# TCEQ LogoNational Comments

# Executive Review Summary

**TCEQ Proposed Comments On:**

Proposed rulemaking on the National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) General Permit Remand, published January 6, 2016, *Federal Register* Volume 81, No. 3, Pages 415-435.

**Overview of Proposal:**

The TCEQ is submitting comments to EPA on the proposed rulemaking for the NPDES MS4 General Permit Remand. The proposal 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, which found that EPA regulations for obtaining coverage under a small MS4 general permit do not provide for adequate public notice, the opportunity to request a hearing, or permit authority review to determine whether the best management practices (BMPs) selected by each MS4 in its stormwater management program (SWMP) meets the Clean Water Act (CWA) requirements including the requirement to ‘‘reduce pollutants to the maximum extent practicable [MEP].’’

Some proposed rule language would revise the small MS4 regulations to ensure that the permitting authority determines the adequacy of BMPs and other requirements, provides public notice, and the opportunity to request a public hearing on the requirements for each MS4. The EPA states that the proposal would not establish any new substantive requirements for small MS4s.

The proposed rulemaking discusses three options for addressing the remand, with the third option being a hybrid of the first two. In the *Federal Register*, the EPA 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. *Option 1 is called the “Traditional General Permit Approach”.* With this prescriptive approach, EPA would require the permitting authority to establish within the general permit any and all requirements (including associated deadlines and frequencies) that MS4s must meet (to reduce pollutants to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA), which would be subject to public notice and comment and an opportunity to request a hearing only when the general permit is issued. (*Note: A hearing in this context is equivalent to TCEQ’s public meeting.*)
2. *Option 2 is called the “Procedural Approach”.* With this approach, EPA would add procedural requirements to the existing rule structure for the MS4 to inform the permitting authority in its Notice of Intent (NOI) of the BMPs it will implement through its SWMP to meet the requirements of the regulations. Under this approach, the permitting authority reviews each NOI and SWMP to ensure that specific controls and measures are based on the MS4’s proposed BMPs and that are necessary to comply with the requirement to reduce pollutants to the MEP, to protect water quality, and to satisfy the water quality requirements of the CWA. Prior to authorizing an MS4’s discharge, the permitting authority must provide the public with an opportunity to comment on the proposed authorization, including the additional permit terms that the MS4 will be required to meet, and to request a hearing, if applicable.
3. *Option 3 is called the “State Choice Approach”.* With this approach EPA would enable the permitting authority to choose between the Traditional General Permit and Procedural Approaches, or to implement a combination (hybrid) of these approaches in issuing and authorizing coverage under a general permit.

The TCEQ regulates almost 600 entities under its Small MS4 General Permit TXR040000. The TCEQ has developed a program that fits the Texas regulated community well, where MS4s develop their own SWMPs that are reviewed and approved by TCEQ. The SWMPs are enforceable and describe which BMPs and measurable goals the MS4s will implement. After the technical review, if the NOI and SWMP is complete, the MS4s publish notice in a local newspaper for a 30 day comment period and the public has the opportunity to request a public meeting.

**Texas’ small MS4 program and processes are mentioned in the proposed rulemaking *Federal Register* preamble. Texas was part of the technical committee formed by the Association of Clean Water Administrators (ACWA) and EPA to assist EPA with the development of the concept for Option 2 “Procedural Approach”.**

**From what we understand based on communication from EPA, they do not plan to publish a supplemental notice providing actual rule language for Options 2 and 3.**

**Summary of Comments:**

* TCEQ supports the Option 3 *“State Choice Approach”* concept described in the preamble since it would offer the greatest flexibility to the permitting authorities to choose between Option 1 and Option 2 or a hybrid of the two.
* TCEQ also supports the Option 2 “*Procedural Approach*” concept described to some detail in the preamble on the basis that it is the most similar to TCEQ’s current small MS4 program.
* MS4s should be allowed to publish their own public notice in the newspaper or an alternate form such as posting on the website.
* After approval of the MS4’s NOI/SWMP, necessary changes to these documents should not require public notice.
* TCEQ does not support EPA reviewing the NOIs and SWMPs prior to TCEQ’s approval. The review and approval of all the NOIs and SWMPs should rest with the delegated permitting authority.

Specific comments are included as Attachment 1.

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**Deadline** (Submittal Due Date)**:** March 21, 2016