



June 1, 2020

VIA ELECTRONIC SUBMISSION

Andrew Wheeler, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on EPA’s proposed rule “2020 National Pollutant Discharge Elimination System (NPDES) general permit for stormwater discharges associated with industrial activity” (Docket No. EPA-HQ-OW-2019-0372).

Dear Administrator Wheeler:

On March 2, 2020, the Environmental Protection Agency (EPA) announced a public comment period for the proposed 2020 National Pollutant Discharge Elimination System (NPDES) general permit for stormwater discharges associated with industrial activity, also referred to as the “2020 Multi-Sector General Permit (MSGP)”.¹ This letter constitutes the public comments of the Office of Advocacy (Advocacy) on the proposed rule.

Advocacy believes that EPA must fully comply with the Regulatory Flexibility Act when promulgating the MSGP. It must evaluate the economic impacts of the proposed revisions to the MSGP on small entities, and it should reconsider the elements of the proposed 2020 MSGP that impose an unreasonable burden without a clear scientific justification. Advocacy recommends that EPA adopt a tiered approach to benchmark monitoring, with a focus on gathering high quality data for future rulemakings rather than immediate burdensome regulatory requirements, to ensure that the 2020 MSGP will not have a significant economic impact on a substantial number of small entities.

¹ 85 Fed. Reg. 12288 (March 2, 2020).

I. Background

A. The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For any rule that is expected to have a significant economic impact on a substantial number of small entities, the RFA requires the federal agency to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ In addition, when EPA cannot certify that a proposed rule would not have a significant economic effect on a substantial number of small entities, EPA must conduct a SBREFA panel to consult directly with potentially affected small entities.⁵

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁶ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, their response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁷ Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁸

B. The MSGP program

The Clean Water Act prohibits anyone from discharging pollutants from a point source into waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. In 1987, Congress expanded the NPDES program to include industrial stormwater runoff, whether discharged directly to waters of the United States or through municipal storm

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.C. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction" that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

⁵ See 5 U.S.C. § 609(a), (b).

⁶ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁷ *Id.*

⁸ 5 U.S.C. § 601 note

sewer systems. This led to a significant increase in the number of industrial facilities that needed NPDES permits to continue operating.

In response, in 1994, EPA established the Multi-sector General Permit for Industrial Stormwater Discharges (MSGP). This new permit provided NPDES permit coverage for a wide range of industrial activities, grouped by industrial sector. The MSGP is reissued every 5 years, consistent with the Clean Water Act time limit for NPDES permits.

The MSGP covers those areas where EPA is NPDES permitting authority, which includes most Indian lands, some federal facilities, all United States territories, the District of Columbia, four states (Idaho, Massachusetts, New Hampshire, and New Mexico), and some industrial sectors in other states. However, the MSGP serves as a model for the states to which EPA has delegated permitting authority, so the policy changes in each MSGP revision are often reflected in state programs.

To operate under the MSGP, a permittee submits a Notice of Intent (NOI). An NOI is a notice to the NPDES permitting authority, not an application. By signing and submitting the NOI, the permittee certifies that the discharge meets all the eligibility conditions specified in the MSGP and that the permittee intends to follow the terms and conditions of the permit. In general, coverage of the permit starts 30 days after EPA notifies the permittee that it has received a complete NOI, unless EPA takes affirmative action to deny or delay the permit.

C. MSGP and the RFA

In the *Federal Register* notices announcing issuance of the 1998 General Permit for Stormwater Discharges from Construction Activities in Region 6⁹ and the 2009 MSGP,¹⁰ EPA claimed that, in their analysis, general permits are not rules under the Administrative Procedure Act (APA) and thus also not subject to the RFA. Advocacy has disagreed with this interpretation of the APA and RFA.¹¹

Nonetheless, EPA stated the following in the *Federal Register* notice for the 2009 MSGP:

. . . EPA hereby commits that the Agency will operate in accordance with the RFA's framework and requirements during the Agency's issuance of CWA general permits (in other words, the Agency commits that it will apply the RFA in its issuance of general permits as if those permits do qualify as “rules” that are subject to the RFA). In satisfaction of this commitment, during the course of this MSGP permitting proceeding, the Agency conducted

⁹ 63 Fed. Reg. 36490, 36497 (July 6, 1998).

¹⁰ 74 Fed. Reg. 8789 (Feb. 26, 2009).

¹¹ See Letter from Thomas Sullivan, Chief Counsel for Advocacy, U.S. Small Business Administration to Benjamin Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency (March 14, 2006) (*available at* https://webarchive.loc.gov/all/20160921203014/https://www.sba.gov/sites/default/files/files/epa06_0314.pdf).

the analysis and made the appropriate determinations that are called for by the RFA. In addition, and in satisfaction of the Agency's commitment, EPA will apply the RFA's framework and requirements in any future MSGP proceeding as well as in the Agency's issuance of other NPDES general permits. EPA anticipates that for most general permits the Agency will be able to conclude that there is not a significant economic impact on a substantial number of small entities. In such cases, the requirements of the RFA framework are fulfilled by including a statement to this effect in the permit fact sheet, along with a statement providing the factual basis for the conclusion. A quantitative analysis of impacts would only be required for permits that may affect a substantial number of small entities, consistent with EPA guidance regarding RFA certification.¹²

In the 2015 MSGP, EPA made passing reference to small businesses in the fact sheet,¹³ but did not conduct a screening analysis elsewhere.¹⁴

D. 2016 Settlement Agreement

EPA issued the 2015 MSGP in June 2015.¹⁵ Environmental nongovernmental organizations petitioned the U.S. Court of Appeals for the Second Circuit for review within weeks of its issuance and notice in the *Federal Register*.¹⁶ Before any briefs were filed, EPA, the petitioners, and intervenors representing permittees signed a settlement agreement that committed EPA to a number of actions prior to issuance the next MSGP proposal.¹⁷

EPA agreed to charter and fund a study by the National Academies of Sciences, Engineering, and Medicine's National Research Council (NRC) to evaluate and provide recommendations on improvements to the MSGP. EPA agreed to propose questions on (1) "issues centered on 'benchmark monitoring'", (2) "the feasibility of numeric retention standards (e.g., volumetric control standards for a percent storm size or based on percentage of imperviousness)", and (3)

¹² 74 Fed. Reg. at 8791.

¹³ "Because most permittees covered under the permit are existing dischargers and control measures are already being implemented to meet the effluent limits in the permit, and considering the relatively modest cost of compliance with the 2015 MSGP, EPA concludes that the technology-based effluent limitations in the MSGP are unlikely to result in a substantial economic impact to the permitted universe, including small businesses." *2015 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) – Fact Sheet*, pp. 21 (available at https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015_fs.pdf).

¹⁴ See, e.g., *Cost Impact Analysis for the Multi-Sector General Permit (MSGP)*, regulations.gov Document ID EPA-HQ-OW-2012-0803-0167.

¹⁵ 80 Fed. Reg. 34404 (June 16, 2015). The complete permit is available at <https://www.epa.gov/npdes/final-2015-msgp-documents>, last accessed May 25, 2020.

¹⁶ *Waterkeeper Alliance v. EPA* (2d Cir. 15-02091).

¹⁷ Available at https://www.epa.gov/sites/production/files/2020-01/documents/multi-sector_general_permit_msgp_2016_settlement_agreement.pdf, last accessed May 25, 2020 [hereinafter "Settlement Agreement"].

“the highest priority industrial facilities or subsectors for consideration of additional discharge characterization and/or monitoring.”¹⁸

EPA also made specific commitments about what it would include in its next MSGP proposal. This included a proposal for new Additional Implementation Measures (AIM) requirements. AIM would be triggered when benchmark monitoring of discharges exceeds thresholds for specified pollutants. There would be three tiers of AIM requirements, with each tier triggered as exceedances become more severe or more frequent.

E. NRC Study

The NRC completed its consensus study in 2019.¹⁹ The study reviews the state of the science underlying the MSGP program and makes recommendations to improve the operation and effectiveness of the program. The study highlights the following selected recommendations in the report summary.

- “EPA should require industry-wide monitoring under the MSGP for pH, total suspended solids (TSS), and chemical oxygen demand (COD) as basic indicators of the effectiveness of stormwater control measures (SCMs) employed on site.”²⁰
- “EPA should implement a process to periodically review and update sector-specific benchmark monitoring requirements that incorporates new scientific information.”²¹
- “EPA should update the MSGP industrial-sector classification so that requirements for monitoring extend to nonindustrial facilities with activities similar to those currently covered under the MSGP.”²²
- “EPA should update and strengthen industrial stormwater monitoring, sampling, and analysis protocols and training to improve the quality of monitoring data.”²³
- “To improve stormwater data quality while balancing the burden of monitoring, EPA should expand its tiered approach to monitoring with the MSGP, based on facility risk, complexity, and past performance.”²⁴

The study also notes that “[t]he Committee was not asked to analyze the financial costs of its recommendations; instead, EPA will assess the costs of possible changes in its proposed review of the MSGP.”²⁵

¹⁸ See Settlement Agreement, pp 5-7.

¹⁹ National Academies of Sciences, Engineering, and Medicine, *Improving the EPA Multi-Sector General Permit for Industrial Stormwater Discharges* (2019) [hereinafter “NRC Study”].

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 5.

²⁴ *Id.* at 6.

²⁵ *Id.* at 1.

F. The Proposed 2020 MSGP

On March 2, 2020, EPA published in the *Federal Register* a notice announcing its proposal for the 2020 MSGP.²⁶ This proposed MSGP would significantly expand the obligations of permittees across all industries. First, it would require quarterly benchmark monitoring for pH, TSS and COD for all permittees²⁷ and would establish a uniform threshold across all industries.²⁸ As part of this universal benchmark monitoring, EPA would end the off-ramp for permittees that have four consecutive quarter test results under the benchmark thresholds. Second, it would impose AIM requirements for exceedances of the uniform thresholds for pH, TSS or COD or industry-specific thresholds for other pollutants.²⁹ EPA also proposes to add sector-specific benchmark monitoring requirements for three sectors: Oil and Gas Extraction (Sector I), Land Transportation and Warehousing (Sector P), and Ship and Boat Building and Repair Yards (Sector R).

EPA has not “applied the RFA framework and requirements” as contemplated in the 2009 MSGP nor directly addressed the question of whether the MSGP is a rule under the APA. EPA has not provided an initial regulatory flexibility analysis for this proposal, as required under 5 U.S.C. 603. In the *Federal Register* notice, EPA makes an assertion that the 2020 MSGP will not have a significant economic impact on a substantial number of small entities, using the language of a certification under 5 U.S.C. 605(b) and referencing the economic impact analysis.³⁰ However, the cost analysis for the proposal does not estimate the cost impact on small entities, stating that because EPA does not have employee numbers or annual receipts for permittees, “estimating impacts on small entities is not possible.”³¹

Advocacy hosted a Small Business Environmental Roundtable on February 28, 2020, at which EPA staff presented information on the proposed 2020 MSGP to interested small business representatives and the public.

²⁶ 85 Fed. Reg. 12288 (March 2, 2020). The complete proposed permit is available on regulations.gov: Parts 1-9 (Document ID EPA-HQ-OW-2019-0372-0065), Appendices A-P (Document ID EPA-HQ-OW-2019-0372-0061), Permit Appendix Q (Document ID EPA-HQ-OW-2019-0372-0089). EPA also prepared a draft Fact Sheet for notice and comment (regulations.gov Document ID EPA-HQ-OW-2019-0372-0064)

²⁷ *Proposed 2020 MSGP*, part 4.2.1.

²⁸ *Id.*, part 8, table 8.1.1.

²⁹ *Id.*, part 5.2.

³⁰ 85 Fed. Reg. at 12294.

³¹ *Cost Impact Analysis for the Proposed 2020 Multi-Sector General Permit (MSGP)* (regulations.gov Document ID EPA-HQ-OW-2019-0372-0063).

II. Advocacy's Small Business Concerns

A. The Proposed 2020 MSGP is a rule under the Administrative Procedure Act and EPA must comply with the Regulatory Flexibility Act, either by convening a SBREFA panel and publishing an Initial Regulatory Flexibility Analysis for notice and comment, or by reducing the impacts on small entities so that EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities.

The Regulatory Flexibility Act applies to any rule which is required to be published for notice and comment by the Administrative Procedure Act (APA) or any other act. The proposed MSGP is a rule within the meaning of that term in the APA, and thus is subject to the requirements of the RFA. As proposed, the 2020 MSGP could have a significant economic impact on a substantial number of small entities. Unless those impacts are reduced, EPA is required to convene a SBREFA panel and publish an Initial Regulatory Flexibility Analysis for notice and comment.

1. The proposed 2020 MSGP is a rule under the Administrative Procedure Act

The Administrative Procedure Act (APA) governs the procedural rule making process for federal agencies. The Act defines a rule as a "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy. . ." and a rulemaking as the agency's process for "formulating, amending, or repealing a rule". Section 553 of the APA requires that general notice of proposed rulemaking be published in the Federal Register. This notice must include a statement of the time, place and nature of rulemaking proceedings, reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved.

EPA's proposed 2020 MSGP fits squarely into the definition of a rule under the APA. First, the 2020 MSGP is an agency statement of general applicability and future effect. A statement of "general applicability," in contrast to a statement of "particular applicability," applies to all that meet the stated criteria. The proposed 2020 MSGP covers stormwater discharges from industrial facilities in 30 sectors across EPA's Regions 1 through 10. It is not limited to named parties nor parties that are already members of the class, so it is a policy of "general applicability." It is also of "future effect," since it will replace the existing MSGP upon its expiration on June 4, 2020 and remain in effect for five years. The proposed 2020 MSGP is designed to implement and prescribe law. Under Section 402(p) of the Clean Water Act, EPA is required to develop a phased approach to regulate stormwater discharges under the National Pollution Discharge Elimination System (NPDES). EPA lists Section 402(p) as the statutory authority under which it proposes this MSGP.

For good policy reasons, EPA adheres to both the nature and function of the rulemaking process in its efforts to improve upon the proposed permit. Rulemaking is characterized by its distinct function in administrative law: its purpose is to develop policies that apply to more than the limited parties known and present at the time. For example, a statute that requires EPA to consider issues of general policy with respect to a pollutant (i.e. the significance of its toxicity

and degradability on affected organisms as opposed to issues of fact concerning a particular entity's discharges) is appropriately adhered to through the rulemaking process. In this case, the proposed 2020 MSGP relies on Section 402(p) of the Clean Water Act. Section 402(p) calls for EPA to issue regulations to set forth the permit application requirements for municipal and industrial stormwater discharges. This authority is a matter of general policy as EPA is directed to formulate permit application requirements for dischargers across the nation. Furthermore, the content of the notice itself shows that EPA intends to engage the public in an APA rulemaking function: formulation. EPA seeks public comments on the permit, noting that the final permit will not be issued until EPA considers all significant comments and makes appropriate changes to the proposed permit. This notice has both the character and function of a rule under the APA.

Nonetheless, EPA's legal position has been that a general permit is issued as an adjudication, not a rulemaking. In EPA's view, "the fact that an NPDES general permit may apply to a large number of different dischargers does not convert it from a permit into a rule."³² EPA also argued that a general permit is not a policy of general applicability: "NPDES general permit for storm water discharges associated with construction activity is effective only with respect to those dischargers that choose to be bound by the permit. Thus, unlike the typical rule, this NPDES general permit does not impose immediately effective obligations of general applicability."³³

The U.S. Court of Appeals for the D.C. Circuit has explicitly disagreed with EPA's interpretation of the issue. In *National Association of Home Builders v. Corps of Engineers*,³⁴ the court held that nationwide permits (NWP) issued by the Army Corps of Engineers under section 404 of the Clean Water Act "fit easily" into the APA's definition of a "rule". Like EPA, the Army Corps of Engineers contended that NWPs should instead be classified as "adjudications" under the APA because they were formulations of an "order", which includes "licensing", and a permit is a form of a "license". However, the court rejected the Army Corps' "elaborate statutory construction for the more straightforward one." Because the NWPs authorized permittees to discharge dredged and fill material, while prohibiting those without an individual permit from doing so, NWPs constituted a legal prescription of the Corps' ability to implement the permitting authority granted by Congress in Section 404 of the Clean Water Act.

Similarly, this proposed 2020 MSGP is a legal prescription of EPA's ability to implement its permitting authority granted by Congress in Section 402(p) of the Clean Water Act. The MSGP authorizes permittees to discharge pollutants into the waters of the United States and prohibits those without an individual NPDES permit or other NPDES general permit from doing so.

³² 63 Fed. Reg. at 36497.

³³ *Id.*

³⁴ *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1284-85 (DC Cir. 2005)

Despite the D.C. Circuit’s opinion, EPA only recognizes that “this legal question remains ‘a difficult one’.”³⁵

2. The proposed 2020 MSGP must comply with the Regulatory Flexibility Act.

The RFA was adopted to ensure that federal agencies formally assess and minimize regulatory burdens on small entities. In crafting the RFA, Congress recognized that alternative regulatory approaches that maintain alignment with the objectives of the authorizing statutes may be available to minimize the significant economic impact of rules on small entities.

Under the RFA, when an agency must publish general notice of proposed rulemaking under the APA, the agency must prepare and make publicly available an initial regulatory flexibility analysis (IRFA) describing the impact of the rule on small entities. In addition, prior to publishing an IRFA, EPA is required to convene a panel under Sec. 609(b) of the RFA, a requirement added to the RFA by the Small Business Enforcement Fairness Act (SBREFA).³⁶ The purpose of the IRFA and the SBREFA panel are similar in nature: both provide opportunities for the agency to minimize a rule’s significant economic impacts on small entities. EPA can avoid the requirement for a panel and an IRFA only if it can certify as a matter of fact that the proposed rule will not have a significant economic impact on a substantial number of small entities.

EPA is required to comply with the requirements of the RFA, because a general permit is a rule under the APA, and EPA is required to publish the MSGP in the *Federal Register* for notice and comment. As described above, although EPA has previously committed to following the “RFA’s framework and requirements,” it has not provided either an initial regulatory flexibility analysis or a certification supported by a factual basis (see below). The minimal consideration of small entity impacts in the *Federal Register* notice and the cost analysis are not consistent with the Congressional purposes of the RFA.

3. EPA must convene a SBREFA panel and publish an Initial Regulatory Flexibility Analysis for notice and comment, or reduce the impacts on small entities so that EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities.

EPA has two options for moving forward in promulgation of the general permit. EPA’s first option would be to initiate the processes for a SBREFA panel under section 609(b), in preparation for an IRFA. EPA may not develop a FRFA in support of the final 2020 MSGP without issuing an IRFA for public comment,³⁷ and EPA must complete a SBREFA panel before

³⁵ 74 Fed. Reg. at 8791.

³⁶ Public Law 104-121, March 29, 1996.

³⁷ *Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411, 1434 (M.D. Fla. 1998) (“the agency could not possibly have complied with § 604 by summarizing and considering comments on an IRFA that NMFS never prepared”).

issuing an IRFA. After public comment on the IRFA, EPA could move forward with development of a FRFA supporting promulgation of the final 2020 MSGP.

EPA's second option would be to issue as final only those elements of the 2020 MSGP that it can certify will not have a significant economic impact on a substantial number of small entities. As discussed below, EPA asserts significant gaps in its knowledge of small entities that are or are likely to become permittees, and EPA has made what Advocacy believes are unreasonable assumptions about the likely costs of the stormwater control measures (SCMs) that would be required under universal benchmark monitoring and AIM. EPA could consider the following alternatives that would reduce the impacts on small entities to a level that would satisfy the requirements.

- EPA could adopt the 2015 MSGP with no changes.
- EPA could adapt the NRC Study recommendation to adopt a tiered approach to benchmark monitoring and allow small entities that are not currently subject to benchmark monitoring to continue visual monitoring only.
- EPA could require benchmark monitoring in phases over the full period of the 2020 MSGP to minimize the impact on small entities.

Advocacy does not believe EPA could certify a final rule that included the second and third tiers of AIM as proposed.

B. To comply with the RFA, EPA must identify affected small entities and their industries, account for all direct costs to small entities, including costs of site-specific controls, and must tailor its analysis of significant impacts to individual industries.

1. EPA must identify affected small entities and their industries

The RFA requires EPA to consider the impacts of its rules on small entities. As part of that consideration, EPA must identify the affected industries and the number of small entities in those industries. The permit already identifies affected sectors, and Appendix D of the proposed 2020 MSGP summarizes the affected industries, but there is no estimate of the number of affected small entities in the proposed rule. If EPA lacks administrative data on these industries, EPA should use data published by the U.S. Census Bureau as part of the Statistics of U.S. Businesses (SUSB) to identify the number of affected small entities and their sizes. EPA can then identify the number of small entities in each industry by applying the Small Business Administration's Table of Size Standards.

As the permit has direct effects on small entities in select states, EPA may narrow the analysis to affected entities in those states. SUSB has data on business size, states, and six-digit North American Industrial Classification System (NAICS) codes but does not publish a single table that breaks down firms by all these variables. EPA could approach the Census Bureau for access to more granular data. Another option would be for EPA to estimate the number of affected small entities by assuming the national distribution of firm sizes applies to the affected states if EPA can identify data with the number of entities by state and industry.

Without data on the number of affected entities, EPA cannot properly certify that the rule would not have a significant economic impact on a substantial number of small entities and must prepare an IRFA.

2. EPA must account for all direct costs to small entities, including costs of site-specific controls.

An analysis of small entity impacts should be comprehensive. EPA has estimated incremental per-entity costs of \$2,363 that consist primarily of monitoring costs. This estimate excludes the significant potential costs of site-specific controls per entity. To properly certify the rule, EPA must estimate the total per-entity impact for small entities, inclusive of site-specific controls costs.

By excluding the cost of implementation measures, EPA underestimates the compliance costs to small entities. EPA states that estimating the total cost is challenging because of the wide variation in effects across industries and mitigation activities, and that making a “unique global assumption for all facilities” is difficult. However, a “unique global assumption” is neither appropriate nor necessary. Instead, EPA can produce realistic per entity cost ranges that representative small entities in each industry group or sector may reasonably have to undertake. Cost ranges should be based on clearly articulated assumptions about what small entities would do to comply with the rule. Those assumptions should then be offered for public comment to ensure they are reasonable.

EPA included unit costs for some control measures in the cost analysis but does not suggest what individual entities would pay. For example, EPA suggests a cost of \$130-\$276 per linear foot for a floodwall but does not generate a per-entity estimate of the cost of a complete floodwall. It is unclear how many small entities would need to build a floodwall, or how large a floodwall would need to be for a typical site in an industry. EPA recognizes that there are many variables affecting the potential costs for an entity to comply with the permit. Considering this uncertainty, EPA should provide a more comprehensive picture of the per-entity costs. Advocacy recommends consulting with small entities in the affected industry by convening a SBREFA panel.

EPA also needs to give more attention to the costs of restricting coal-tar sealcoat. EPA assumes that “most facilities who intend to use coal-tar sealcoat will be able to find a product alternative at negligible cost difference.”³⁸ It may be true that there are alternatives to coal-tar sealcoat available at a similar cost, but EPA needs to verify that losing access to coal-tar sealcoat will have no significant economic impact on the operations of affected small entities. If entities have chosen to use coal-tar sealcoat, they may well have chosen it based on an important attribute that EPA is overlooking. A SBREFA panel could also cover the potential impacts of this provision.

EPA should give special attention to Sectors I, P, and R that could experience higher incremental costs because they have not been subject to universal benchmark monitoring before. Small

³⁸ *Cost Impact Analysis for the Proposed 2020 Multi-Sector General Permit (MSGP)*, pp. 11.

business representatives have expressed a significant concern that small entities in these sectors will need to spend more upfront resources adjusting procedures and training staff than EPA has accounted for in the cost analysis. The introduction of monitoring may also entail higher site-specific costs for entities in these sectors.

3. EPA must tailor its analysis of significant impacts to individual industries.

EPA’s discussion of costs is at the sector level, but the impacts to small entities will vary widely within sectors. EPA states that it does not “currently collect data on the number of employees or annual receipts of entities that may seek coverage under the MSGP, and therefore estimating impacts on small entities is not possible.”³⁹ EPA can find firm size data by receipts and by employment in SUSB, and use SUSB estimates to assess the impacts of the rule on small entities. Affected industries should be specifically identified. An example of this data is below: Each industry affected by the permit should be considered individually to fully understand the impacts.

Advocacy prepared examples of the potential impacts on small entities in three industries to illustrate how impacts can differ. For Petroleum Bulk Stations and Terminals, which is part of Sector P: Land Transportation and Warehousing, the costs of the rule as estimated by EPA represent a very small portion of receipts, even for the smallest entities (**Error! Reference source not found.**).

Table 1: Impacts by Firm Size in NAICS 424710, Petroleum Bulk Stations and Terminals

Enterprise Employment Size	Number of Firms	Estimated 2017 Receipts per firm (\$)	Cost Per Entity (\$)	Cost as a Percentage of Receipts
01: Total	2,334	227,661,246	2,363	0.0%
02: <5	508	4,625,051	2,363	0.1%
03: 5-9	415	18,561,169	2,363	0.0%
04: 10-19	411	21,714,669	2,363	0.0%
05: <20	1,334	14,225,742	2,363	0.0%
06: 20-99	612	108,771,529	2,363	0.0%
07: 100-499	251	188,678,163	2,363	0.0%
08: <500	2,197	60,493,188	2,363	0.0%
09: 500+	137	2,908,451,190	2,363	0.0%

Census Bureau Statistics of U.S. Businesses, 2017

For other industries in the same sector, the impacts are larger for small entities. NAICS 484110: General Freight Trucking, Local is also in Sector P. For this industry, costs represent about 4 percent of receipts for the smallest firms, and considerably less for larger small firms (Table 2).

However, in another example, NAICS 485113: Bus and Other Motor Vehicle Transit Systems, which is also in Sector P, has relatively large impacts for small firms (Table 3). For the smallest firms, EPA’s estimated costs of the rule represent 5 percent of receipts.

³⁹ *Id.* at 3.

Table 2: Impacts by firm size in NAICS 484110: General Freight Trucking, Local

Enterprise Employment Size	Number of Firms	Estimated 2017 Receipts per firm (\$)	Cost Per Entity (\$)	Cost as a Percentage of Receipts (\$)
01: Total	25,754	1,340,553	2,363	0.2%
02: <100,000	6,077	53,176	2,363	4.4%
03: 100,000-499,999	10,823	254,963	2,363	0.9%
04: 500,000-999,999	3,401	762,568	2,363	0.3%
05: 1,000,000-2,499,999	2,734	1,666,444	2,363	0.1%
06: 2,500,000-4,999,999	1,129	3,646,765	2,363	0.1%
07: 5,000,000-7,499,999	429	6,264,715	2,363	0.0%
08: 7,500,000-9,999,999	267	8,281,175	2,363	0.0%
09: 10,000,000-14,999,999	216	11,363,350	2,363	0.0%
10: 15,000,000-19,999,999	127	14,833,636	2,363	0.0%
11: 20,000,000-24,999,999	67	17,333,913	2,363	0.0%

Census Bureau Statistics of U.S. Businesses, 2012. Receipts in 2017 dollars. Data suppressed for larger firm sizes.

Table 3: Impacts by firm size in NAICS 485113: Bus and Other Motor Vehicle Transit Systems

Enterprise Receipts Size	Number of Firms	Estimated 2017 Receipts per firm (\$)	Cost Per Entity (\$)	Cost as a Percentage of Receipts (\$)
01: Total	625	5,309,079	\$2,363	0.0%
02: <100,000	147	47,385	\$2,363	5.0%
03: 100,000-499,999	211	262,399	\$2,363	0.9%
04: 500,000-999,999	78	762,987	\$2,363	0.3%
05: 1,000,000-2,499,999	78	1,689,948	\$2,363	0.1%
06: 2,500,000-4,999,999	36	3,354,527	\$2,363	0.1%
07: 5,000,000-7,499,999	15	4,882,671	\$2,363	0.0%
08: 7,500,000-9,999,999	4	7,691,070	\$2,363	0.0%
09: 10,000,000-14,999,999	15	10,975,933	\$2,363	0.0%
10: 15,000,000-19,999,999	7	13,230,961	\$2,363	0.0%
11: 20,000,000-24,999,999	4	22,098,602	\$2,363	0.0%

Census Bureau Statistics of U.S. Businesses, 2012. Receipts in 2017 dollars. Data suppressed for larger firm sizes.

Due to the heterogeneity of industries within the sectors EPA intends to regulate under the permit, EPA must estimate small entity impacts at the industry level. Analysis at the industry level will also reveal where small business burdens are greatest, and where the best opportunities to provide regulatory relief may be.

C. EPA lacks a scientific basis for universal benchmark monitoring and the alternative implementation measures.

EPA proposes to require universal benchmark monitoring with prescriptive requirements for corrective actions when monitoring results exceed benchmark thresholds. However, EPA's rationale for this new regulatory compliance mechanism is not based in the NRC study or the information presented by EPA. As such, EPA should revisit the purpose behind NRC's recommendations alongside the need for better data with which to justify the MSGP program in the future and tailor its provisions to likely environmental impacts.⁴⁰ As proposed, the 2020 MSGP would impose an unreasonable burden on small businesses that currently are only subject to visual monitoring without justification based on available data.

1. The NRC recommends universal monitoring but does not recommend universal benchmark thresholds.

The NRC Study recommends "a suite of water quality parameters [pH, TSS, and COD] for benchmark monitoring by all industrial sites that must do stormwater sampling, including those that currently only do visual monitoring."⁴¹ It states that these three parameters are good direct measures of water quality and the potential presence of other pollutants, as well as indications of SCM absence, neglect, failure.

Nonetheless, the NRC Study only cites specific thresholds for pH, saying that it "can be indicative of a major polluting event or process failure."⁴² It does not claim that such severe events would not be detected by visual monitoring or inspections. For TSS and COD, the NRC Study discusses the established history and procedures of these tests but does not assert that there are well-established benchmark thresholds. The usefulness of this monitoring is in its value in identifying industrial sectors for further study. To be useful now, EPA would need to be able to associate new benchmark thresholds with the circumstances of each industrial sector for which it does not currently have data, including cost-effectiveness and technical feasibility of additional SCMs.⁴³

Elsewhere, the emphasis of the NRC Study is forward-looking, with an emphasis on gathering quality data for future MSGP revisions. The report has recommendations on electronic reporting, minimizing monitoring error and a tiered approach to monitoring. The NRC Study recognizes that established monitoring tests have significant sources of sampling error and variability.⁴⁴

⁴⁰ ". . . the committee found that many of the program elements have been hampered by shortfalls in generating, considering, and acting on new information. This has resulted in missing opportunities for refining the MSGP monitoring requirements in support of improved stormwater management." NRC Study, pp. 1.

⁴¹ NRC Study, pp. 27.

⁴² *Id.*

⁴³ ". . . the benchmarks provide an appropriate level to determine whether a facility's stormwater control measures are successfully implemented." *Proposed 2020 MSGP*, Fact Sheet, Part 4.2.1.

⁴⁴ *See* NRC Study, Table 3-1.

These sources of error make it particularly important that benchmark thresholds be established based on the real world data of permittees, including the specifics and cost effectiveness of the SCMs adopted or required to be adopted. In its recommendation for the tiered approach, the NRC Study discusses the benefit of reducing the burden on low-risk facilities while ensuring “that high-risk industries that are more likely to be significant sources of stormwater pollution invest in the necessary monitoring to confirm that SCMs are effective in reducing pollutants and risks to receiving water. . . . Combined with suggested improvements to monitoring protocols, training, data management discussed in [Chapter 3], the tiered approach is also expected to increase the usefulness of data collected towards improving the management of industrial stormwater.” The NRC Study emphasizes the need for better data before establishing new stormwater management measures.

2. EPA does not justify the AIM requirements.

As required by the Settlement Agreement, EPA proposes AIM, which impose a progressive series of requirements on permittees based on the frequency and severity of benchmark monitoring threshold exceedances. The first tier requires a permittee to review and reconsider SCMs. The second tier requires implementation of “all feasible SCMs” from a sector-specific checklist.⁴⁵ The third tier requires new structural or water treatment SCMs.

EPA proposes these requirements without addressing the cost-effectiveness of implementing AIMS or the technical achievability of proposed thresholds using SCMs. The NRC Study reviews recent MSGP data using the AIM triggers and finds significant numbers of industrial sectors with high percentages of exceedances that would trigger AIM tiers 2 and 3,⁴⁶ but for Tier 2 compliance EPA assumes that “[r]esponses are substantially similar to those requirements in the 2015 MSGP.”⁴⁷

This assumption is particularly problematic when considering the requirement that facilities implement “all feasible SCMs,” EPA does not specify whether the feasibility to be evaluated is technical or financial, but the caveat itself creates an unreasonable burden for the facility to make a showing on a case-by-case basis and for multiple potentially overlapping SCMs. If the assumption stated is correct, then this provision imposes a significant paperwork burden without a resulting benefit to water quality. If the assumption is incorrect, neither the burden nor the potential water quality benefits are evaluated.

Small business representatives have also expressed a concern that EPA or future litigants will be able to second-guess their evaluation of feasibility, thus putting their permit compliance in jeopardy.

⁴⁵ *Proposed 2020 MSGP*, Permit sections 5.2.2.2 and Appendix Q.

⁴⁶ NRC Study, pp. 22-26, table 2-3.

⁴⁷ *Cost Impact Analysis for the Proposed 2020 Multi-Sector General Permit (MSGP)*, pp. 5.

3. EPA does not narrowly tailor its regulatory proposal to the data it has.

The categorization of industrial activity under the proposed 2020 MSGP is a legacy of the 1994 MSGP. SIC codes are outdated, having last been updated in 1987, and inappropriate for the regulatory classification of industrial activities. The grouping of SIC codes in MSGP sectors creates rigidly uniform requirements over industries of great diversity. The NRC Study discussed this issue, citing inconsistent monitoring requirements for similar sectors with similar industrial activities.⁴⁸

EPA's proposed new monitoring requirement for Sector P, Land Transportation and Warehousing, provides a good example of this issue. This is a broad sector, covering many disparate industry activities, from railroads to petroleum terminals and chemical distribution facilities. EPA proposes to require benchmark monitoring for mercury and lead for all Sector P permittees, citing the NRC Study.⁴⁹ (The NRC Study does not specifically recommend benchmark monitoring for mercury and lead benchmark monitoring, suggesting only that "chemical-specific monitoring with the MSGP would be appropriate.") The NRC Study cites a recommendation by O'Donnell (2005) for mercury and lead monitoring.⁵⁰ O'Donnell is further based on analyses of the Toxic Release Inventory (TRI) data from 1999-2002⁵¹ and 2000 MSGP Discharge Monitoring Reports (DMR).⁵² However, in the TRI, all of the reports of interest came from only one of the 12 SIC Codes in Sector P, Petroleum Bulk Stations and Terminals. In the DMR, for Sector P, "no applicable data were reported."⁵³ From the data presented, EPA's proposes mercury and lead benchmark monitoring on industrial sectors that it has not identified as likely to have mercury and lead in stormwater runoff. Small business representatives in this sector believe that this is unfair and an unnecessary burden.

III. Advocacy's Recommendations

A. EPA must comply with the requirements of the Regulatory Flexibility Act.

As discussed above, general permits are rules under the Administrative Procedure Act and the Regulatory Flexibility Act. As also discussed above, EPA does not have the factual basis to certify that the proposed MSGP will not have a significant economic impact on a substantial

⁴⁸ NRC Study, pp. 29.

⁴⁹ *Proposed 2020 MSGP*, Fact Sheet, pp. 10.

⁵⁰ Memorandum from John O'Donnell, Tetra Tech Inc., *Re: Review of 2000 MSGP Monitoring Requirements and Suggested Changes* (2006) (regulations.gov Document ID EPA-HQ-OW-2019-0372-0006).

⁵¹ Memorandum from Jon Harcum, Susan Adair, and Jim Collins, Tetra Tech, Inc., *Re: Review of Toxic Release Inventory data from 1999-2002 as related to the NPDES Industrial Storm Water Permit Program* (February 9, 2005) (regulations.gov Document ID EPA-HQ-OW-2005-0007-0008).

⁵² Memorandum from Jon Harcum and Jim Collins, Tetra Tech, Inc., *Re: Review of Discharge Monitoring Report data from the MSGP 2000* (January 26, 2005) (regulations.gov Document ID EPA-HQ-OW-2005-0007-0003).

⁵³ *Id.* at 9.

number of small entities. Therefore, prior to issuance of the final permit must do one of the following:

- Initiate a Small Business Advocacy Review panel under 5 U.S.C. 609(b), (2) issue an Initial Regulatory Flexibility Analysis for public comment, and (3) prepare a Final Regulatory Flexibility Analysis; or
- Finalize only those provisions of the general permit that were the same as the 2015 MSGP or exempt all or most small entities from the most costly requirements.

B. EPA should establish a reasonable and long-term data collection effort to fill in the gaps identified by the NRC.

EPA should develop and issue for public comment a monitoring plan that commits EPA to gathering the data necessary to support future permits. The results of this monitoring would not trigger any regulatory obligations or permit noncompliance but would be a cooperative scientific effort between EPA and permittees. Advocacy recommends EPA consider the following in such a plan.

- Gather and analyze data by industrial activity rather than NAICS code or sectors. The current MSGP sectors are too broad, encompassing many disparate activities that do not share characteristics of regulatory interest. EPA should use data to associate issues with specific pollutants with particular industrial activities.
- Exempt low risk facilities and other facilities to the extent that the marginal value of the data that would be gathered is low.
- Exempt small entities to the maximum extent possible.
- Phase in monitoring for small entities over 3 to 4 years. Small entities need time to develop monitoring and testing capacity. EPA should offer technical assistance and training to small entities and publish data quality guidelines for monitoring and testing
- Phase-out of monitoring for industrial sectors if the data do not support a need for future action.
- Establish a clear timeline for the use of monitoring data to support the 2030 MSGP. Short of significant exigent circumstances, EPA should not plan to use this data for the 2025 MSGP.

C. EPA should adopt the tiered monitoring approach recommended by the NRC, without AIM for all industrial sectors.

EPA should focus its effort and resources on industrial sectors and facilities that pose the highest risk to water quality and reduce the burden on industries and facilities that are unlikely to threaten water quality. The NRC Study provides a good starting point with examples of possible criteria for low-risk activities. This list can be significantly expanded, on an activity-by-activity basis, in consultation with small business permittees. EPA should implement AIM only for those industrial sectors for which EPA can demonstrate a history of water quality issues under the MSGP.

Conclusion

EPA's proposed 2020 MSGP has the potential to have significant economic impact on a substantial number of small entities. Despite EPA's past commitments to the "RFA's framework and requirements," Advocacy believes that EPA has missed the mark and must now recognize that the MSGP is a rule, subject to the RFA, and engage in full RFA compliance. If moving forward with the 2020 MSGP without conducting a SBREFA panel, IRFA and FRFA, EPA will need to narrowly tailor the 2020 MSGP to minimize the impact on small entities to the extent that the agency can certify the 2020 MSGP will not have a significant economic impact on a substantial number of small entities.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel David Rostker at (202) 205-6966 or by email at david.rostker@sba.gov.

Sincerely,



Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration



David Rostker
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Paul Ray, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget