**Attachment 1**

1. **Summary of Proposed Action**

On January 6, 2016, the U.S. Environmental Protection Agency (EPA) published in the *Federal Register* a proposed rulemaking that would revise the small MS4 regulations to ensure that the permitting authority determines the adequacy of best management practices (BMPs) and other requirements, and provides public notice and the opportunity to request a public hearing on the requirement for each MS4. The proposal would not establish any new substantive requirements for small MS4s.

The proposed rulemaking results from a decision by the Ninth Circuit U.S. Court of Appeals in *Environmental Defense Center, et al. v. EPA*, in 344 F.3d 832. The proposed rulemaking discusses three options for addressing the remand, with the third option being a hybrid of the first two. The proposed rulemaking includes proposed rule language *only* for Option 1 (Traditional General Permit Approach); and describes in the preamble the concepts, *without* proposed rule language, for Option 2 (Procedural Approach) and Option 3 (State Choice Approach).

1. **Comments**

The TCEQ appreciates the opportunity to comment on the proposed rulemaking and concepts described in the preamble and offers the following comments.

1. **Option for modifying the general permit under the minor modification procedures in 40 CFR §122.63 for “nonsubstantial revisions” to BMPs and what criteria should apply for distinguishing between when a change to BMPs are “substantial” and require full public participation process or when a change is not substantial.**

The TCEQ does not support that the regulations define what constitutes a nonsubstantial versus a substantial change to an MS4’s Notices of Intent (NOI) and Stormwater Management Program (SWMP); this should be left to the permitting authority to include in its general permit. The permitting authority should have the flexibility to establish in its small MS4 general permit a process for MS4s making changes to the SWMPs without triggering the permit modification procedures in 40 CFR Part 122.

The TCEQ currently reviews and approves the NOIs and SWMPs submitted by the MS4s. The SWMPs are considered the MS4s’ permits and are enforceable documents. Once these are technically complete, the MS4 provides public notice on the NOI and the SWMP and an opportunity for a public meeting. After approval, the SWMPs may need to be revised by the MS4 to make changes to BMPs, etc., and the approval of the changes are requested to TCEQ via a Notice of Change (NOC) form. The TCEQ reviews the requests for changes and determines whether they can be approved or denied. Some changes, as outlined in the Small MS4 General Permit, do not require the MS4 to submit an NOC form for TCEQ’s approval (ex. adding or replacing BMPs with similar alternate BMPs). The TCEQ nor the MS4s have experienced a problem following this process during the last ten years. If an MS4 makes changes that require an NOC form to be submitted to the TCEQ and fails to submit the NOC, the MS4 becomes noncompliant. It should also be noted that in the almost ten years that TCEQ has implemented the MS4 program, TCEQ has not received any public comments on the NOIs or SWMPs. Therefore, requiring public notice for changes to the NOIs or SMWPs is not the best way to use resources that can be best utilized elsewhere in the implementation of the MS4 program at the MS4 and state levels.

1. **Should EPA’s Option 2 the “Procedural Approach” enable permitting authorities relying on the MS4 to public notice its NOI to be able to use this approach to satisfy the public notice requirement for the individual NOI?**

Yes. The TCEQ strongly advocates that the final rule for the Option 2 “Procedural Approach” allow the flexibility for the permitting authorities to decide if the MS4 should publish its own public notice instead of the permitting authority. As the permitting authority, Texas has established in the general permit itself a process for making changes to the SWMP and identifies what changes could be made and under what circumstances. In Texas, after the NOI and SWMP are technically complete, TCEQ relies on the MS4s to publish its public notice in a newspaper of general circulation in the area where the MS4 is located. If an MS4 does not comply with the notice requirement, TCEQ will not issue the authorization thus ensuring that no authorizations are issued unless the public has been notified and given the opportunity to provide comments or request a public meeting. The TCEQ has not had any issues relying on the MS4s for the public notice. If comments are received, TCEQ works with the MS4 to respond to the comments and if needed, require the NOI and/or SMWP to be revised.

Texas’ approach satisfies the public notice requirement. It is worth noting that during the almost ten years that TCEQ has followed this approach, the TCEQ has not received any public comments on the NOIs or SWMPs, suggesting that alternate methods of publishing the public notice could be considered such as using a web-based public notice in the MS4’s and/or the permitting authority’s website(s) to fulfill this requirement. This alternate web-based public notice method would save the MS4s and/or permitting authorities money while still reaching a wide or even broader audience.

1. **Should EPA adopt as its final rule Option 2 “Procedural Approach”?**

Yes. The TCEQ strongly requests that the final rule include the Option 2 “Procedural Approach”. Although EPA did not provide actual line-by-line regulatory text, the concept for how Option 2 would work was described to some detail in the preamble. The TCEQ strongly urges EPA to provide the actual rule language for Option 2 in a supplemental notice to give the states the opportunity to review and comment.

As described in the two comments above, TCEQ developed and is implementing a process similar to the “Procedural Approach” described in the preamble and prefers to keep using that method. The approach works well in Texas. The TCEQ understands that only a handful of states use that approach and that other states use other approaches.

Multiple MS4s in Texas have participated in the permit development process in 2007 and 2013, when the Small MS4 General Permit was issued. Stakeholders have expressed that they do not want the general permit to be overly prescriptive and prefer to develop their own BMPs and measureable goals for the six minimum control measures due to the variation of each MS4. The TCEQ’s MS4 general permit takes into account that larger MS4s have more resources than smaller MS4s by having a tiered permitting approach where larger MS4s have more permit requirements than small MS4s. Stakeholders are very supportive of this approach.

The TCEQ does not support Option 1 “Traditional General Permit Approach” since it is a very prescriptive approach and does not offer flexibility and does not take into consideration the uniqueness of each MS4’s needs and environmental concerns. It is TCEQ’s concern that if all requirements were included in a general permit and MS4s would obtain authorization by submitting a NOI – and not develop their own program (the SWMP), there would be more compliance issues. Many MS4s might prepare the NOIs without completely understanding the general permit requirements. Evaluating each SWMP allows TCEQ to verify that the MS4 has addressed all requirements of the general permit and request information about BMPs, implementation schedules, measurable goals, and required elements while still allowing MS4s the flexibility they need due to local site conditions and resources.

1. **Should EPA include a third option (Option 3 – State Choice Approach) where states can choose Option 1 (Traditional General Permit Approach) or Option 2 (Procedural Approach)? Which approach is Texas likely to choose?**

Yes. The TCEQ highly recommends that the final rule also include Option 3 to provide the most flexibility to the permitting authorities since this option would enable the permitting authority to choose between Option 1 and Option 2, or to implement a combination of these two approaches. The TCEQ intends to choose Option 3 if available in the final rule *only if* EPA does not create new requirements, burdens or conditions associated with the selection of Option 1 or Option 2. The regulatory language for Option 3 should not limit the flexibility of when and why a state may choose one option over the other. As noted in comments above and in the *Federal Register*, the TCEQ follows a similar approach as the proposed concept for Option 2 “Procedural Approach” described by EPA in the preamble. As such, if Option 3 is not an option available in the final rule, then TCEQ would choose Option 2.

1. **Where states have the permitting authority, should EPA have the opportunity to review the NOIs and SWMPs prior to approval?**

No. The TCEQ does not support EPA having the opportunity to review the NOIs and SWMPs prior to approval. In Texas, under the Memorandum of Agreement (MOA) the EPA reviews and approves the draft general permit in which the SWMP requirements are outlined. The TCEQ reviews the SWMPs; there is no reason for both agencies to conduct the technical review of the SWMPs. If the EPA were to review the MS4 NOIs and SWMPs the approval process would be greatly delayed.

1. **Economic Analysis Cost Estimates – Clarification**

The TCEQ notes that a clarification needs to be made to the Economic Analysis Cost Estimates spreadsheet included as one of the 21 Supporting Documents. The information in the spreadsheet under the tab entitled “Opt. 1 State Permits” includes Texas. Although the column titled “States that issue general small MS4 permits” specifies that Texas is one of these states, it is unclear why states that are not Option 1 states would be included in this tab and could be misleading.