Federal StormWater Association

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Via www.regulations.gov and
Electronic Mail
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Re: Federal StormWater Association Comments on the Environmental Protection Agency's Proposed *National Pollutant Discharge Elimination System (NPDES) 2026 Issuance of the Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity*; Docket No. EPA–HQ–OW–2024–0481; 89 Fed. Reg. 101,000 (December 13, 2024).

Dear Ms. Denning:

The Federal StormWater Association (FSWA) submits the following comments on the U.S. Environmental Protection Agency's (EPA's) proposed National Pollutant Discharge Elimination System (NPDES) 2026 Issuance of the Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity (Proposed MSGP). EPA's Proposed MSGP appeared in the Federal Register on December 13, 2024 with a 60-day comment period that was subsequently extended until May 19, 2025.

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state permitting authorities under the Clean Water Act (CWA). FSWA has been engaged in stormwater regulatory and litigation matters across the country for more than 20 years. Its members have been involved in similar stormwater regulatory matters since the beginning of the current stormwater regulatory program was adopted by Congress in 1987, related Phase I regulations by EPA in November 1990, and then the Phase II stormwater program expansion in 1999. As an intervening party, FSWA also helped to defend EPA's 2015 MSGP in litigation brought by various environmental groups.

FSWA members own and operate facilities located on or near waters of the United States. FSWA members cover a broad range of sectors in the MSGP in the following industries: airports, construction, electricity distribution, manufacturing (various sectors), metal finishing, petroleum refining, recycled materials, and more. Many conduct operations in areas in which EPA serves as the NPDES permitting authority, that generate "stormwater associated with industrial activity" as defined at 40 CFR § 122.26(b)(14) and

are subject to EPA's MSGP. In addition, FSWA members operate in states that have been authorized to issue their own general permit for industrial stormwater but that have historically relied extensively on EPA's MSGP as the "model" permit that informs the state's general permit. Therefore, FSWA and its members have a direct interest in the Proposed MSGP. Beyond the issues raised in these comments, individual members of FSWA may have additional concerns with various aspects of the proposed MSGP and may file additional comments separately.

I. Introduction and Comments Overview

FSWA asserts that the Proposed MSGP was rushed forward to publication before the Biden Administration was to be replaced by the new Trump Administration, is significantly flawed, lacks proper factual and procedural justifications, and should be withdrawn and restarted under Administrator Zeldin's new leadership. The first MSGP was promulgated in 1995. Over the next 20 years, significant improvements were made and the Agency made various commitments to further justifying various aspects of its MSGP, including its concept of "Benchmark Monitoring" as one example. With some exceptions, the 2015 MSGP represents the most balanced and best MSGP example.

But like many federal programs, continuous expansion without critical review of purpose and focus on preventing regulatory bloating has resulted in a Proposed MSGP that significantly oversteps its regulatory authority (limited to "stormwater associated with industrial activity"), includes extremely costly measures that have little or no environmental benefits, and generally needs the type of federal review/belt-tightening that Administrator Zeldin is generally advocating for at EPA.

FSWA leadership and many of its members have been actively engaged in all MSGP related rulemakings since EPA promulgated its 1990 NPDES stormwater regulations implementing the 1987 Clean Water Act Amendments. I served on EPA's Wet Weather Flows Federal Advisory Committee and helped to negotiate the original MSGP as well as important program revisions (Phase II regulations) in 2000. FSWA has successfully challenged EPA's stormwater regulations when the Agency has exceeded its statutory authority or violated the Administrative Procedure Act (APA).

Importantly, FSWA also has intervened on EPA's behalf to defend appropriate regulatory determinations (such as the 2015 MSGP being challenged by environmental groups). FSWA was instrumental in helping the Agency negotiate the 2016 settlement agreement that was intended to result in a new and improved MSGP in 2021. Unfortunately, EPA's proposed MSGP was not true to the 2016 settlement agreement and looked more like an acquiescence to the original plaintiffs' demands that led them to sue

EPA in 2015…a most unfortunate development for FSWA and its members after investing significantly in helping to defend EPA's 2015 MSGP.[1]

Nevertheless, FSWA is prepared to bring its comprehensive experience, its broad membership that covers many of sectors in the MSGP, and experience with state MSGPs, to assist EPA to develop the most efficient and effective MSGP possible. Such an outcome cannot be achieved by modifying the significantly flawed Proposed MSGP. It can only result from withdrawing that proposal and directing staff to revisit every aspect of the existing MSGP with purpose and focus. For these reasons, these comments will focus on identifying the significant problems with the Proposed MSGP, but these comments cannot and will not be able to explain how to fix the Proposed MSGP other than to request that EPA withdraw that proposed permit.

II. Major Concerns with the Proposed MSGP

A. Logical Outgrowth

FSWA has two concerns with regard to the Administrative Procedure Act (APA) requirement that final rules must be the "logical outgrowth" of the proposed rule. If EPA makes the necessary changes to the Proposed MSGP that must be made, the final MSGP will be so different from this proposal that the Agency would be succeptible to legal challenge from NGOs and others under the logical outgrowth APA obligations. Conversely, if EPA is concerned about that succeptibility, it may be motivated not to make significant changes to the Proposed MSGP, which is equally concerning to FSWA and its members.

On numerous occasions when attempting to promulgate complex regulatory schemes, such as the Proposed MSGP, EPA often protects itself with regard to logical outgrowth by reproposing a revised, clarified version of its original proposal or by issuing a Notice of Data Availability (NODA) and request for additional comment on a proposed rule impacted by new information/data submitted during the original comment period. FSWA advocates for EPA to withdraw this Proposed MSGP. In the alternative, a second proposed rule or NODA would provide EPA and the public with another notice and comment period on a more refined Proposed MSGP.

B. Benchmark and Indicator Monitoring

As FSWA has explained previously, EPA justified benchmark monitoring in 1995 on its theory that such monitoring would provide useful "flags" or indicators to industrial facility operators regarding the benefits of their technology-based controls and potential environmental impacts. That theory gave the program an opportunity to prove that benefits would result from

[1] For further information on FSWA's concerns with EPA's 2020 MSGP proposal, See FSWA's June 1, 2020 comments at https://www.regulations.gov/comment/EPA-HQ-OW-2019-0372-0245

the investment in analytical monitoring and a comparison of those results to the existing resource of water quality standards (WQS) and review of best management practices (BMPs).

The foundation upon which EPA created its benchmark monitoring scheme was arbitrary at best and has never resulted in the type of robust process for which EPA had hoped. In fact, the basis for benchmark monitoring was never grounded in science, and EPA has never fully justified how and why a facility should use, for example, ambient low flow in-stream WQS to gauge technology-based control strategies for stormwater discharges that are episodic, high flow, variable, and potentially a significant distance from the type of receiving stream used as the basis for the WQS.

Originally, only about one-half of the sectors were required to conduct benchmark monitoring because those were the only sectors that, based on extensive data collection and analyses associated with the "group permit applications" that preceded the first MSGP, those sectors were the only ones from which there were concerns about potential significant pollutant impacts from stormwater associated with industrial activity. Then, in 2021, again lacking a clear purpose and focus, EPA added "indicator monitoring" for those sectors without benchmark monitoring. Now, EPA was able to collect stormwater data from every MSGP permittee.

And, like the 30 years of benchmark monitoring data that have been collected, all of those data reside in computer files at EPA and we believe they reveal nothing more than the arbitrary conditions and situations in which EPA requires sample collection. EPA has not been able to use the benchmark or indicator monitoring data to prove or justify anything.[2] The resources that have gone into collecting analytical samples could be better used by the permittees to conduct comprehensive facility inspections and improving BMPs. Instead, site operators must invest in sample collection, data submission, and then a circular system of unnecessary bureaucratic responses dictated by the 2021 "Additional Implementation Measures" (AIM) "do loop."

In assessing EPA's benchmark monitoring program, the National Academies of Science/National Research Council (NRC) found that the MSGP's approach "has largely been a failure."[3] Reviews of benchmark monitoring data "showed no relationship between facility type and stormwater discharge quality. The reasons that NRC cited for the poor relationship included variability in sampling parameters, sampling time, and sampling strategy—that is, poor

[2] In its MSGP 2000 and 2008 Fact Sheets, EPA committed to analyzing all of the monitoring data and protocols associated with benchmark monitoring since 1995 to determine if benchmark monitoring provides "useful indicators of control measure inadequacies or potential water quality problems." MSGP 2008 Fact Sheet at 96. For whatever reason, EPA never produced—or at least EPA has never released —any analyses that would support or defend the use of benchmarks. See also SBLRC's comments in this rulemaking docket (being filed contemporaneously with these comments.

[3] *See* NRC "Reducing Stormwater Discharge Contributions to Water Pollution," *available at* https://www8.nationalacademies.org/pa/projectview.aspx?key=48711 at 439.

data."[4]. NRC also found that "it is not clear whether [benchmark] exceedances provide useful indicators of stormwater pollution prevention plan inadequacies or potential water quality problems." [5] Finally, the NRC concluded that a "national numeric benchmark should be avoided. . . ."[6] and, if NRC had its way, "the current benchmark monitoring conducted by MSGP facilities would be eliminated."[7]

The Small Business Low Risk Coalition (SBLRC)[8] has done extensive research and analyses of EPA's current docket for the Proposed MSGP. What the SBLRC has revealed in multiple correspondence with EPA staff is that there are no new analyses that provide any support for benchmark monitoring, the analyses in the docket are incomplete and EPA appears unwilling to provide important background information in order to verify the Agency's conclusions, and generally that Coalition's efforts to get to the "facts" has forced it into a frustrating game of hide and seek with EPA staff. Despite the length of this comment period, EPA still has not been able to fix all of the document deficiencies or malfunctions that SBLRC has identified in the docket.

In fact, FSWA and SBLRC were asked to meet with EPA Office of Water leadership and key staff on May 16, 2025. At that meeting, we shared with EPA fundamental problems with the docket, EPA's lack of justifications for various proposed provisions, and general concern with the Proposed MSGP and why it should be withdrawn. To that end, later that Friday afternoon – one business day before comments were due – EPA provided information, corrected documents and other modifications to the docket. This is one example regarding EPA's problems with the notice and comment process associated with this proposal.

As a result of FSWA intervening in the NGO challenge to EPA's 2015 MSGP, FSWA helped to negotiate the settlement in the 2015 MSGP litigation that created the AIM response program to samples that exceeded benchmarks. While FSWA has not supported benchmark monitoring, we believed that in helping to defend EPA's 2015 MSGP, we might be able to generate some benefit from outfall specific/pollutant specific monitoring. Unfortunately, the 2021 MSGP deviated from the structure approved in the settlement and still is missing critical components to justify the AIM approach.

In particular, the settlement agreement required EPA to develop industry-specific fact sheets to inform Level 1 of AIM. Those fact sheets were recognized in the settlement as a prerequisite for implementing AIM. And yet, EPA failed to finalize for the current MSGP the industry-specific BMP fact sheets that serve as the bais for Level 1 of AIM. Those fact sheets were proposed for the current MSGP but never finalized with the current permit, with EPA

[4] *Id.*
[5] *Id.* at 30.
[6] *Id.* at 433.
[7] *Id.* at 435.
[8] A coalition of small business trade associations with some overlap with FSWA.

promising "to work with external stakeholders to thoroughly revise the sector-specific fact sheets." 86 Fed. Reg. at 10,274 (February 19, 2021). EPA initiated a few webinars on possible revisions to certain of the industry-specific fact sheets, but does not appear to be ready to provide these critical tools that are necessary for appropriate AIM implementation.

In sum, EPA has had nine years to develop the fact sheets identified in the 2015 MSGP settlement. EPA must finalize those fact sheets before a new MSGP proposal is released. The current Proposed MSGP prevents adequate opportunity for public comment because the Agency is proposing changes to the AIM process without anyone knowing what the fact sheets will contain. That puts the cart before the horse and is another reason why the current Proposed MSGP should be withdrawn.

C. Impaired Waters Monitoring

EPA is proposing substantial modifications to its impaired waters monitoring approach that, once again, lack logical or legal explanation/justification. Up through EPA's promulgation of the 2015 MSGP, the Agency created a balanced approach to meeting water quality-based effluent limitations obligations under the NPDES program. The fundamental problem, which has existed since the beginning of this program, is that EPA declined in the 1990s to develop wet weather water quality standards. The failure of not having such standards means that we must force the square peg of ambient, low flow based water quality standards to the round hole that can best be described as temporary, high flow conditions associated with precipitation events.

Because we do not have an appropriate tool for addressing WQS and impaired waters, EPA has attempted to fill in that void and this Proposed MSGP misses the mark significantly. After 35 years of stormwater permitting experience, EPA should finally commit to developing wet weather water quality standards that would eliminate the entire benchmark monitoring debate and properly lay the foundation for stormwater permitting they way the Clean Water Act envisions.

EPA also should return to the presumption that compliance with technology-based effluent limits is sufficient to meet water quality based effluent limits absent clear information to the contrary. Forcing facilities to sample for any pollutants that may cause or contribute to an impairment is not a fair compromise. In fact, EPA's continued use of the terms "cause or contribute to a water quality violation" are the type of "end result" permit terms that the Supreme Court recently ruled are inappropriate.[9]

FSWA does not support EPA and its request for comment regarding continuous impaired waters monitoring throughout the length of the permit. There are more efficient and effective ways of addressing impaired waters and EPA approved total maximum daily loads,

[9] See *City and County of San Francisco v. EPA* at www.supremecourt.gov/opinions/24pdf/23-753_f2bh.pdf

such as how the 2015 MSGP approaches those concerns. Finally, EPA should proceed with developing wet weather water quality standards so we can stop attempting to force a square peg in a round hole when it comes to stormwater permitting.

EPA announced that it will continue with PAH monitoring requirements added to the current MSGP and it has requested comment on monitoring for 6PPD. EPA added PAH monitoring in an attempt to discourage the use of coal-tar sealants in the current MSGP. The use of NPDES permits to influence what products are available or used in the general economy is inappropriate. After thoroughly analyzing EPA's proposed permit, FSWA concluded: the science underlying the PAH impacts from stormwater discharges is controversial and not well-settled, and EPA has not provided sufficient data showing that such BMPs are inadequate to protect water quality.

After collecting five years' worth of data on PAHs under the current permit, EPA fails to provide any data analysis regarding what it has learned and yet wants to continue the PAH monitoring approach. If EPA was not justified in 2021 and has not done any further analyses, EPA is arguably not in better (and perhaps a worse) position to maintain this monitoring requirement.

FSWA recognizes that 6PPD is a concern due to its impacts on certain salmon species. At the same time, we recognize that EPA and various western states are working very closely with the tire manufacturers in an effort to address the 6PPD issues. EPA's data collection through the MSGP will not further inform the process between EPA and the tire manufacturers, and further monitoring, as EPA requested comment, will not provide any actionable benefits.

D. PFAS Monitoring

FSWA opposes the PFAS-related requirements in the Proposed MSGP for the reasons set forth below. These PFAS requirements would disproportionally impact small businesses, and they would impose the type of unnecessary regulatory burden that the Trump Administration has indicated it would eliminate, due to high costs and lack of appreciable benefits.

- **Eliminate PFAS Monitoring:** EPA is proposing to include PFAS indicator monitoring in the Proposed MSGP for 23 of the 30 regulated sectors, which would require every covered facility to collect quarterly stormwater samples for all regulated outfalls for the duration of the permit. EPA has provided little, if any, justification for this proposed mandate, and there are strong reasons to remove the PFAS requirements:
    - The Agency has not shown that PFAS poses a water quality concern due to its occurrence in stormwater discharges associated with industrial activity from those sectors. While PFAS has been shown to be present in rainfall, and thus

may end up being present in urban, municipal and industrial stormwater discharges, that does not mean that it should be monitored for or regulated under the next MSGP. If PFAS is not associated with industrial activity – which is the case for many of the regulated sectors – then its mere presence is insufficient justification for EPA to pursue mandatory monitoring through the MSGP.[10]

- EPA relies on several information sources to justify its proposed PFAS monitoring requirements, none of which are sufficient:
    - First, EPA reviewed its PFAS Strategic Road Map's identification of industries that may handle PFAS. That is insufficient justification for an NPDES permit mandate.
    - Next, EPA claims that it conducted a literature review. EPA has added a generally drafted "memo" to the docket, describing the reasons for proposing PFAS monitoring, but there are no specific references to any "literature" that justifies PFAS monitoring.[11] That memo is dated immediately before EPA released the Proposed MSGP. That docket entry cannot justify the drafting of the PFAS monitoring provisions that must have already been included in the Proposed MSGP.
    - Finally, the DMR data that EPA identifies are too limited to allow the Agency to determine if the PFAS was from stormwater associated with industrial activity.
- Even if facilities end up with non-detection results from their monitoring efforts, they must continue to monitor for PFAS for the length of the permit at every outfall, which is an enormous waste of resources.
- Even if site operators find some level of PFAS contamination in their stormwater discharges, EPA's Destruction & Disposal Guidance document provides little useful information for addressing or remediating most potential PFAS sources.

[10] To demonstrate how unreasonably broad and unnecessarily burdensome the Proposed MSGP is with regard to PFAS monitoring, EPA's Superfund and Effluent Limitations Guidelines offices recognize that only commercial, Part 139 certificated airports have any exposure to PFAS, none of which is associated with industrial activity. However, this proposal would also require PFAS monitoring at the thousands of small general aviation airports across the country. Thus, the entire Air Transportation Sector (Sector S), for example, would suffer significant injury.

[11] See Record for the Proposed 2026 Multi-Sector General Permit (MSGP) – Docket ID# EPA- EPA-HQ-OW-2024-0481

For all of the above reasons, FSWA recommends that unless and until EPA has conducted a careful analysis of the extent to which industrial activities in the listed sectors result in significant levels of PFAS in the resulting stormwater discharges, it should eliminate PFAS testing from the MSGP. If EPA were to decide to include any PFAS monitoring requirements in a final MSGP, it must address the following challenges and concerns.

- **Reconsider Indicator Monitoring Schedule for PFAS:** If EPA decides, notwithstanding the concerns raised above, to retain PFAS sampling in the MSGP, then the Agency needs to reconsider its proposed indicator sampling requirements for PFAS, which are aggressive and include an overly burdensome sample schedule. EPA proposes that samples be taken every quarter for the entire five-year permit term for PFAS. This sampling schedule goes far beyond the samples needed to adequately categorize a waste stream, and the costs of such frequent sampling could be substantial. Sampling for PFAS, if it is retained in the permit, should be reduced to a single annual sample for the first five years of permit coverage and should be eliminated if any sample results are non-detect.

- **Address Concerns as to Method 1633:** Part 4.2.1.1.c of the Draft MSGP requires PFAS monitoring using EPA Method 1633. That test method, however, has not yet been adopted into 40 CFR Part 136. When EPA proposed to approve that method, the PFAS Regulatory Coalition[12] provided comments on that proposal, which included a report by Environmental Standards, Inc. that outlines at least five issues that EPA should address before prescribing the use of Method 1633 for compliance purposes.[13] FSWA recommends that EPA revise Method 1633 before adopting it into 40 CFR Part 136 and before finalizing any PFAS monitoring in the MSGP.[14]

- **Eliminate Use of Method 1621:** In Request for Comment #2, EPA specifically requested comment on requiring PFAS indicator monitoring using Method 1621, Determination of Adsorbable Organic Fluorine (AOF) in Aqueous Matrices by Combustion Ion Chromatography (CIC) in applicability and Schedule of Indicator Monitoring, Per- and Polyfluoroalkyls Substances (PFAS) (Part 4.2.1.1(c)).

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[12] The PFAS Regulatory Coalition is a sister coalition to FSWA with overlapping members and counsel.

[13] *Comments of PFAS Regulatory Coalition on Clean Water Act Methods Update Rule 22 for the Analysis of Contaminants in Effluent* (Docket ID No. EPA-HQ-OW-2024-0328-0060, Feb. 20, 2025), attaching *US EPA Methods Update Rule 22 – Review and Evaluation of Methods 1621, 1628 and 1633A* (Environmental Standards, Inc., Feb. 20, 2025), accessible at Regulations.gov .

[14] The link to Table 1 of EPA Method 1633 listing the 40 PFAS target analytes, provided in Draft MSGP Part 4.2, Table 4-1, footnote [**] is not functional. We recommend that EPA correct the link before the Draft MSGP is finalized.

The potential requirement of sampling under both Methods 1633 and 1621 would be extremely burdensome for industry, with very little likely environmental benefit. Method 1621 is a screening method that might indicate that additional evaluation is needed, but it should not be considered for use as an indicator sampling method. Method 1621 screens for thousands of organofluorines at the part per billion level in aqueous samples, and reports results as a combined total concentration, but does not define what substances are actually present.

Therefore, the cause of any organic fluorine presence is generally not known and cannot be ascertained through use of Method 1621. In addition, the method has potential for interference or false positives from other compounds. Concerns regarding this method are identified in the Environmental Standards, Inc. report cited above. EPA should not require use of Method 1621 in the MSGP.[15]

- **Revise Requirements to Address Lab Capacity Issues for PFAS:** We understand from our engineering contractors that laboratory capacity to process PFAS samples has been adversely affected by numerous new regulations that require sampling. These include the 2020 Department of Defense (DOD) policy on PFAS sampling, EPA's 2024 final rule on legacy CCR surface impoundments and CCR management units, NPDES permits issued by U.S. EPA and several States for municipal and industrial facilities that require PFAS sampling, property investigations occurring across the country, and now potentially the PFAS sampling requirements contained in the Proposed MSGP. Based on inquiries that our contractors have made, for example, there is currently a four-week turnaround after receiving a sample, which is double the time expected for general samples. This is true even after the recent DOD PFAS sampling requirements were placed on hold. If these regulatory requirements are enacted as scheduled, we expect substantial shortages in laboratory capacity, leading to very long turnaround times and costly sampling fees. Because EPA's MSGP serves as the model for many State permitting authorities, these lab capacity issues will only be exacerbated over time, on a national scale.

- **Revise Schedule to Address Concerns about Sampling for PFAS**: During an EPA informational webinar concerning the Proposed MSGP on January 16, 2025, Agency staff acknowledged potential difficulties in laboratory availability, but stated that they were unaware of any complexities in the sampling procedures necessary for sample collection. The guidelines for PFAS sampling posted on the EPA website, however, indicate several complex and problematic factors in sampling for PFAS.[16] Due to the ubiquitous nature of PFAS in everyday items, there are stringent requirements for

[15] If EPA does require PFAS monitoring in the final MSGP, it should preserve permittee flexibility and allow the facility to choose which test method it will employ, whether that be 1633, 1621 or another method.
[16] *EPA Pacific Southwest (Region 9) Per- and Polyfluoroalkyl Substances (PFAS) Tribal Drinking Water Sampling Project* (Jun. 2022).

sampling crews to undertake 24 hours prior to and during sampling efforts. For example, an excerpt from EPA guidance states:

- Minimize use of the following products on the day of the sample event, preferably **24 hours prior to the event**:
  - Cosmetics, moisturizers, sun-blocks, insect repellants, fragrances, creams, or other personal care products (including hair products). Exceptions: Products that are known to be 100% natural.
- Other items that are likely to contain PFAS and to be avoided include:
  - Paper packaging for food or fast food.
  - New or unwashed clothing.
  - Clothing washed with fabric softeners or dried with anti-static sheets.
  - Synthetic water-resistant/or stain-resistant materials (such as waterproof clothing and shoes such as Gore-Tex), waterproof of coated Tyvek® material (special attention to boots).
  - Teflon® and other fluoropolymer-containing materials (e.g., polyvinylidene fluoride [PVDF], Kynar®, Neoflon®, Tefzel®).
  - Waterproof/treated paper on field notebooks.
  - Waterproof markers (such as Sharpie®, etc.).
  - Chemical or blue ice, which may contain PFAS and may not reduce and/or maintain the temperature of the samples adequately.
- Avoid sampling in the rain if possible (if necessary, please use vinyl or polyvinyl chloride [PVC] rain gear).
- Avoid filling your gas tank the day of the sampling (prior to sampling).[17] (emphasis added)

Because stormwater sampling teams at sites are often in travel status, working across multiple sites, and sampling events at some sites need to be relatively spontaneous if an outfall does not flow regularly and a rain event causes a discharge, these sampling requirements are indeed complex, and can be infeasible in the stormwater context. EPA must recognize the difficulty, cost, and effort associated with proposed PFAS sampling requirements, and maintain a schedule that is consistent with circumstances experienced in the field.

[17] *Id.* at p3.

E. **SWPPP Availability Concerns**

EPA has indicated its intention to continue to mandate public posting of or otherwise making SWPPPs available to the public. FSWA requests these requirements be removed. Posting of SWPPPs leaves industrial facilities vulnerable to terrorist attacks and can otherwise create unnecessary security risks, based on the public disclosure of facility layouts including locations where hazardous substances are stored. EPA states that portions of the SWPPP may be eligible for redaction under claims of Confidential Business Information or other confidentiality grounds. However, the burden to invoke properly any confidentiality claim is on the permittee and EPA could deny such claims. This burden is unnecessary, as is the burden to make SWPPPs available.

F. **Compliance with the Regulatory Flexibility Act**

Previously, EPA has asserted that NPDES permits are not "rules" subject to the Regulatory Flexibility Act (RFA) requirements.[18] However, in promulgating the 2008 Construction Stormwater General Permit, EPA committed to applying the RFA framework and requirements to all NPDES general permits whether or not the Agency considered them "rules" or not under the Administrative Procedures Act. EPA must conduct an appropriate and complete RFA analysis for the Final 2026 MSGP.

EPA must comply with the RFA when its action would have "significant economic impact on a substantial number of small entities" unless it certifies to the contrary, which EPA apparently has not done, and which the record does not support. Evidence in the record and in comments being submitted demonstrate that EPA should have proceeded with full RFA compliance, including assembling a Small Business Regulatory Enforcement Fairness Act review panel.

G. **Severe Weather Adaptive Measures**

EPA has proposed new conditions in which the site operator must consider severe weather when developing adaptive measures (see Section 2.1.1.8). NPDES permits (including the Proposed MSGP) last for five years at a time. In complying with this five year permit term, EPA would like site operators to have to consider the impacts of the 100-year flood, with a 1% annual chance of occurring, when designing and implementing their stormwater control measures. There may be no reasonable controls to prevent impacts from the 100-year flood. In addition, a 100-year flood will have significantly detrimental impacts on all receiving streams regardless of what MSGP permittees implement. Typically, such floods end up with significant urban and municipal debris fields that may include underground storage tanks, destroyed

[18] 5 USC §§ 601 et seq.

building and other significant cleanup that will result. Forcing MSGP dischargers to plan for extreme weather that is unlikely to occur during the five year permit term is illogical.

Conclusion

FSWA appreciates your consideration of the issues raised in this letter. We believe the only appropriate pathway forward is for this Administration to withdraw this Proposed MSGP and begin a public process with affected stakeholders to develop a more efficient and effective MSGP moving forward. That process could start with convening a small business SBREFA panel. If you have any questions or would like to engage with FSWA further on this issue, please contact me directly at jeffrey.longsworth@earthandwatergroup.com or (301) 807-9685.

Respectfully,

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FSWA Coordinator and Counsel

Cc: Nick Goldstein, SBA Advocacy
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