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*Via Email*

July 25, 2019

**Vojin Janjić**

*Division of Water Resources*

*Tennessee Department of Environment & Conservation*

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**RE: Proposed rulemaking amending Chapters 0400-40-40-05 and 0400-40-40-10 should include language requiring Stormwater Phase II Notices of Intent and supporting documentation to be subject to notice and comment**

Dear Mr. Janjić:

Thank you for accepting comments on the Tennessee Department of Environment and Conservation (“TDEC”)’s proposed rulemaking amending Chapters 0400-40-40-05 and 0400-40-40-10. These chapters address standards of National Pollutant Discharge Elimination System (“NPDES”) permits in Tennessee. The Tennessee Environmental Council, Harpeth Conservancy, Obed Watershed Community Association, Tennessee Chapter of the Sierra Club, and Tennessee Clean Water Network (collectively “Commenting Groups”) submit the following comments. The rulemaking proposal addresses several topics across regulatory sections, but these particular comments specifically concern public notice of stormwater notices of intent (“NOI”) and supporting information under the NPDES Separate Storm Sewer System Municipal (“MS4”) Phase II Program.

## About the Commenting Groups

The **Tennessee Environmental Council** is a 501(c)(3) that operates statewide for the benefit of Tennessee’s communities

and environment. The Council educates and advocates for the conservation and improvement of Tennessee's environment, communities, and public health.

The **Harpeth Conservancy** restores and protects Tennessee water and river ecosystems. The Conservancy uses scientific expertise and collaborative relationships to develop, promote, and support broad community stewardship and action.

The **Obed Watershed Community Association** protects and enhances the watersheds of the Obed River and its tributaries within Cumberland County, Tennessee through community education, creating opportunities for community research and service projects, and promoting conservation, recreation, and best management practices. It also supports activities in other nearby watersheds both within Cumberland County and surrounding counties.

The **Tennessee Chapter of the Sierra Club** is a statewide unit of the world's oldest, largest, and most influential grassroots environmental organization. With more than 105,000 members and supporters in every county across Tennessee, the Chapter empowers people to influence public policy through community activism, public education, lobbying, and litigation. Its mission is to explore, enjoy and protect the planet.

The **Tennessee Clean Water Network** empowers Tennesseans to exercise their right to clean water and healthy communities by fostering civic engagement, building partnerships, and advancing water policy for a sustainable future.

**It is good public policy to incorporate a public notice and comment requirement for MS4 Phase II notices of intent and supporting materials into state regulations.**

Memorializing a public notice requirement for stormwater notices of intent is good public policy. The Commenting Groups value and understand the importance of public involvement in environmental decision-making. As such, the current lack of language regarding public notice of stormwater management plans, programs, and notices of intent submitted under the General Permit framework is worrisome.

Placing notices of intent and supporting documents on public notice provides members of the public an opportunity to actively participate in the development and implementation of stormwater control standards in their communities. This framework is called for under federal law and is sound policy for the State of Tennessee.

TDEC's Division of Water Resources finalized its most recent General Permit for MS4 Phase II communities before the regulation requiring notices of intent to be subject to public notice and comment was finalized on December 9, 2016. *See* National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed. Reg. 89320, 89340 (December 9, 2016 ). But

now—as TDEC contemplates amending regulatory provisions about stormwater pollution control—is a good time to incorporate the federal regulation into state regulation.

**1. Federal regulations now require notice and comment of notices of intent and accompanying documents when applying for General NPDES Permit MS4 Phase II Coverage.**

The Code of Federal Regulation requires public notice of materials submitted by MS4s under a two-step MS4 Phase II program like what is in existence in Tennessee. Federal stormwater regulations allow states to either issue individual permits or to cover a group of dischargers under one general permit.” *See* 40 C.F.R. § 122.26 (2019). *See also* 40 C.F.R. § 122.21 (2019); 40 C.F.R. § 122.28(2019).

In order to meet federal permit requirements for regulated small MS4 permits, states may offer a comprehensive general permit or a two-step permit. *See* 40 C.F. R. §122.28(d)(2019). A comprehensive general permit includes “all required permit terms and conditions.” 40 C.F. R. §122.28(d)(1)(2019). A two-step general permit includes “required permit terms and conditions in the general permit applicable to all eligible small MS4s and, during the process of authorizing small MS4s to discharge, establishes additional terms and conditions not included in the general permit to satisfy one or more of the permit requirements in §122.34 for individual small MS4 operators.” 40 C.F. R. §122.28(d)(2)(2019). More specifically:

The Two-Step approach requires the MS4 operator to provide information about what it intends to do during the permit term to satisfy some or even all of the permit requirements for meeting the MS4 permit standard. The rule then requires the permitting authority, through a review and public comment process, to establish MS4-specific permit terms and conditions that the permitting authority deems necessary to meet the MS4 permit standard.

National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed. Reg. 89320, 89340 (December 9, 2016 ). This required information is submitted in the form of a NOI.

If the permitting authority makes a preliminary decision to authorize the MS4 to operate under the general permit, the permitting authority “must give the public notice of and opportunity to comment and request a public hearing on its proposed authorization and the [Notice of Intent], the proposed additional terms and conditions, and the basis for these additional requirements.” *See* 40 C.F. R. §122.28(d)(ii)(2019). Further, the public notice itself, processes for submitting comments, and public hearing protocol must conform to co-existing federal procedures applicable to draft permits. *See* 40 C.F. R. §122.28(d)(2019). *See also* 40 C.F.R. §§124.10 - 124.13(2019) (excluding §124.10(c)(2)).

The permitting authority must also respond to significant comments received during the comment period. *See* 40 C.F.R. § 124.17(2019).

TDEC's General Permit for MS4 Phase II Communities is a Two-Step Permit. Tennessee's NOI form requires permittees to provide essential details that satisfy permit requirements for meeting the MS4 permit standard. For example, Part V of the MS4 Phase II NOI requires a MS4 to describe current and proposed activities for the proposed stormwater management program. This requirement includes specified proposed best management practices ("BMPs") for illicit discharge detection & elimination, construction site runoff, and pollution prevention and housekeeping. The NOI also contains details about BMP measurable goals and milestones. Further, it is not uncommon for MS4s to submit lengthy attachments in addition to the 20 page NOI itself. These details are not available within the General Permit itself, so the NOI and supporting materials should be subject to notice and comment.

## **2. Our state regulations should reflect the 2016 Remand Rule.**

TDEC should update its regulations in light of the 2016 Remand Rule to honor its commitment to have current regulations reflect current federal authority. The Memorandum of Agreement between the Environmental Protection Agency ("EPA") and the State of Tennessee establishes that "[the Tennessee Department of Environment & Conservation Division of Water Resources] has the primary responsibility to establish the State NPDES program priorities that are **consistent with national NPDES goals and objectives.**" National Pollutant Discharge Elimination System Memorandum of Agreement between the State of Tennessee and the United States Environmental Protection Agency Region 4 (Oct. 12, 2007) (emphasis added). Further, Section III, Part A of the memorandum of understanding provides that "the [Tennessee Department of Environment and Conservation Division of Water Resources] will... **create and maintain the legal authority** and, to the maximum extent possible, the resources required **to carry out all aspects of the State NPDES program...**" National Pollutant Discharge Elimination System Memorandum of Agreement between the State of Tennessee and the United States Environmental Protection Agency Region 4 (Oct. 12, 2007) (emphasis added). The proposed rulemaking should reflect the current public notice and comment requirement of 40 C.F.R. § 122 in order to meet its responsibility to create and maintain legal authority to carry out all aspects the Phase II MS4 program.

Case law also supports the notion that state law should be comparable to federal Clean Water Act requirements. In *Jones v. Lakeland*, the Sixth Circuit Court of Appeals examined a portion of the Tennessee Water Quality Control Act with an analogous section of the Clean Water Act to determine if the sections were comparable. The Court acknowledged that "the overall State regulatory scheme" should "[afford] interested and/or adversely affected citizens the safeguard of a meaningful opportunity to

participate in the administrative enforcement process” in a manner consistent with federal standards. *Jones v. Lakeland*, 224 F.3d 518, 523 (2000).

TDEC should update Chapters 0400-40-40-05 and 0400-40-40-10 to conform with federal standards. While acknowledging that some states may need to change their legal authorities, EPA recognizes that 40 C.F.R. 122 alone does not explicitly require specific changes to a state’s regulatory language. *See* National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed. Reg. 89320, 89346 (December 9, 2016 ). But the Sixth Circuit comparability analysis articulated in *Jones* raises the bar for the regulatory regime in Tennessee. Further, public policy supports an update of Tennessee regulation that includes a public notice requirement of stormwater notices of intent, stormwater management plans, and stormwater management programs.

**3. There are several draft language possibilities that can be added to the rule in order for TDEC to honor public policy.**

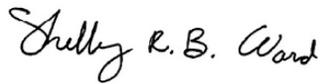
Chapters 0400-40-40-05 and 0400-40-40-10 could be revised in number of ways to incorporate the need to public notice a given NOI and stormwater management plan. For example, the State of Pennsylvania incorporated the Remand Rule’s regulatory provision by reference. *See* 25 PA. CONS. STAT. § 92a.32(a) (explain that “[t]he provisions of 40 CFR 122.26(a), (b), (c)(1), (d), (e)(1), (3)—(9) and (f)—(g) (relating to storm water discharges (applicable to State NPDES programs, see § 123.25)) and 122.30—122.37 are incorporated by reference.”). At the minimum, the rulemaking can reference the public notice requirements in the General Permit that is forthcoming. *See* ALA. ADMIN. CODE r. 335-6-6-.23(15)(f)(2019) (providing that “[i]f required by a specific general permit, proof of public notice as required by the permit under which the applicant seeks to discharge must be submitted with the notice of intent.”).

Further, as an illustration, the States of Texas and Pennsylvania have public participation language in their general permits that can be instructive. *See* General Permit to Discharge under the Texas Pollutant Discharge Elimination System TXR040000, Texas Commission on Environmental Quality, available online at <https://www.tceq.texas.gov/assets/public/permitting/stormwater/txr040000-2019-issued-permit.pdf>. *See also* NPDES General Permit for Stormwater Discharges from Small MS4s (PAG-13). Pennsylvania Department of Environmental Protection, available online at <https://www.dep.pa.gov/Business/Water/CleanWater/StormwaterMgmt/Stormwater/Pages/default.aspx>.

## Conclusion

Adding a public notice and comment requirement to TDEC's proposed rulemaking amending Chapters 0400-40-40-05 and 0400-40-40-10 is sound public policy and is accordance with federal regulation and the memorandum of agreement between Tennessee and EPA. When the new general permit for Phase II MS4s is complete in the next few years, it must require the public notice of a MS4 NOI, stormwater management program, and stormwater management plan. Embodying that requirement in state regulation now will help prepare the Department and MS4s themselves for the upcoming change. Again, thank you for the opportunity to comment on the proposed rulemaking.

Sincerely,



On behalf of the following:



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Tennessee Environmental  
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**Dennis Gregg**  
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**Axel C. Ringe**  
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