis. Part 5.8 of the permit requires an Annual Report to EPA covering, in part, progress in implementing the SWMP and any changes being made or proposed to the program. As proposed April 4, 2006, and in response to comments received during the September 2003, comment period and issues raised in the 9<sup>th</sup> Circuit Decision, revisions to Part 5.8.1 and a new Part 5.8.1.7 were added to help ensure that the public will have the opportunity to review and locally comment on Annual Reports and revisions to the SWMP as it evolves. Inclusion of issues being raised and the permittee's responses, will help EPA, States, Tribes, and the public assess whether or not the SWMP is proving successful in meeting the requirements of the permit and the CWA. This condition also supports the regulatory requirement for a public participation program (40 CFR 122.34(b)(2)).

## **Comment No. 2**

Another issue of concern with public participation is the language outlining public

involvement in the NOI and SWMP development process. Language in section 5.2.2.1 and 5.2.2.2 should be clearer to insure that MS4s solicit public involvement and comments prior to submitting a NOI and then again prior to submitting the SWMP to the EPA for approval. This will ensure public participation at the beginning of the process. Language in section 5.2.2.3 should be amended to encourage the person(s) responsible for the SWMP to address public concerns and incorporate changes if appropriate:

*“Develop and implement a process by which public comments to the plan are received [and] reviewed, and addressed and that appropriate changes are incorporated by the person(s) responsible for the SWMP.”*

**Response No. 2**

See Response No. 1.

**Comment No. 3**

There seems to be an inconsistency with sections 5.1.2.2 and 5.6. Section 5.1.2.2 requires MS4s to write and meet measurable goals in implementing the Storm Water Management Plan (SWMP). Yet section 5.6, which outlines the monitoring requirements, requires water quality monitoring only from MS4s that will impact a water with a TMDL completed. How will progress towards these measurable goals be met if there is not consistent comprehensive water quality monitoring program to determine if they have been met or if even if there has been any improvement. All MS4s should be required to implement some kind of water quality monitoring program to determine if the SWMP is effective.

**Response No. 3**

EPA believes the permit already adequately addresses measurable goals. Part 5.6 requirements for monitoring related to discharges to impaired waters have been modified to clarify requirements related to collection of analytical data on the pollutant of concern. Parts 5.1.2.2. and 5.6 serve similar, but slightly different purposes. Part 5.1.2.2 implements the requirement at 40 CFR 122.34(d)(1)(ii) and is aimed more at determining success of particular BMPs and program elements. On the other hand, Part 5.6 implements the broader requirement at 40 CFR 122.34(g) for assessing the effectiveness of the SWMP as a whole. Requirements to collect or review available data when discharging to waters with a TMDL were included in Part 5.2 because a waterbody that has had a TMDL developed is (or was) water quality impaired. Review of monitoring data in such conditions will assist the permittee in developing SWMPs that are consistent with the goals and requirements of the TMDL. However, analytical monitoring of storm water discharges is not the only way that program effectiveness can be measured and the NPDES regulations for small MS4 permitting do not require analytical monitoring in all cases. See also the section on monitoring and assessment in the preamble to the December 8, 1999, Phase II rule at 64 FR 68769. Examples of ways to measure program effectiveness are included in EPA’s guidance on measurable goals. A discussion on measurable goals and a link to EPA’s measurable goals guidance was provided in section IV.C of the fact

sheet to the proposed general permit. EPA does believe that analytical monitoring programs may be a useful tool, but a balance must be struck between the costs of analytical monitoring of storm water discharges that are inherently variable (and then interpreting the monitoring results) and potential impacts on in-stream water quality versus preserving resources for implementation of the programs that will actually prevent or reduce the discharge of pollutants. Part 5.6 (which has been modified based on comments) requires monitoring and/or data collection when the receiving water has already been identified by the State as impaired and a Total Maximum Daily Load has been established. (See also Response Nos. 15, 19 & 31)

Measurable goals are described in the Phase II rule as BMP design objectives or goals that quantify the progress of program implementation and the performance of BMPs. They are objective markers or milestones that the MS4 operator, EPA, and the public will be able to use to track the progress and effectiveness of the SWMP in reducing pollutants to the MEP. EPA recommends that MS4 operators develop a program with a variety of short- and long-term goals. At a minimum, the measurable goals should contain descriptions of actions that will be taken to implement each BMP, what is anticipated to be achieved by each goal, and the frequency and dates for such actions to be taken. Also, EPA recommends that BMPs and measurable goals be used to help establish a baseline against which future progress at reducing pollutants to the MEP can be measured. For example, information on current water quality conditions (which could be obtained from various sources such as a State's ambient water quality monitoring program), numbers of BMPs already implemented, and the public's current knowledge/awareness of storm water management would be useful in setting this baseline.

There are a number of different ways the MS4 operator could write measurable goals. EPA recommends developing measurable goals based on one or more of the following general categories:

1. *Tracking implementation over time.* Where a BMP is continually implemented over the permit term, a measurable goal can be developed to track how often, or where, this BMP is implemented.
2. *Measuring progress in implementing the BMP.* Some BMPs are developed over time, and a measurable goal can be used to track this progress until BMP implementation is completed.
3. *Tracking total numbers of BMPs implemented.* Measurable goals also can be used to track BMP implementation numerically, e.g., the number of wet detention basins in place or the number of people changing their behavior due to the receipt of educational materials.
4. *Tracking program/BMP effectiveness.* Measurable goals can be developed to evaluate BMP effectiveness, for example, by evaluating a structural BMP's effectiveness at reducing pollutant loadings, or evaluating a public education campaign's effectiveness at reaching and informing the target audience to determine whether it reduces pollutants to the MEP. A measurable goal can also be a BMP design objective or a performance standard.
5. *Tracking environmental improvement.* The ultimate goal of the NPDES storm water program is environmental improvement, which can be a measurable goal. Achievement of environmental improvement can be assessed and documented by ascertaining whether state water quality

standards are being met for the receiving waterbody or by tracking trends or improvements in water quality (chemical, physical, and biological) and other indicators, such as the hydrologic or habitat condition of the waterbody or watershed.

EPA strongly recommends that measurable goals include, where appropriate, the following three components:

- The activity, or BMP, to be completed;
- A schedule or date of completion; and
- A quantifiable target to measure progress toward achieving the activity or BMP.
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Measurable goals that include these three components and are easy to quantify will allow the MS4 operator, EPA, and the public to assess progress at reducing pollutants to the MEP.

#### **Comment No. 4**

What is meant by a “measurable goal”? Amigos Bravos contends that a “measurable goal,” when talking about water quality issues, is linked to water quality standards as outlined in EPA regulations “a water quality standard defines the water quality goals of a water body” (40 CFR 131.2). There should be numeric goals outlined in this permit that MS4s must strive to meet through implementing their SWMP. If no numeric goals are set by EPA in the language of the permit then the MS4 should be required to set numeric goals in their SWMP and then monitor during storm events to determine if those goals are being met. To reduce costs of such a requirement MS4s should be encouraged to pursue the numerous opportunities to partner with local and regional academic institutions for implementing storm water monitoring.

#### **Response No. 4**

A discussion on Measurable Goals and numeric monitoring is contained in the response to Comment No. 3. The measurable goals the permittees will be required to develop must be quantifiable, so will usually contain a numeric aspect (e.g., inspect “x” percent, conduct “y” training seminars per year, track information on instream water quality compared to water quality standards, etc.) EPA has not established numeric goals applicable to all MS4s (e.g., national effluent limitation guidelines) and therefore no universal numeric goals are established for this general permit. The conditions of the general permit were developed in accordance with EPA’s August 1, 1996, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits* (61 FR 43761) and the measurable goal requirements in the Phase II rule. However, where a Total Maximum Daily Load applicable to the permittee’s discharges has been established, the permittee will be required to ensure that the Storm Water Management Program contains controls consistent with any applicable allocations or other requirements (Part 1.4.6). Where monitoring is included by the MS4 in support of program assessment or measurable goals, EPA does support cooperative monitoring programs (see 40 CFR 122.34(g)). The permittees will also have access to a state or tribe’s instream monitoring network data. This data forms the basis for state, tribal, and federal determinations whether or not a waterbody’s quality is supporting designated uses or if it should be placed on the CWA section 3030(d) list of impaired

waters. Information of this sort will be useful to MS4 operators in targeting activities or redirecting their programs.

#### **Comment No. 5**

Enforcement is not adequately outlined in the permit. Language should be included (perhaps added as a section 5.6.4) that outlines the enforcement mechanisms that are in place if the results of the monitoring show that measurable goals are not being met.

#### **Response No. 5**

EPA believes the permit already adequately addresses enforcement and the final permit has not been changed. Part 4 of the permit contains conditions to address situations where the SWMP is failing to protect water quality and/or comply with applicable conditions of a TMDL. Part 5.5 of the permit contains requirements for annual review of the SWMP. Part 5.6 requires the permittee to evaluate program compliance, appropriateness of identified BMPs, and progress towards achieving measurable goals. As a result, the permittee may change the SWMP to replace BMPs that are proving ineffective, substitute more cost effective BMPs, etc. EPA may also require changes in the SWMP to address impacts on water quality, deficiencies in the plan, etc. Part 6.1 contains the “duty to comply” requirement applicable to all NPDES permits and outlines the potential ramifications of non-compliance.

#### **Comment No. 6**

The permit needs to include a process for requiring a discharger to obtain an individual permit under certain circumstances. In Michigan there are numerous scenarios outlined in the general MS4 permit under which a permittee cannot obtain coverage under the general permit and must obtain coverage under an individual permit. These scenarios include: 1. If the discharger is a significant contributor to pollution in the effected water body; 2. If the discharger is not complying under the general permit; 3. The regulating entity has determined that the criteria under which coverage under the general MS4 permit no longer applies; and 5. If endangered species are involved. In Pennsylvania individual permits are required in cases where there are impairment problems in the receiving water body, compliance problems or endangered species concerns. To protect New Mexico’s waters the general permit should require an individual permit under some circumstances, such as the ones outlined above.

#### **Response No. 6**

EPA believes the permit contains adequate restrictions on eligibility and provisions for requiring an individual permit if necessary. The final permit has not been changed. Parts 1.4-1.6 contain the limitations on eligibility, including conditions related to water quality, cultural properties, and endangered species. Part 4 of the permit contains conditions addressing situations where the SWMP is failing to protect water quality and/or comply with applicable conditions of a TMDL. Under Part 4, the Director can require coverage under an individual permit. Part 6.18 specifically deals with requiring an individual permit or an alternative general



permit. Under Part 6.18.1, any interested person may petition the Agency to take action under that section (see also 40 CFR 122.28(b)(3)). Note that the public will also be able to comment on individual NOIs and could raise specific concerns on a particular MS4's discharges at that time.

**Comment No. 7**

A clearer mechanism for defining and assessing the accountability requirements for each entity involved with a joint SWMP should be outlined in the permit. This section (section 3.4) needs to explicitly state that all areas of all partnering regulated MS4s need to be covered by the joint SWMP.

**Response No. 7**

EPA believes the permit already contains adequate requirements for identifying responsibilities for program implementation and the final permit has not been changed. Part 5.4 covers requirements for shared responsibilities and the SWMP requirements in Part 5.2 include a requirement for identification of the person(s) responsible for implementation of SWMP components.

**Comments from National Association of Homebuilders (NAHB)**

**Comment No. 8**

NAHB expressed interest in ensuring that there are no procedural differences between the MS4 permit and the Construction General Permit finalized on July 1, 2003, as any deviations may have important implications for the storm water permit program in general.

**Response No. 8**

The requirements for issuance of, and obtaining coverage under, NPDES general permits are found at 40 CFR 122.28. The procedural requirements of the small MS4 general permit are similar, but not identical, to those required in other EPA-issued storm water general permits including the 2003 Construction General Permit. Note that procedural requirements of a particular general permit, particularly those regarding how to obtain coverage under the permit (generally through an NOI), are reassessed each time a general permit is issued or reissued in light of the nature of discharges to be covered, the Agency's administrative needs, conditions resulting from actions required under other statutes (e.g., consultations under the ESA or NHPA), applicable court decisions, and any currently applicable permitting requirements or policies. For example, the 9<sup>th</sup> Circuit Court's decision on the Phase II rule greatly influenced the NOI procedures selected for use in this permit. In addition, note that even the individual permit application requirements for small MS4s are not identical to those for construction and industrial storm water dischargers.

**Comment No. 9**

NAHB expressed support for the bulk of the proposed MS4 General Permit. NAHB specifically expressed support for the automatic authorization of coverage 30 days after the date

the Notice of Intent (NOI) is postmarked, unless notified by EPA of any deficiencies and for public involvement in the development and implementation phases of the minimum measures of the Storm Water Management Program (SWMP).

**Response No. 9**

See Response No. 37

**Comment No. 10**

NAHB was pleased the proposed permit did not add [additional] requirements to the minimum measures and that the Construction Site Storm Water Runoff Control and Post-Construction Storm Water Management in New Development and Redevelopment minimum measures are in line with the federal regulatory requirements.

**Response No. 10**

Comment noted.

**Comment No. 11**

NAHB comment regarding proposed Permit Part 1.5 Endangered Species Act (ESA) Eligibility Requirements:

“The draft MS4 General Permit must be clear on the information sources the permittee must consult in order to determine eligibility under the ESA provision. In the Fact Sheet, EPA refers the permittee to both EPA’s website and the U.S. Fish & Wildlife Service’s (FWS) web site, but then states that FWS is the more accurate of the two lists. Therefore, a permittee relying on EPA’s list of endangered and threatened species may be mistaken about the listed endangered and threatened species located near the site. Violations of the ESA are serious and can result in civil and criminal penalties, including fines and imprisonment; therefore, EPA must choose one definitive source to refer permittees to and on which they may rely. An additional concern is that FWS’s online information on threatened and endangered species may not be current. EPA must work with the FWS Region 2 Field Office to provide current and complete information on endangered and threatened species as well as critical habitat. This information should be online and must be routinely updated. If FWS cannot effectively maintain an accurate and up-to-date online list of listed species, then EPA should direct permit applicants to FWS Regional staff until such time that a permit applicant can rely upon online resources.”

**Response No. 11**

The final permit recommends use of the U.S. Fish and Wildlife Service’s (USFWS) web site at <http://www.fws.gov/ifw2es/EndangeredSpecies/Lists/default.cfm> for species lists. MS4 operators may also contact the local field office of the USFWS for assistance in identifying endangered species that may potentially be affected. The operator of an activity also has an

independent responsibility to comply with the ESA section 9 prohibition on causing a “take” of an endangered species.

Endangered species eligibility criterion D in the proposed permit has been removed from the final permit. Only those MS4s with no listed species or critical habitat in proximity will be eligible for the permit without at least an informal consultation with the FWS. To help clarify the screening process, reflect the changed eligibility criterion, and provide guidance to MS4 operators who cannot immediately meet one of the eligibility criterion, Appendix A has been revised and documentation requirements concerning eligibility decisions have been added. Information on how eligibility conditions have been met must be submitted with the NOI. Those screening requirements insure that EPA will authorize no actions that may affect listed species or critical habitat before they’ve been considered in consultation under ESA §7. Where listed species or critical habitat do not occur in the area affected by the discharge or discharge-related activities, the applicant may generally certify there will be no effect on listed species or critical habitat and obtain permit coverage without consultation. If an effect may occur that has not been considered in a prior consultation, however, the screening mechanism ensures that an appropriate level of consideration and coordination is devoted to avoiding and minimizing potential adverse effects, often through an informal consultation process in which the applicant may act as a non-federal representative dealing directly with the U.S. FWS without significant EPA involvement. If potential adverse effects cannot be eliminated in that informal consultation, the applicant is ineligible for coverage under the general permit and must apply for an individual permit. In processing that permit application, EPA will engage in formal consultation with U.S. FWS. However, following completion of a consultation initially leading towards an individual permit, the MS4 operator may use the completed consultation to meet eligibility criterion B and submit an NOI for coverage under this general permit.

**Comment No. 12**

NAHB comment regarding proposed Permit Part 5.6 Monitoring:

“Part 5.6 confuses two concepts, monitoring and sampling. NAHB recognizes the need for monitoring to ensure that the controls implemented by the permittee comply with a TMDL’s wasteload allocation, and believes it is imperative that permittees retain the flexibility to select the best methods for monitoring. However, monitoring and sampling are two different activities, and EPA must not require permittees to conduct sampling. Sampling is one of several forms of monitoring that the permittee may employ should the permittee determine that monitoring is warranted. Alternatively, a permittee could inspect the integrity of the BMPs in place or conduct a visual analysis of the receiving water. In many cases, sampling will be unnecessary to determine the effectiveness of the permittee’s controls, and will force the permittee to divert limited resources away from other actions that may achieve greater environmental benefits. This provision must be clarified to maintain the distinction between monitoring, which is an appropriate and necessary permit condition, and sampling, which is one of a number of tools at the permittee’s disposal to satisfy the monitoring requirement.”

**Response No. 12**

EPA disagrees that sampling and monitoring are mutually exclusive, since sampling or observations are forms of monitoring. However, Part 5.6 has been modified in response to other comments and EPA has clarified the requirements for analytical and non-analytical monitoring. See also Response Nos. 19 & 31.

**Comment No. 13**

NAHB comment regarding proposed Permit, Appendix B, Historic Properties Guidance:

“This provision must clearly define what is considered “in the path” and how the permittee should determine whether there is a historic property “in the path” of its storm water discharge and if so, how to determine whether there will be an adverse effect on the historic property. As written, this section lacks the detailed terminology needed in order for the permit applicant to make an informed eligibility certification. At a minimum, “in the path of” should be limited to only those instances where the storm water discharge flows over the property in question. NAHB’s proposed definition strikes a balance between the need to protect nationally listed historic sites and the need to provide MS4 operators the opportunity to determine their eligibility under the draft MS4 General Permit. NAHB urges EPA to revise this provision so that the permittee has a clear understanding of what “in the path” means and how to assess the impact of the MS4 storm water discharge on any national historic site “in the path” of it.

While the inclusion of the National Park Service’s web address was intended to be helpful, the information could not be accessed through the address given (although it was reachable using <http://www.nr.ps.gov>). The inclusion of the contact information for the State Historical Preservation Officers is helpful, but in view of other errors, EPA is urged to check the accuracy of this information.”

**Response No. 13**

EPA believes that “in the path of an MS4’s discharge” is sufficiently self-explanatory and the permit has not been changed. Areas that the storm water does not flow through or over are not “in the path” of the discharge and would not generally be expected to impact a historical property. On the other hand, “in the path” could include areas in the vicinity of the discharge outfall that could be impacted by the discharge (e.g., where erosion caused by the discharge itself could potentially impact adjacent historical properties). Note that the same terminology has been used in other EPA storm water general permits (e.g., Multi-Sector General Permit Addendum B, 65 FR 64868) The web address for the National Park Service’s national Register Information System (NRIS) has been updated.

**Comment No. 14**

NAHB comment regarding proposed permit Fact Sheet, Part II Section C, Authorized Discharges & Part III Section D, Endangered Species:

“Part II, Section C requires regulated MS4 operators to obtain coverage for their construction and industrial activities under the existing Construction General Permit for Storm Water Discharges and the Multi-Sector General Permit, instead of being able to use the MS4 General Permit to address these discharges (page 16). However, Section C is contradicted by a provision in Part III, Section D that states, “MS4 operators choosing to cover their construction and industrial activity storm water discharges under today’s permit can only cover those discharges that meet the endangered species eligibility requirements of the Multi-Sector General Permit or the Construction General Permit that would otherwise be used.” (page 22) Thus, it would appear that MS4 operators *may* elect to cover their construction and industrial activity storm water discharges under the MS4 General Permit, so long as they satisfy the ESA eligibility requirements of those permits. NAHB urges EPA to correct this contradiction to allow use of a single permit. Further, if coverage for construction and/or industrial storm water discharges is possible with the issuance of the MS4 permit, which we fully support, EPA should clearly describe how this is to be done.”

**Response No. 14**

The general permit, as proposed, did not allow MS4 operators to obtain coverage for discharges of storm water associated with industrial or construction activity (see Parts 1.4.2 and 1.4.3). The conflicting language in Part III, D of the fact sheet was an inadvertent remnant from an earlier draft. Note that the second paragraph of Section II, C of the fact sheet discussed how Region 6 had considered, but did not propose, allowing such coverage. EPA regrets any confusion this may have caused, but the clear language of Part 1.4 of the permit and Part II, Section C of the fact sheet described the intent of the proposal.

Region 6 believes additional provisions that would be needed for compliance with CWA, ESA, and NHPA requirements would have added undue complexity and largely negated the benefits of providing coverage under a single permit versus separately covering the operator’s construction and industrial storm water discharges under the already available CGP and MSGP. Other than removal of the remnant language inadvertently left from earlier drafts, the final permit has not been changed.

**Comment No. 15**

NAHB comment regarding proposed permit Fact Sheet, Part III, Section C, Consistency with an Applicable Total Maximum Daily Load (TMDL) Analysis:

“In Section C of Part III, EPA issues the “clarification” that where a TMDL contains a load allocation that the “permitting jurisdiction” later determines is for a discharge covered under the MS4 general permit, the load allocation must then be considered a wasteload allocation and the SWMP revised to be consistent with any specific requirements attached to the wasteload

allocation. First, the identity of the “permitting jurisdiction” is unclear – is this EPA Region 6? The MS4 General Permit should clearly define this entity, and if the permitting jurisdiction is in fact EPA, then “EPA” should replace “permitting jurisdiction.” NAHB believes that the “permitting jurisdiction” is EPA Region 6, and that the Fact Sheet should be revised to reflect this identity. Second, the Fact Sheet does not specify when this determination will occur, or how the permittee will be notified of the need to incorporate any additional requirements connected with redefining a load allocation as a wasteload allocation. Will EPA make this determination when it reviews the permit applicant’s NOI? Is the permit applicant supposed to discern whether a load allocation should in fact be interpreted as a wasteload allocation? As written, the permit applicant does not have adequate notice to address these new requirements properly in his/her NOI, and is burdened with making the determination as to what the TMDL writer intended (and what EPA approved) in assigning a load allocation instead of a wasteload allocation. If EPA, or the “permitting jurisdiction” if they are not one and the same entity, believes that a wasteload allocation has been improperly cast as a load allocation, then EPA must amend the TMDL to reflect this correction in order to give notice and certainty to the permit applicant.”

### **Response No. 15**

To eliminate potential confusion, EPA has replaced the term “permitting jurisdiction” with “permitting authority or TMDL authority.” At the time of permit issuance, EPA would be the permitting authority and either the State or a Tribe, depending on the situation, would be the TMDL authority.

Part III, Section C of the Fact Sheet discussed what a discharger would have to do to show consistency with the terms and conditions of a TMDL as required by Part 1.4.6 of the permit. Prior to obtaining coverage, the operator would have to determine if a TMDL applied to the discharges from the MS4. If so, the MS4 operator would only be eligible for permit coverage if the SWMP incorporated conditions necessary for compliance with any load allocations or conditions of the TMDL. Under current regulations and EPA program guidance (40 CFR §130.2 and §130.7), TMDLs must include wasteload allocations for point sources, and load allocations from non-point sources and natural background conditions. However, older TMDLs may have dealt with all storm water discharges, regardless of whether they were point sources (e.g., MS4 discharges) or non-point sources (e.g., agricultural runoff from cropland), as part of the background or non-point source load allocations. In these older TMDLs, there is the potential that a MS4 operator who only looked at Waste Load Allocations (WLA) would miss TMDL requirements or allocations that applied to their storm water discharges or incorrectly assume that the TMDL did not apply to them. Conversely, an MS4 operator could also incorrectly assume that an older TMDL whose WLA did not include mention their discharges did not allow any loading when, in fact, the Load Allocation addressed their discharge.

Under 40 CFR 122.44(d)(7)(b), NPDES permits must contain conditions to assure the authorized discharges are consistent with the assumptions and requirements of any available wasteload allocation for the discharge. If no pollutant load was allocated for a discharge or class of discharges, a permit would have to limit the discharge of the pollutant of concern to zero.

EPA has adopted an approach for interpreting existing TMDLs where allocations for MS4 discharges are found in the Load Allocation section instead of the Wasteload Allocation that would not penalize the operator by assuming a Wasteload Allocation of zero. Prior to submitting an NOI, the MS4 operator will need to determine if there is a TMDL for their receiving waters and what conditions of that TMDL apply to their discharges. EPA does encourage applicants to contact the TMDL authority (usually the State) with any questions and expects that it is at this time that the TMDL authority would resolve any questions about the need to treat a Load Allocation as a Wasteload Allocation. (See also Response No. 19)

Updating of TMDLs is outside the scope of this permitting action. However, EPA has issued guidance on accounting for storm water loads in TMDLs and future TMDLs should have point source storm water discharges properly accounted for in the wasteload allocation section.<sup>2</sup>

### **Comment No. 16**

NAHB comment regarding proposed permit Fact Sheet, Part III, Section D, Endangered Species:

On page 21, the Fact Sheet states that in some instances EPA will require an applicant to pursue a formal or informal consultation with FWS, and gives as an example the scenario that even where there is no formally designated critical habitat, it may be necessary to examine the effect of habitat alteration or destruction on listed species, regardless of whether they are detected in the proximity of the MS4. However, the provision does not specify at what point EPA or FWS may contradict this finding and impose additional requirements on the MS4 operator. Under this scenario, the permit applicant, upon finding no listed species in its area using either the FWS online list, Regional personnel, and/or visual inspection, will likely certify his/her eligibility under Criteria A, that no endangered or threatened species are in the proximity of the MS4. This provision in the Fact Sheet removes the permit applicant's ability to establish with any certainty its eligibility under any of the Criteria to obtain coverage under the General Permit.

More importantly, however, NAHB is concerned that this provision gives EPA the ability to subject the permittee to a "virtual" critical habitat, which is clearly beyond its authority under the CWA or, for that matter, beyond FWS's authority under the ESA. If a species has been listed as endangered but critical habitat has not yet been designated, FWS must prove that species exists in a particular area (i.e., that the area is "occupied") before it can be regulated under the

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<sup>2</sup>See November 22, 2002, memorandum from Robert Wayland, Director of OWOW and James Hanlon, Director of OWM to Regional Water Division Directors: "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" available online at <http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf>

ESA. The Supreme Court has upheld this interpretation in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995) when it found it was the duty of FWS to prove the actual death or injury to a species to show “harm” and thus a violation of the ESA. Outside of designated critical habitat areas, there is no authority under the ESA to prohibit adverse modification or destruction of unoccupied habitat. Despite a lack of authority, this is exactly what EPA is intending to do here. Only when a federal action or authorization may directly jeopardize the continued existence of a species (i.e., the action under consideration takes place in an area that is “occupied”) may ESA Section 7 or 10 consultations be evoked. The Fact Sheet must be revised to clearly state that EPA will only require permit applicants to complete formal or informal consultation with FWS for those actions that occur within areas occupied by the species in question. If no species are present, no consultation is required and project proponents must be allowed to proceed with their general permits. This approach will ensure consistency with the law and will create needed certainty for permittees while at the same time ensuring adequate protections for endangered species.

*NAHB's Footnote: Even the draft MS4 General Permit contradicts EPA's assertion of authority to find a “virtual” critical habitat for unoccupied areas where none has been designated. “Coverage under this permit is available only if the MS4 operator’s storm water discharges, allowable non-storm water discharges, and discharge-related activities are not likely to: jeopardize the continued existence of any species that are listed as endangered or threatened (“listed”) under the ESA or result in the adverse modification or destruction of habitat that is designated as critical under the ESA (“critical habitat”); or cause a prohibited “take of endangered or threatened species (as defined under Section 3 of the Endangered Species Act and 50 CFR 17.3), unless such takes are authorized under sections 7 or 10 of the Endangered Species Act.” No mention of a “virtual” critical habitat is contained in this provision.*

## **Response No. 16**

The comment contends that “only when a federal action or authorization may directly jeopardize the continued existence of a species (i.e., the action under consideration takes place in an area that is “occupied”) may ESA Section 7 or 10 consultations be evoked.” This is plainly incorrect; consultations are required on federal actions that “may affect” listed species or critical habitat, not just on those that may directly jeopardize the continued existence of a listed species. This is why EPA is not providing coverage for actions that “may affect” listed species under this permit until they have been considered in an informal or formal consultation.

*Nor is Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), in which the Supreme Court considered circumstances under which habitat destruction could constitute a “take” under ESA §9, germane to the need for Section 7 consultations. The Supreme Court specifically noted “Any overlap that § 5 or § 7 may have with § 9 in particular cases is unexceptional [citation omitted] and simply reflects the broad purpose of the [Endangered Species] Act set out in § 2 and acknowledged in *TVA v. Hill*. Id. At 703.



More to the point, perhaps, the comment suggests language in the permit relating to ESA Eligibility Criterion A should be clarified so applicants determining there are no listed species or critical habitat in the action area may be certain no ESA consultation will be required before EPA may provide coverage under the general permit. In most instances, discharge-related activities in areas where there are no listed species or critical habitat will have no effect on those species or habitat and ESA §7(a)(2) and implementing regulations at 50 C.F.R. Part 402 will require no consultation before EPA grants coverage under the permit. In extraordinary circumstances, however, listed species not in proximity to storm water discharges or storm water-related activities may be affected. A better example than the fact sheet's of a situation requiring consultation in such circumstances is documented in *Save Our Springs Alliance v. Cook*, 2002 WL 31757473 (W.D. Tex. 2002)(not published in F.Supp.2d). To deal with such extraordinary situations, the permit reserves the right to consult under ESA §7 even if an applicant accurately certifies there are no species or critical habitat in proximity to its discharges or discharge-related activities.

**Comment No. 17**

NAHB comment regarding proposed permit Fact Sheet, Part IV, Section A:

Item 1.a, Deadlines for NOIs (page 24), should be corrected to reflect the same provision in the draft MS4 General Permit, located at Part 3.1. The draft MS4 General Permit reflects the fact that this draft permit has been proposed long after the March 10 deadline, and provides that an existing MS4 in an urbanized area will have 90 days following the effective date of the permit to submit its NOI or application for an individual permit. The Fact Sheet should be amended to reflect this reality.

**Response No. 17**

The NOI deadlines at Part 3.1 of the permit have been revised. Small MS4s in Urbanized Areas must submit NOIs by April 1, 2007. (See Response No. 1)

**Comments from County of Bernalillo**

**Comment No. 18**

Bernalillo County disagreed with the Part 5.2.4.3 requirement that the MS4 operator must review the plans and verify (in written communication with the construction site operator) that the BMPs for the site are adequate. The County objected to the requirement for two reasons. First, the operator of a construction site is required to comply with EPA regulations [obtain NPDES permit coverage for discharges of storm water associated with construction activity]. The County believes that requiring the MS4 operator to make a determination that the BMPs are appropriate for the site obstructs the relationship between the EPA and the construction site operator. The County expressed concern that the County could be held liable for approving BMPs that EPA or the NMED later found to be inappropriate. Second, the County believes that requiring the MS4 operator to make the determination that BMPs are adequate implies that the

MS4 has a greater responsibility than the permittee to develop appropriate BMPs. The County also noted that the requirement is particularly burdensome for small MS4s, which do not have the additional trained staff to make these determinations.

**Response No. 18**

The permit condition at Part 5.2.4.3 is based on the minimum measure for small MS4 permits at 40 CFR 122.34(b)(4)(ii) that requires the construction program element include: *“(A) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law; (B) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices; (C) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality; D) Procedures for site plan review which incorporate consideration of potential water quality impacts; ...”* While many construction site operators will have an independent responsibility to obtain an NPDES permit for their storm water discharges associated with construction activity, it is the MS4 operators duty to ensure compliance with the local construction storm water program they have developed in support of the requirement to reduce, to the Maximum Extent Practicable, the discharge of pollutants from the MS4. Local authorities are better equipped, with assistance in the form of national and/or state guidance, to generally assess the appropriateness of BMPs given local conditions and site-specific parameters (e.g., a simple silt fence at the bottom of a large area of denuded steep slope would not likely be appropriate - nor within manufacturer’s specifications). EPA is not requiring the MS4 operator certify to EPA or the construction site operator that BMPs deemed “appropriate” will not need to be revised once installed. EPA acknowledges that a particular BMP that was expected to be effective can turn out to prove ineffective in a certain situation, which is why the construction general permit requires construction site operators periodically inspect BMPs for proper operation and effectiveness.

In the MS4 operator’s review, EPA expects that grossly inappropriate BMPs will be identified, saving the construction site operator the cost of installing, and then replacing, an ineffective BMP, thereby helping ensure the local water quality will be protected. For example, the MS4 operator could require the construction site operator certify, with documentation, that the BMPs for a site fell within the manufacturers parameters for use, sizing, and/or good engineering practices and review that certification. The MS4 operator could also discourage or prohibit, based on local experience, certain BMPs that have proven problematic in local applications. Many MS4 operators may wish to handle this site plan during the development or building permit approval process.

To address the concern expressed over liability for approval of BMPs, EPA has revised Part 5.2.4.3 to clarify that the construction site operator is ultimately responsible for the performance of BMPs at the construction site.

### **Comment No. 19**

The County objected to the requirement in proposed permit Part 5.6 that permittees discharging to waters for which a TMDL has been established monitor to determine if the storm water controls are adequate to maintain compliance with the MS4's wasteload allocation. The County noted that the Phase II rule (64 FR 68753) specifically identifies narrative effluent limitations requiring implementation of BMPs to reduce pollutants to the Maximum Extent Practicable (MEP) as the program structure to be implemented by the Phase II MS4s. The County believes that requiring monitoring for numeric effluent limitations is not consistent with the final rule and therefore not an appropriate permit requirement. The County also noted that small MS4s may be located near larger MS4s that are already conducting monitoring and that those results should be considered representative for the small MS4s in the area. The County believes that monitoring is not cost effective for entities struggling to meet the requirements of a federal mandated program that lacks federal funding.

### **Response No. 19**

Discharges subject to a TMDL are a special case under the regulatory requirements for small MS4 permits. Under 40 CFR 122.34(e), *“(1) You must comply with any more stringent effluent limitations in your permit, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL) or equivalent analysis. The permitting authority may include such more stringent limitations based on a TMDL or equivalent analysis that determines such limitations are needed to protect water quality.”* and *“(2) Guidance: EPA strongly recommends that until the evaluation of the storm water program in §122.37, no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4, except where an approved TMDL or equivalent analysis provides adequate information to develop more specific measures to protect water quality.”* (emphasis added). EPA believes it is appropriate to include permit conditions requiring assessment of whether or not the MS4 operator's SWMP is proving effective at controlling the pollutants of concern and ensuring consistency with the conditions and requirements of applicable TMDLs. This approach is also consistent with EPA's November 22, 2002, memorandum from Robert Wayland, Director of OWOW and James Hanlon, Director of OWM to Regional Water Division Directors: “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.”

EPA acknowledges that there may be opportunities for regional or alternative monitoring/assessment programs to verify that the MS4 Operator's SWMP is proving effective at controlling pollutants addressed by an applicable TMDL and the proposed language at Part 5.6 was intended to accommodate all types of monitoring activities and is not limited to storm water discharge analytical sampling. The monitoring requirement at Part 5.6. has been revised and clarified to more clearly allow non-analytical monitoring/assessment programs and cooperative monitoring/assessment programs and make the actual requirements for analytical sampling more apparent.

However, based on the pollutant of concern, information on the quantity actually present in the MS4 operator's discharges (as opposed to a nearby Phase I MS4's discharges) could be a valuable tool in assessing whether additional efforts are needed to reduce that constituent in the small MS4s discharges. Part 5.6 has also been modified to require the development of a monitoring/assessment plan so as to provide a clear understanding for the permittee, state and federal regulators, and the public as to exactly what the permittee will be doing to monitor/assess the effectiveness of the SWMP in meeting the objectives of the TMDL. If the TMDL assigns a specific numeric loading to one or more of the small MS4's discharges (or the MS4 as a whole), analytical discharge monitoring would typically be required as the most appropriate method for assessing whether the SWMP BMPs are achieving compliance with the TMDL. For discharges to an impaired water prior to development of a TMDL or where the TMDL does not establish specific allocations for the MS4's discharges, flexibility to participate in cooperative and/or representative monitoring programs and/or use of existing data on MS4 discharge quality may be proposed to reduce the cost burden on the MS4. The proposed monitoring/assessment plan may also take advantage of any monitoring or assessment recommendations in the TMDL or any TMDL implementation plan - even if this would result in use of non-analytical methods or alternative assessment methods. (See also, Response to Comment No. 15).

### **Comments from New Mexico Environment Department**

#### **Comment No. 20**

NMED pointed out an inconsistency between the Fact Sheet (Section IV.H.3.) and proposed permit Part 5.8.1 regarding the due date and reporting period for Annual Reports. NMED believes that since small MS4s were required to apply for permits on March 10, 2003 (application for an individual permit since general permit coverage was not available) and MS4s should have developed and implemented a storm water management program by March 10<sup>th</sup>. NMED therefore believes the Annual Report reporting period and due date should be based on March 10<sup>th</sup> as described in the Fact Sheet, rather than on the anniversary of the 1<sup>st</sup> of the month after permit issuance as described in Part 5.8.1 of the permit.

#### **Response No. 20**

The requirement for annual reports at 40 CFR 122.34(g)(3) is "... you must submit annual reports to the NPDES permitting authority for you first permit term." In considering the NMED comment on the timing of annual reports, EPA has changed the permit to require submittal of the first annual report by April 1, 2008, and then annually thereafter. The reporting year will be January 1 - December 31. This will allow permittees three months after the close of the reporting year to compile the annual report.

In accordance with 40 CFR 122.34(a) permittees will have "...up to 5 years from the date of permit issuance..." to fully develop and implement the SWMP. Part 5.1.2.2 of the permit does allow schedules for developing and implementing SWMP components as soon as practicable but not later than 5 years, but also requires credible interim progress over the five year term of the

permit. For example, given the wealth of guidance available, development and implementation of an illicit discharge detection and elimination program and at least an initial programs for municipal operations, public education and public participation/public involvement would not take 5 years and could likely be put in place within a year or so. On the other hand, the construction and post construction programs - which could involve adopting engineering or performance criteria and passing new ordinances - could take longer. In addition, many programs already being implemented by the MS4s may satisfy all or parts of the SWMP requirements and could simply be continued until any necessary enhancements were made.

**Comment No. 21**

NMED noted a discrepancy between the permit numbers in the Fact Sheet, Federal Register, and proposed permit.

**Response No. 21**

The permit numbers listed on the cover page of the proposed permit were correct. The third character in the permit numbers should be “R” rather than “S” (e.g., NMR040000). EPA would also point out that commentors were instructed to reference the docket number for all the proposed general permits (6WQ-03-SW01) rather than a permit number, minimizing the effect of the typographical errors. The permit numbers have been corrected in the final permit documents.

**Comment No. 22**

Proposed permit Part 1.4.6 discussed eligibility conditions for discharges of pollutants of concern to waters for which there is an applicable total maximum daily load (TMDL) and requires the operator to incorporate into their SWMP measures or controls that are consistent with the assumptions and requirements of such TMDLs. Where the TMDL did not contain specific requirements applicable to the MS4 discharges, the permit suggested the operator “should” consult with the State or Federal TMDL authority to confirm that adherence to a SWMP meeting the requirements of the general permit would be considered to be consistent with the TDML. NMED commented that the permit should require rather than suggest this consultation with the TMDL authority.

**Response No. 22**

EPA has no objection and has modified Part 1.4.6. accordingly. In reviewing Part 1.4.6 in response to NMED’s comment, EPA also determined that this section should be reworded to improve clarity.

**Comment No. 23**

NMED suggested the NOI also require information and attachments documenting compliance with the eligibility conditions at Part 1.4.6. regarding discharges inconsistent with a TMDL. NMED suggested that it might be more appropriate to include any measures or controls

adopted for the operators's SWMP for consistency with an applicable TMDL as information required to be submitted with the NOI under Part 3.2 rather than simply being referenced under Part 2.1.1.

**Response No. 23**

Submittal of the NOI constitutes a certification by the discharger that they have met all applicable eligibility conditions of the permit. In accordance with Part 3.2, information on how eligibility conditions related to TMDLs, endangered species, and historic properties have been met will be submitted as part of the NOI. EPA does agree that documentation on eligibility is desirable and has added a requirement at Part 5.7.3 more clearly require documentation in the SWMP on how eligibility with regard to not only TMDLs (Part 1.4.6), but also Endangered Species (Part 1.5) and Historic Preservation (Part 1.6) eligibility conditions were determined. Note that Part 5.7.1 already required the permittee to "...retain records of ... all data used to complete the application (NOI) for this permit...." The new Part 5.7.3 simply highlights the need to document these aspects of permit eligibility.

**Comment No. 24**

The term "municipal separate storm sewer system" includes those owned or operated by a State. To avoid potential confusion from the use of "municipal" in Part 3.2.1 ("...name of the federal facility or municipal entity..."), NMED suggested adding "state facility" to the list or replacing the list with "MS4 operator."

**Response No. 24**

Part 3.2.1 as been modified to use the term "MS4 Operator."

**Comment No. 25**

NMED commented that the proposed permit Part 3.2.5 requirements to include "[t]he area of land that drains to the applicant's MS4 (in square miles)" was confusing and asked that EPA clarify whether the estimate was limited to just the area within the MS4 or must also include areas outside the operator's MS4. NMED also commented that "... since there is likely at least some, and perhaps in some cases, a significant pollutant load associated with drainage that originates outside of the regulated MS4 boundary, [NMED's Surface Water Quality Bureau (SWQB)] believes it is appropriate for the MS4 operator to address pollutant loads from these physically interconnected drainage areas. In fact, particularly in the case of MS4s that conduct analytical or other water quality monitoring of flows in the MS4 conveyance themselves, it will likely be impossible (and historically contrary to EPA regulations) to segregate out these pollutant loads." SWQB also questioned whether these drainages from outside of the UA boundary represent MS4s located outside an Urbanized Area that contributes substantially to the pollutant loads of a physically interconnected MS4 already designated under Phase II and would require designation under 40 CFR 123.35(b)(4).

### **Response No. 26**

To eliminate confusion and for consistency with the corresponding small MS4 individual permit application requirement at 40 CFR 122.33(b)(2)(i), Part 3.2.5 as been changed to require an estimate of the area (in square miles) served by the operator's MS4. Where MS4s are interconnected, the area outside the operator's MS4's service area would not be included in this estimate. The Census Bureau's "State & Country Quickfacts" web site is a useful online reference for acres within a city or county ( <http://quickfacts.census.gov/qfd/> ).

In accordance with 40 CFR 123.35(b)(4), the permitting authority is required to designate an unregulated small MS4 that contributes substantially to the pollutant loadings of a physically interconnected MS4 regulated by the NPDES storm water program. The designation decisions would be made based on the specific circumstances taking into account whether or not the systems were physically interconnected (as opposed to simply discharging to the same receiving water) and if so, whether or not the loadings from the "upstream" MS4 were substantially contributing to the loadings of the "downstream" MS4.

### **Comment No. 27**

NMED noted that proposed permit Part 4.1 stated that "...coverage under this general permit may be terminated by EPA, and EPA may require an application for coverage under an alternative general permit or for an individual permit." NMED suggested that it is inappropriate to allow coverage under the general permit for discharges that continually or repeatedly exceed water quality standards and believes that such discharges are more appropriately covered by an individual permit. NMED suggested that "...may be terminated..." be replaced with "...will be terminated..."

### **Response No. 27**

EPA disagrees that a change from "may" to "will" is necessary and has not changed the final permit. The permit places conditions and requirements on the permittee and not on EPA. EPA also notes that the condition is consistent with that found at 40 CFR 122.28(b)(3)(i): "The Director may require any discharger authorized by a general permit to apply for and obtain an individual NPDES permit. Any interested person may petition the Director to take action under this paragraph."

### **Comment No. 28**

NMED requested clarification of the term "credible" as used in the proposed permit Part 5.1.2.2. requirement that "credible" interim progress in developing and implementing program elements be made over the five year term of the permit. NMED believes that EPA should incorporate required time frames for completion of the various program elements in the final permit and that the time frames should fall within the five year term of the permit.

### **Response No. 28**

40 CFR 122.34(a) states that “Your NPDES permitting authority will specify a time period of up to 5 years from the date of permit issuance for you to develop and implement your program.” EPA agrees that program elements should be developed and implemented as expeditiously as practicable and must be implemented within 5 years of permit issuance. The proposed requirement for “credible interim progress” was intended to insure that permittees did not put off all program development and implementation until the fifth year. However, EPA does recognize that small MS4 operators will have varying program development and implementation tasks to face depending on many factors including: currently existing programs that can be used or adapted, existing resources (funding and/or staff) for new programs or implementing existing programs in a manner consistent with permit requirements; legal authority issues that would need to be resolved, etc.

To resolve concerns about the subjective nature of the “credible interim progress” requirement, the Part 4.1 has been modified and Table 4-1 added to set forth expectations on reasonable progress and require justification for any delays beyond those time frames.

**Comment No. 29**

NMED noted that Part 5.2 required the identification of the person(s) responsible for implementation under each measure except Public Involvement/Participation and suggested revising to “person(s) or position(s)”.

**Response No. 29**

Part 5.2.2.4.7 requires identification of the person responsible for implementing and coordinating the public involvement/participation program element. EPA concurs that allowing identification of a responsible position rather than individual would reduce the burden on permittees of make changes to the SWMP as personnel in a position change. Precedent exists as identification of a position rather than a named individual is already allowed under the requirements for signatory authority at 40 CFR 122.22. Relevant sections of Part 5.2 have been changed.

**Comment No. 30**

NMED noted that Part 5.2.3.9.3 and Part 5.2.4.4 referred to a permittee’s lack of legal authority and stated that “the permittee may rely on EPA and the state environmental agency for assistance in enforcement...” Both these parts require that the permittee establish ordinances or other regulatory mechanisms to require compliance so it was unclear to NMED that a “lack of legal authority” meets the requirements of the permit. In addition, NMED pointed out that while it had the authority to enforce State laws, rules and regulations, there was no state authority for NMED to enforce the federal Clean Water Act or NPDES regulations.

**Response No. 30**

EPA interprets “lack of legal authority” to refer to situations where a MS4 operator had no authority under or had been specifically prohibited by applicable State or Federal law from adopting or enforcing ordinances or other enforceable mechanisms. “Lack of legal authority”



does not extend to situations where a permittee had not utilized existing legal authority, for example, a construction and development ordinance did not yet exist, but authority to adopt such an ordinance did.

EPA does note that NMED does not, at this time, have the authority to directly enforce the NPDES program. Local MS4s could, however, contact NMED for assistance in resolving compliance issues which may ultimately require the involvement of EPA. No changes to the permit are necessary.

#### **Comment No. 31**

NMED noted that Part 5.6.1 would have required permittees to monitor discharges into receiving waters for which a TMDL had been established to determine if their storm water controls were adequate to maintain compliance with the MS4's waste load allocation. NMED assumed that monitoring in this context meant analytical monitoring since the following Part 5.6.2 referred specifically to analytical monitoring procedures and requested that EPA include a requirement to develop a sampling and analysis plan for this requirement as a part of the SWMP. NMED stated that such a monitoring plan should be developed in consultation with NMED and EPA so that sampling locations, frequencies, parameters, etc. would be appropriate and, to the extent practicable, avoid overlap and duplication with other monitoring programs. In addition, NMED requested that EPA apply the same requirement to permittees that discharge to a waterbody for which a TMDL is approved during the permit term, provided the TMDL included a waste load allocation or load allocation for a parameter expected to be present in the MS4s discharges.

#### **Response No. 31**

Part 5.6.1 was intended to provide a mechanism for assessing whether or not the permittee's SWMP was proving effective in assuring that authorized discharges were consistent with the assumptions and any specific wasteload allocations in an applicable Total Maximum Daily Load. In accordance with EPA's November 22, 2002, memo "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" a monitoring program would allow for iterative adjustments to SWMPs (see Parts 1.4.6, 5.1, 5.5 and 5.6) as necessary to protect water quality and demonstrate consistency with assumptions and allocations under an applicable TMDL.

Part 5.6 has been revised to clarify the purpose and goals of the monitoring and to require that the monitoring plan be developed in consultation with NMED and EPA. EPA acknowledges that in certain circumstances, joint monitoring programs, non-analytical indicators of program success, and/or reliance on other available data being collected may be appropriate.

#### **Comment No. 32**

NMED interpreted the monitoring in the Part 5.8.1.5 requirement that the MS4 operator include a "[d]escription and schedule for implementation of additional BMPs that may be necessary, based on monitoring results, to ensure compliance with applicable TMDLs..." to refer

to the more general monitoring discussed in Part IV.H.1 of the Fact Sheet which could include non-analytical monitoring or assessment methods. NMED requested clarification that the permittee was not limited to analytical monitoring and could also consider use of non-analytical indicators to assess effectiveness for the SWMP in limiting pollutant loads to the Maximum Extent Practicable and protecting water quality.

**Response No. 32**

EPA agrees that changes necessary to assure compliance with a TMDL may not only be triggered by analytical monitoring. Part 5.6.1 has been revised to include “new information or monitoring results.”

**Comment No. 33**

NMED noted two typographical errors regarding references to other parts of the permit in Appendix C. Item 4 reference to Part 1.4.8 should have been Part 1.4.6 and Item 7 reference to Part 5.3 should have been Part 5.2.

**Response No. 33**

Typographical errors corrected.

**Comment No. 34**

NMED requested that EPA include a requirement to submit signed copies of NOIs, annual reports, Discharge Monitoring Reports, NOTs, and any other documents/reports that are required to be submitted to EPA by New Mexico operators additionally to NMED.

**Response No. 34**

Part 8.1.1 of the final permit has been added to require submittal of signed copies of documents to NMED.

**Comments from Pueblo of Isleta**

**Comment No. 35**

Pueblo of Isleta noted that the permit numbers on signature page were not the same as those listed in the table on page 4 of Section 1-1.

**Response No. 35**

Typographical error corrected. See also Response No. 21.

**Comment No. 36**

Section 1.4.3 on page 6 seemingly precludes coverage of construction storm water discharges yet the SWMP in section 5.2.4 and 5.2.5 addresses such discharges. The Pueblo of Isleta was of the opinion that the Construction General Permit adequately addressed this issue and sections 5.2.4 and 5.2.5 were unnecessary.

**Response No. 36**

Part 5.2.4 implements the 40 CFR 122.34(b)(4) requirement for the MS4 to have a program to reduce pollutants in storm water runoff to the MS4 from construction activities, while Part 5.2.5 implements the 40 CFR 122.34(b)(5) requirement for the MS4 to have a program to address storm water runoff from new envelopment and redevelopment projects. These two program elements are part of the six Minimum Control Measures being used in the permit to reduce pollutants to the Maximum Extent Practicable. The permit has not been changed in response to the comment.

**Comment No. 37**

Pueblo of Isleta commented that an Indian Tribe was neither a municipality nor a federal facility and suggested adding, where appropriate, “Indian Tribe” to list of entities being discussed

**Response No. 37**

Indian Tribes are included in the definition of “municipality” at 40 CFR 122.2 - “*Municipality* means a city, town, ...or an Indian tribe or an authorized Indian tribal organization....” However, EPA agrees that the proposed permit was unclear in several instances whether requirements applied to not only Tribal, but also State or Federal operators of MS4s in addition to more traditional municipal entities such as cities, towns, and counties. The final permit has been clarified. For example, Part 3.2.1 now simply asks for the name of the MS4 operator rather than the name of the municipality and includes “(or Indian reservation/pueblo)” in the request for core municipality the MS4 is located within; the heading for Part 5.2.1.1.1 has been changed from “Traditional Municipalities” to “Traditional Municipal Entities” and the list of entities includes tribes.

**Comment No. 38**

The Pueblo of Isleta commented that the Pueblo has many irrigation canals, drains, and other constructed conveyances which discharge into the Rio Grande whose flows are strictly due to upstream events. The Pueblo believes the permit should include language so that owners of conveyances would not be responsible for storm flows where the owner does not contribute to the load.

**Response No. 38**

Under the NPDES program, the operator of a conveyance at the point it discharges to a water of the United States is strictly responsible for the quality of their discharge. The realities of how storm water drainage systems, which serve primarily to prevent flooding and provide drainage, have evolved over the years sometimes make it difficult to regulate under the traditional NPDES permitting program. For the storm water program, Congress authorized

(CWA 402(p)(3)(B)(i)) and EPA has adopted, a permitting approach that focuses more the system as a whole and concentrates more on preventing pollutants from entering the municipal storm sewer in the first place.

However, there are mechanisms available to ensure that operators of upstream MS4s that are significantly contributing pollutants to an interconnected downstream MS4 are held accountable for their contributions. If the upstream MS4 is a regulated small, medium, or large MS4, they will be controlled under their own permit requirements. If the upstream interconnected MS4 is an unregulated small MS4 and is contributing significant pollutant loads, they could be designated for permitting under 40 CFR 122.32(a)(2). The downstream MS4 may petition EPA to designate a MS4 under 40 CFR 122.26(f).

On the other hand, agricultural storm water runoff and agricultural return flows are exempt from regulation under the NPDES program (CWA 402(l)(1) and definition of “point source” at CWA 502(14)). Determinations of the applicability of the NPDES storm water program or where compliance should be assessed for a particular conveyance would have to be made case-by-case. The permit has not been changed.

#### **Comment No. 39**

The Pueblo of Isleta expressed concern that MS4s would have difficulty in assembling all the information and attachments for the NOI within the 90 day period provided in the draft permit, which could lead to requests to amend NOIs. Modifications to Part 5.2 that would allow up to one year for the development of “implementable” control measures was suggested.

#### **Response No. 39**

The final permit has been modified to allow roughly six months from issuance of the permit (until April 1, 2007) to submit the NOI. MS4s have also had since the December 8, 1999, promulgation of the Phase II storm water rules to do preliminary planning on their SWMPs and measurable goals. Since the permit, in accordance with 40 CFR 122.34(a), allows up to 5 years to have the SWMP fully developed and implemented, the NOI can include schedules for developing program elements (Part 5.1.1). The SWMP is also expected to be a living document that will be modified over time as new information, accomplishments, and priorities warrant (see Part 5.5).

#### **Comment No. 40**

The Pueblo of Isleta commented that Part 4.1 should be revised so that MS4s found to be causing or contributing to a water quality standards exceedance would be required to monitor for the pollutant of concern until they could adequately demonstrate compliance with the applicable standard.

#### **Response No. 40**

Part 4.1. has been modified to alert permittees that monitoring for the pollutant of concern to verify success of the corrective actions may be required under Part 5.6.1.3. Decisions on appropriate monitoring requirements would be made at the time the permittee was notified that corrective actions were needed.

**Comment No. 41**

The Pueblo of Isleta commented that Part 4.1 should be revised so that if discharges continue to cause or contribute to water quality exceedances even after modification of BMPs or other management actions by the permittee, EPA would (rather than could) terminate coverage under the general permit and require coverage an individual permit.

**Response No. 41**

EPA believes that the permissive “may” is more appropriate for use in the permit since the permit places requirements on the permittee and not EPA. This section simply puts the permittee on notice that EPA has retained the authority to take action to address threats to water quality should the permittee fail to do so. Given the state of the science in storm water quality management, more than one iteration of SWMP improvements may be needed to solve problems and EPA would need to evaluate each case on its own merits in determining whether support of instream water quality could better be served by modification to the SWMP under the general permit or requiring a individual permit. See also Response No. 27.

**Comment No. 42**

Pueblo to Isleta noted that in several places (e.g., Parts 5.2.1.2.7, 5.2.2.47, 5.2.3.9.9), the permit requires identification of a responsible person. The Pueblo noted that this would require changes to the SWMP if personnel changed and suggested broadening the requirement so that a single individual would not have to be named.

**Response No. 42**

EPA believes that flexibility to name a position instead of an individual would be appropriate and has modified the permit accordingly.

**Comment No. 43**

Pueblo of Isleta noted that “state” was misspelled in Part 5.2.3.9.3 and commented that coordination with adjacent tribes should also be required.

**Response No. 43**

EPA concurs and has modified to the permit to include tribes in the list of entities that could be coordinated with on illicit discharges originating outside the MS4. The typographical error has been fixed.

**Comment No. 44**

For MS4s in the Albuquerque Urbanized Area, which drains into the Rio Grande immediately above the Pueblo of Isleta, the Pueblo of Isleta requested that NOIs, annual reports, and information required to be submitted to EPA under Parts 5.5.2.1 and 5.5.4 also be submitted to the Pueblo.

**Response No. 44**

Parts 8.1.2 and 8.2.2.1 have been added to the permit to require that MS4s with discharges on the Pueblo of Isleta and all MS4s in the Albuquerque Urbanized Area send copies of NOIs, annual reports, and information required by submitted to the Director under Parts 5.5.2.1 and 5.5.4 to the Pueblo of Isleta. EPA agreed to include MS4s in the Albuquerque Urbanized Area in this requirement because the Pueblo of Isleta is located immediately below Albuquerque and MS4 discharges in this urbanized area could impact the water quality of the Rio Grande within the Pueblo's jurisdiction.

**Comment No. 45**

The Pueblo of Isleta suggested that Part 5.5.3 changed from "EPA may notify a permittee that changes to the SWMP are necessary..." to "EPA will notify a permittee that changes to the SWMP are necessary..." The Pueblo believed the use of "will" instead of "may" would better insure attainment of Tribal water quality standards.

**Response No. 45**

EPA believes that the permissive "may" is more appropriate for use in the permit since the permit places requirements on the permittee and not EPA. This section simply puts the permittee on notice that EPA has retained the authority to take action to address threats to water quality, inadequate SMWPs, and compliance with the Clean Water Act and other federal statutes and regulations.

**COMMENTS FROM APRIL 4, 2006, SUPPLEMENTAL COMMENT PERIOD**

**Comments from Amigos Bravos**

**Comment No. 46**

Commentor expressed concern that by limiting comment to only the supplemental language, the EPA was denying the public's right to comment every five years on permit language.

**Response No. 46**

The federal regulations at 40 CFR 124.10-15 set forth the requirements for public comment periods for NPDES permits, including reopening of the comment period to solicit additional comments only on limited issues or portions of the proposed permit. While NPDES permits are limited to a term of five years (40 CFR 122.46), when drafting a proposed permit,

EPA's obligation is to provide an opportunity for public comment prior to issuance of the final permit - not every five years. The required opportunity for public comment was provided.

**Comment No. 47**

Commentor noted that the supplemental fact sheet specifically requested comments on what form the required local public notice of documents should take and whether the MS4 operator should be required to respond to comments that they receive directly. Amigos Bravos believes that they should be required to respond to these comments and that they should be required to send these responses to the EPA.

**Response No. 47**

Part 1.2.3.1 of the final permit clarifies that local public notice may be made by newspaper notice, notice at a council meeting, or other method consistent with state/tribal/local public notice requirements. Part 1.2.4.1. requires submittal of a summary of unresolved issues related to local comments with the NOI. The final permit has limited this requirement to unresolved issues to reduce the burden on the MS4 Operator for local issues that have been resolved locally. Limiting the information provided to EPA to issues where there may be outstanding issues, and providing the MS4 Operator to provide responses, will help the Agency put comments into context and speed the NOI review process. See also Response No. 59.

**Comment No. 48**

Commentor noted that the supplemental fact sheet specifically requested comments on whether automatic coverage should be granted after the 30-day comment period in certain cases. Amigos Bravos believes that automatic coverage is inappropriate and in conflict with the ninth circuit decision, the Clean Water Act and the Endangered Species Act.”

**Response No. 48**

Under Part 2.1.3 of the final permit, coverage will not commence until the MS4 Operator is notified by the Director. Regulations for issuance of general permit at 40 CFR 122.28(b)(2)(iii) only require that the permit specify the date the discharger is authorized to discharge under the permit (in this case the date to be specified in the Director's notice of coverage). However, EPA does not agree that the concept of automatic general permit coverage after specified period following submittal of the NOI necessarily conflicts with requirements of the ESA, NHPA, nor the 9<sup>th</sup> Circuit decision.

**Comment No. 49**

“This draft permit and supplemental language fail to adequately protect waters that are already impaired. The EPA should require individual permits of all MS4s that plan to discharge into TMDL waters. In these individual permits, monitoring to ensure compliance with the TMDL

must be required. As recognized by the EPA in their November 22<sup>nd</sup> 2002 memo on the issue, NPDES-regulated storm water discharges may not be addressed by the load allocation component of a TMDL and therefore must be addressed by the waste load allocation component (WLA). Individual permits are more appropriate to ensure compliance with WLA designations. In some states with delegated authority to implement the NPDES program, such as North Carolina, communities that discharge into impaired waters are not allowed coverage under the general permit and are instead required to obtain coverage under individual permits. It is only through requiring individual permits for MS4s that discharge into TMDL waters will EPA ensure compliance with TMDLs and fulfill their duty to protect and restore all waters, including those that [are] already impaired.”

**Response No. 49**

Comment is outside the scope of the supplemental comment period. See comments from September 6, 2003, for similar concerns (e.g., Response Nos. 3, 4, 15, and 19). Note that the public will be able to comment on individual NOIs and could raise specific concerns on a particular MS4's discharges at that time.

**Comment No. 50**

“Under the Endangered Species Act, EPA is duty bound to make an affirmative determination whether or not a given permit and then individual coverage under a permit may affect a listed species. Furthermore the EPA, in addition to simply ensuring that the permit and individual coverage under [the] permit will not jeopardize the continued existence of a listed species or a prohibited take, must also ensure that the permit will not compromise recovery efforts for that listed species. Pursuant to the ESA these duties flow not simply to the permittee but to the EPA. The current ESA provisions provided in the MS4 General Permit expose the EPA to significant legal vulnerabilities and most importantly fail to comport with the ESA, in particular section 7. Even assuming that the EPA could satisfy its ESA duties by simply relying on the permittee the current provisions are riddled with deficiencies. For example, the permit does not require how the permittee must determine whether or not an endangered or threatened species or critical habitat are in proximity to the MS4. In addition criterion D is riddled with loopholes and undermines ESA protection. The permittee has a vested interest in reaching a no jeopardy determination and not disclosing impacts to the listed species including the very real possibility of a prohibited take and should not be given the authority to conduct their own ESA consultation with complete reliance on their own “best judgement.” The existing criterion provides little to no assurance of ESA compliance.”

**Response No. 50**

Comment outside scope of supplemental comment period. See Response No. 11 from September 6, 2003, for similar concerns. Note that the public will be able to comment on individual NOIs and could raise specific concerns on a particular MS4's discharges at that time.



## **Comments by National Association of Home Builders (NAHB)**

### **Comment No. 51**

Commentor supported holding a single hearing addressing groups of MS4s for which EPA had received requests for hearings rather than holding an individual hearing for each separate MS4 as a more efficient use of limited resources, without denying the public an opportunity for a hearing.

### **Response No. 51**

Region 6 acknowledges support for the concept of grouping hearings to reduce overall administrative burden. In the supplemental notice, EPA noted that a single hearing might be used to address hearing requests on more than one MS4 NOI. Whether or not this approach will be used will largely depend on if and when hearing requests are received regarding multiple MS4s in a geographical area that would make grouped hearings practicable.

### **Comment No. 52**

Commentor believes that the responsibility for collecting comments and holding hearings lies with the permitting authority and opposes any transfer of such responsibilities from the Region to the MS4s or any other permitted party. NAHB recommends that Region 6 use the Region 1 approach as the basis for developing an efficient process for New Mexico Phase II MS4 permitting. Region 1 has adopted an approach with regards to public hearings whereby it will accept requests for hearings on groups of NOIs (not individually) and then, if there is a significant level of public interest, will hold a hearing on the appropriate NOIs in that grouping.

### **Response No. 52**

EPA believes it is appropriate, and consistent with the Public Participation/Involvement Minimum Measure at 40 CFR 122.34(b)(2), to ensure that an opportunity for local input on the NOI and SWMP is provided. This allows preparation of a program that better reflects the needs and concerns of local citizens prior to submittal to EPA. Consistent with the 9<sup>th</sup> Circuit decision, EPA will provide a separate NPDES permit-based comment period and opportunities for hearing on the version of the NOI (with attached SWMP documents) once officially submitted. See also Response No. 51).

### **Comment No. 53**

Commentor noted that EPA Headquarters' guidance outlines the permitting authority's responsibility to conduct an appropriate review of the Phase II MS4s NOI to ensure consistency with the permit. NAHB expressed opinion that official approval of the NOIs is not necessary, and urged Region 6 to specify in the general permit when authorization occurs or establish a specific waiting period at the conclusion of which authorization is automatically granted unless the permitting authority denies coverage under the general permit.

**Response No. 53**

See Response Nos. 47, 48, and 52.

**Comment No. 54**

NAHB Comment on Section 1.2.3.2: NAHB supports making the MS4's NOI available for public review during business hours at the MS4 operator's main office. The NOI also could be made available on the web, at the MS4s option. NAHB does not believe that multiple copies of the NOI should be made available at other locations, including local libraries. Under the stormwater program, the SWMP (summarized in the NOI) is considered a "living document" and is modified often to address ongoing environmental issues. If multiple copies of the NOI are available in multiple locations, then it becomes an administrative nightmare for the MS4 to update and modify those multiple copies. NAHB urges Region 6 to remove the language referring to posting the NOI, SWMP, and annual reports in the local library and/or other readily accessible location.

**Response No. 54**

The permit does not require (nor prohibit) making copies available in more than one place. EPA does believe that making the documents available via the Internet would likely prove one of the most feasible and least burdensome methods. EPA makes substantial use of the Internet for providing 24/7 access to documents and information of interest to the public. See also Response Nos. 48 and 49.

**Comment No. 55**

NAHB Comment on Section 1.2.3.2: In addition, MS4 operators should not be required or even encouraged to hold public meetings on their NOI, SWMP or annual reports. There is no support in the Clean Water Act for acquiring a permittee to hold its own public meetings or hearings on its own permit compliance documents. Those functions are appropriately delegated by the Clean Water Act to the permitting authorities. NAHB strongly urges Region 6 to revise the general permit to eliminate the language that implies or encourages the MS4 to hold public meetings.

**Response No. 55**

See Response Nos. 47 and 52.

**Comment No. 56**

NAHB Comment on Section 1.2.4.1: NAHB objects to Region 6's requirement that the MS4s provide responses to any public comments on the NOI received either by the MS4 or by EPA during the permitting process. Once again, there is no authority under the Clean Water Act that requires the permittee to respond to public comments on behalf of or in lieu of the permitting authority. The permit is issued by the permitting authority and the Clean Water Act requires that

the permitting authority conduct those administrative procedures. *See e.g.*, 40 CFR § 124.17. By requiring the MS4 to hold hearings and respond to public comments on the NOIs, SWMPs, and annual reports as proposed, Region 6 would be delegating its authority in a way that is entirely contrary to the Ninth Circuit's EDC decision. That court intended to prevent EPA from making MS4s act more like permitting authorities without appropriate oversight. By delegating the responsibilities for responding to comments and holding hearings to the MS4 permittee, Region 6 is contravening the intent of the EDC case. NAHB urges Region 6 to remove Section 1.2.4.1 from the general permit and revise Section 1.2.4.2 to state "Modify, or include a schedule to modify, the SWMP, as required by the Director in response to public comments." These changes are absolutely necessary to eliminate the MS4's response to public comments as a requirement of the permitting process. In addition, Region 6 is urged to make clear that all comments to be considered in the permitting process are to be routed through the permitting authority and will not be directly handled by the MS4.

#### **Response No. 56**

Local comment and hearings will allow more issues to be resolved at a local level without escalation to EPA, but do not take the place of any comment periods or opportunities to request hearings EPA is required to provide. The changes proposed in the April 4, 2006, supplemental notice were not limited solely to the issues directly raised in the 9<sup>th</sup> Circuit Decision. A large part of the 9<sup>th</sup> Circuit decision was based on needing to provide the public with the opportunity to review and have input on the SWMP - which will not be fully developed and implemented for up to five years from the permit date. Ensuring the public continues to have opportunity - via the Annual Report process, which included updates on SWMP development and implementation progress - not only addresses the concern that the public would be cut out of the loop, but is also consistent with the goals of the Public Participation/Involvement Minimum Measure. See also Response Nos. 47, 52, 60, and 61.

#### **Comment No. 57**

NAHB Comment on Section 2.1.3: NAHB supports Region 6 and its request for comments on automatically granting permit coverage within 30 days of receiving a completed NOI, unless significant comments from the public have been received or request for public hearing has been granted. Thirty days is more than sufficient for affected, interested public participants (with appropriate standing) to submit comments or request a hearing. An automatic 30-day approval process is appropriate. NAHB urges Region 6 to revise Section 2.1.3 to remove the written notification requirement before authorization to discharge under the permit is granted.

#### **Response No. 57**

See Response Nos. 48 & 56. Regarding the comment on "standing" for the public to submit comments or request a hearing, EPA does not prohibit any interested person from making comments or requesting a hearing. EPA welcomes all comments that lead to a better permit. Decisions on whether or not to grant hearings are based on the criteria at 40 CFR 124.12 (e.g., significant public interest, where the hearing might clarify one or more issues involved in the

permit decision, etc.). “Standing” is more relevant in litigation regarding a permit decision.

**Comment No. 58**

NAHB Comment on Section 5.8.1: NAHB objects to the Region 6 proposal that each MS4 provide public notice and make available for public review and comment a draft annual report before that report is submitted to EPA. The EDC case does not address either SWMPs or annual reports or the need for public review of those documents. Annual reports are the permittee’s report to the permitting authority to help demonstrate compliance with the general permit. The permitting authority must work with the permittee to ensure that the permittee has demonstrated full and appropriate compliance. NAHB urges Region 6 to remove the requirement that the permittee must make the annual report available for public review 30 days in advance of submission to the permitting authority.

**Response No. 58**

See Response Nos. 47 and 56.

**Comments by the City of Santa Fe**

**Comment No. 59**

Comments on Part 1.2.3.1 The proposed requirement for NOIs to be noticed to the public prior to filing with EPA increases the administrative burden and cost to the MS4. However, the MS4 recommends EPA permit local public notice of the NOI and attachments through the City’s Web site and announcement of it’s availability through a one-time notice in the local newspaper. Under these conditions the new requirements can be readily accomplished.

**Response No. 59**

The final permit accommodates the commentor’s preferred methods of notice. See also Response Nos. 47 and 52.

**Comment No. 60**

Comments on Part 1.2.3.2 – The NOI (and attachments), the SWMP, Annual Reports are currently available to the public during normal business hours at the City’s Storm Water Office. Therefore, the new requirement can be met. The City agrees with permit language encouraging that documents be made available on the City’s web site and the flexibility provided in the draft with regard to conducting a public meeting on the NOI and Annual Reports.

**Response No. 60**

Comment appreciated.

**Comment No. 61**

Comments on Part 1.2.4.1 - The City agrees with this condition of the permit requiring a response to all comments received by either EPA or the MS4 with regards to the NOI. Further, the City agrees with using the responses in EPA's decision-making process.

**Response No. 61**

EPA recognizes the support for the proposed approach.

**Comment No. 62**

Comments on Part 2.1.3 - EPA should include language, similar to the draft of September 2003, providing authorization to discharge storm water within 30 days of receipt of a complete NOI if no significant comments from the public have been received or a request for public hearing has been granted.

**Response No. 62**

See Response No. 48.

**Comment No. 63**

Comments on Part 5.8.1 - The requirement to make the Annual Report available and provide the opportunity for public comment prior to submittal to EPA appears to be outside the scope of the 9th Circuit Court Decision. This is duplicative as Annual Reports are available to the public during normal business hours. In addition, any proposed changes to the MS4's SWMP will be notices through the NOI process. The City recommends this provision not be added to the permit language.

**Response No. 63**

See Response Nos. 47 and 56.

**Comment No. 64**

Comments on Part 5.8.1.7 – See Comment on 5.8.1

**Response No. 64**

See Response Nos. 47 and 56.

## Comments from Pueblo of Santa Clara

### **Comment No. 65**

The Pueblo of Santa Clara requested that copies of NOIs and NOTs be sent to the Santa Clara Governor's Office at the time they are submitted to EPA and that copies of SMWPs be made available to Pueblo of Santa Clara staff upon request.

### **Response No. 65**

Parts 8.2.3.1 and 8.2.3.2 have been added to the permit to require submittal of NOIs and NOTs to the Office of the Governor and access to SMWPs be provided to Pueblo of Santa Clara staff upon request.

## Comments from Pueblo of Acoma

### **Comment No. 66**

Pueblo of Acoma supported the public availability of the complete NOI and opportunities for public comment on the SWMP and annual reports.

### **Response No. 66**

Region 6 acknowledges support for these permit conditions.

### **Comment No. 67**

The Pueblo of Acoma also requested that EPA require coverage for the Rio San Jose Flood Control District under a General MS4 Permit.

### **Response No. 67**

Requests for designation of MS4s not currently required to obtain MS4 discharge permits are outside the scope of this permitting action and will be considered separately.

*/s/ Brent Larsen* \_\_\_\_\_

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