

**RESPONSE TO COMMENTS  
FINAL PERMITTING DECISION**

Permit No.: ARR040000

Prepared by: Terry Liu

The following are responses to comments received regarding the draft Regulated Small Municipal Separate Storm Sewer Systems (MS4s) General Permit ARR040000 and are developed in accordance with regulations promulgated at 40 C.F.R. §124.17, APC&EC Regulation No. 8 Administrative Procedures, and A.C.A. §8-4-203(e)(2).

**Introduction**

The above permit was submitted for public comment on July 23, 2018. The public comment period ended on August 22, 2018.

This document contains a summary of the comments that the ADEQ received during the public comment period. A summary of the changes to the NPDES Permit can be found on the last page of this document. There were several similar issues raised throughout the comments; those are grouped together, with one response from the ADEQ.

The following people or organizations sent comments to the ADEQ during the public notice. A total of thirteen (13) comments were raised by four (4) separate commenters.

Commenter	Number of Comments Raised
1. Danny Carder, Stormwater Manager, City of Hot Springs - Public Works	2
2. Alan Pugh and Chris Brown, City Engineer, City of Fayetteville	8
3. Janet Paith, Stormwater Coordinator, City of Bentonville	1
4. John Fleming, Environmental Division Head, Arkansas Department of Transportation	2

**Comment 1** Was it intentional to remove MEP (Maximum Extent Practicable) from the definitions section?

**Response:** EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. Part VI.B of the Remand Rule and 40 CFR § 122.34(a) emphasize that the permit requirements must be expressed in clear, specific, and measurable terms. Therefore, the term of MEP has been removed from the previous permit.

**Comment 2** Recommend that Non-Point Source be included into the definitions section since we do have a Point Source definition included.

**Response:** The Department notes that this permit has included the definition of Point Source. The term of Nonpoint Source is defined to mean any source of water pollution that does not meet the definition of Point Source based on the Clean Water Act.

**Comment 3** Section 1.2.1.2: The coverage area for the permit has been revised to the City Limits. While in general the City of Fayetteville enforces most ordinances city wide, our concern is that it may drastically impact the number of individuals we are required to reach through our education program and in turn drastically impact the cost of that program. Other smaller communities that have very small urbanized areas may also be negatively impacted. This combined with the new requirement, discussed further below, of being required to update things such as the mapping of the system within the first year of the new permit may be financially devastating and unattainable for some communities. Do you also intend to clarify the extent of coverage of the Counties and other non-municipal government entities which could be impacted by such a regulation?

**Response:** Section 1.2.1.2 states that MS4s designated under this part shall use the city limits as the coverage area or a boundary delineated on maps contained in the SWMP approved by the Department. Therefore, an MS4 operator is allowed to submit the boundary of a proposed coverage area for approval by the Department instead of the city limits.

**Comment 4** Section 1.2.2.2: uncontaminated has been added as a clarifier to many of the allowed non-stormwater discharges. Would the City or other entity now be required to sample the runoff, such as street wash water, to ensure it meets the requirements of SPC&EC Regulation 2. It seems a definition, including the language of also not containing a harmful quantity of any substance, would be too broad if the intent were to require sampling. It would not be financially feasible to sample for all possible constituents. If no sampling is required, how is fact the runoff is uncontaminated determined.

**Response:** Please see the response to comment 5 below.

**Comment 5** Section 3.2.3.6: see the previous comments regarding the use of uncontaminated as a clarifier to many of the non-stormwater discharges.

**Response:** Uncontaminated runoff means that the water will not exceed the water quality standards as set forth in APC&EC Regulation 2; also not containing a harmful quantity of any substance.

This permit has included the term of Uncontaminated, defined in Part 6.37, to reflect the requirement to protect water quality standards by the Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation 2. The permit authorizes non-stormwater discharges to the MS4 in accordance with the non-stormwater discharge list provided in 40 CFR 122.26(d)(2)(iv)(B)(1), based on an authorization under applicable federal or state regulation. In making a determination of acceptability of a discharge of non-stormwater to waters of the state, the permittee shall apply generally accepted scientific principles to the knowledge of the process from which the process water was originated. Monitoring is not required by the referenced sections because it is understood by the general nature of the exempted processes that reasonable potential does not exist for the exempted process water discharges to significantly contribute contaminants or threaten to cause exceedances of water quality criteria. However, if an operator has knowledge or reason to believe that an exceedance may occur due to unexpected conditions in a process, such as a leak, spill, malfunction, or upset condition, then it is the duty of MS4 operator to investigate through inspection or monitoring to determine if a threat to water quality standards exists. MS4s are authorized to enter and inspect facilities in their jurisdictional boundaries to ensure protection of water quality standards. According to section 3.2.3.4, the Department expects the permittee will use a variety of sources of information to determine if a non-stormwater discharge is a significant source of pollutants.

**Comment 6** Section 3.1.1: The language of maximum extent practicable (MEP) has been removed. The City agrees with this revision and has been concerned for some time that this language was too broad and ambiguous.

**Response:** Please see the response to comment 1.

**Comment 7** Section 3.2.3.2: The time period to update maps based on a revision to the coverage area has been shortened to one year. This does not allow enough time, in our opinion, for a municipality or other entity to plan, budget and implement updates for areas that may be included within annexations or a redefinition of the coverage area. Please consider revising the time period back to the expiration date of the permit. If that is not acceptable we would recommend at least a 3-year time

period. This would allow for the proper planning and potential spreading of the cost over a few budget cycles give time for entities to budget appropriately for the additional work.

**Response:** Please see the response to comment 8 below.

**Comment 8** Section 3.2.3.2, Illicit Discharge Detection and Elimination. MS4s that are required to update storm sewer system maps due to Part 1.2.1.3. of the permit must update their storm sewer system maps within one year of the effective date of this permit. This requirement is not feasible for ARDOT. It is requested current permit language is maintained.

**Response:** The Department acknowledges these comments and understands that the MS4 permittees may have difficulty updating the maps in one year, which may not allow time for proper planning and budget allocation. Therefore, the Department adopts the recommendation to revise section 3.2.3.2 that the map shall be completed within three (3) years of the effective date of this permit for existing MS4 permittees.

**Comment 9** Section 3.4.5: It appears that language has been removed regarding an impaired waterway being listed on the 303d list, however, the definition of impaired waterway is included in the definition section. Can you confirm that the process for determining impairment will be the same as the current permit? If not, can you indicate what process for impairment determination will be followed?

**Response:** Section 303(d) of the Clean Water Act is still being used to identify the impaired waterbodies. The language regarding impaired waterbodies on the 2016 303(d) list has been incorporated into section 3.4.5.2.

**Comment 10** Section 3.4.5.2.3: Why was the decision made to specifically call out turbidity and have differing requirements for that impairment? What is the intent for the inclusion of failing stream banks? Would a permitted entity then become responsible for repairing all of the stream banks that contribute to the turbidity? As you are aware, this could become extremely burdensome from a financial standpoint as streambank erosion is very expensive to solve sustainably. This may in turn force entities to find cheaper, less environmentally desirable ways to deal with the erosion simply to try and meet a number which could be an unintended consequence of such a requirement.

**Response:** High turbidity lowers the water quality of a surface water by blocking sunlight for the plants and makes food harder for the fish to find and may be an indication of a higher amounts of other pollution in the water. High turbidity can be caused by insufficient erosion control in construction activities, failing septic systems, decaying plants or animals, and excessive algae growth.

Streams in urbanized areas, particularly areas where little if any stormwater management infrastructure is present, have developed steep, high channel banks as high volumes and rates of urban runoff cause these natural waterways to run full more frequently and at higher velocities than before their watersheds became urbanized. This bed and bank erosion is a significant source of sedimentation and siltation of downstream waterways as well as a cause of property loss and damages to those properties through which these impaired streams pass.

As defined by Section 3.4.5.2.3, the MS4 permittees are responsible for reducing the discharge of turbidity into Water Quality Impaired Waters or Waters with an approved TMDL that identifies municipal stormwater runoff as a source. However, it doesn't mean that the permittees must physically implement and financially fund the work if there are other responsible parties. The permittees can enforce their stormwater management programs (SWMP) by prioritizing projects and initiating local changes, such as developing and implementing BMPs, to reduce the discharge of turbidity contributed by any other significant source identified in the source identification evaluation. The structural BMPs may include engineered and constructed stormwater management means, such as infiltration basins, detention ponds, rain gardens, bioswales, permeable pavement, green roofs, as well as streambank stabilization. Non-structural BMPs include operations and maintenance practices such as street sweeping, inlet and storm pipe cleaning, fixing and stabilizing roadside swales, grounds maintenance, policies for application of chemicals or stockpiling of material, tree planting and establishment of riparian buffers along stream banks. If erosion from construction activities is determined to be a substantial contributor to the impairment, the MS4 permittees can provide a more robust program for stormwater permitting, inspection, and enforcement.

**Comment 11** Section 3.5.3: The development and submittal of a sampling program within 90 days appears unreasonable for budgetary purposes. Is the intent that the plan would be ready to implement within 90 days or simply that the sampling constituents and frequency will be identified? If not already in place, a permitted entity that contracts this out would need more than 90 days to go through the procurement process to even begin discussions about what the program may entail. The appeal process for this determination by the department should also be outlined. There may be instances where the permitted entity may disagree with the requirement of the sampling plan.

**Response:** Section 3.5.3 indicates the MS4 will be required to develop a monitoring plan development timeline and submit it to the Department according to an agreed schedule, generally within ninety (90) days. The permittee is expected to develop and submit a monitoring plan, describing action items and a schedule for deliverables, to the Department for review in 90 days. Upon Departmental approval of a monitoring plan, the MS4 must take samples for the pollutant(s) in accordance with the approved plan.

The initial monitoring plan is not set out to be a permanent document. Based upon initial results of sampling or changing local conditions, the MS4 may submit a revised sampling plan to the Department for approval. If an extension would be needed to achieve compliance with the sampling requirements, the permittee shall promptly submit such request with facts or information in writing to the Department. Upon a showing of good cause, the Department may establish alternative schedule approvals.

**Comment 12** Please add the following definitions: a. Define Waters of the State; b. Define street wash waters; c. Define outfall more clearly; d. Define redevelopment.

**Response:** Waters of the State can be found under Arkansas Code Annotated (ACA) Title § 8-4-102. The definition of Outfall in the permit is referred to the regulatory definition by 40 CFR 122.26(b)(9). The Department believes the terms street wash waters and redevelopment are generally unambiguous as understood by most MS4 operators and thus the creation of a new set of definitions specific to this permit is unnecessary.

**Comment 13** Section 4.3.1, Reporting. Existing permittees must submit their annual reports no later than March 31st of the following year (i.e. 2019 report would be due no later than March 31, 2020). The draft language moves the annual report date to March 31st from June 1st to allow the MS4 three months to create the annual report as stated on the Fact Sheet. This implies the annual report should be based on a calendar year. If the effective date of the permit is August 1, the annual reporting period should be based on the permit year cycle i.e. August 1-July 31 with the annual report due October 31st. As the permit is currently written the first annual report would only contain data collected August 1 through December 31st. Clarification is requested regarding what constitutes a permit year and how it relates to the five year permit cycle.

**Response:** The Department expects the existing permittee to continue the implementation of the reporting requirements of the existing SWMP until the renewal is approved in 2019. Once the renewal permit is effective, the permittees should meet the requirements of the most currently approved SWMP and the new permit. The 2019 annual reporting period will start January 1, 2019 and end December 31, 2019. The permittees will have three (3) months to create and submit the annual report to the Department since the due date is on March 31 of each year. Section 4.3.1 of the permit has been updated to clearly define the annual report requirements for the existing permittees. The permit renewal effective date does not relate to the reporting cycles as effective dates could change in future renewals.

<b>Summary of Changes to the permit</b>				
Part	Draft Permit	Final Permit	Reason	Comment #
3.2.3.2	MS4s that are required to update storm sewer system maps due to Part 1.2.1.3 of the permit must update their storm sewer system maps within one (1) year of the effective date of this permit	MS4s that are required to update storm sewer system maps due to Part 1.2.1.3 of the permit must update their storm sewer system maps within three (3) years of the effective date of this permit	This will allow enough time for the permittees to update the map.	7 and 8
3.5.3	When additional information is required in the determination of the cause or status of a stream impairment, in the development or implementation of a TMDL, or in the development or implementation of a comprehensive watershed management plan, the Department may require an MS4 to develop and submit a sampling plan for review. The Department will notify the MS4 in writing, describing what areas and parameters are to be sampled and requested frequency. Upon notification, the MS4 will be required to develop a monitoring plan and submit it to the Department according to an agreed schedule, generally within ninety (90) days. Upon Departmental approval of a monitoring plan, the MS4 must take samples for the pollutant(s) in accordance with the approved plan. Based upon initial results of sampling, the MS4 may submit a revised sampling plan to the Department for approval. All sampling results must be submitted with the MS4's annual report.	When additional information is required in the determination of the cause or status of a stream impairment, in the development or implementation of a TMDL, or in the development or implementation of a comprehensive watershed management plan, the Department may require an MS4 to develop and submit a sampling plan development timeline for review. The Department will notify the MS4 of the decision in writing, regarding the proposed action items and schedule for deliverables. Upon notification, the MS4 will be required to develop a monitoring plan and submit it to the Department according to an agreed schedule, generally within ninety (90) days. Upon Departmental approval of a monitoring plan, the MS4 must take samples for the pollutant(s) in accordance with the approved plan. Based upon initial results of sampling, the MS4 may submit a revised sampling plan to the Department for approval. The monitoring plan and schedule shall be followed to maintain compliance as it is considered an integral part of the SWMP upon approval. All sampling results must be submitted with the MS4's annual report.	Clarification of the monitoring plan requirements	11
4.3.1	Existing permittees must submit their annual reports no later than March 31st of the following year (i.e. 2019 report would be due no later than March 31, 2020).	Existing permittees must submit their annual reports, which covers the previous twelve (12) months from January 1st to December 31st of a calendar year, no later than March 31st of the following year (i.e. 2019 report would be due no later than March 31, 2020).	Clarification of the annual report period for the existing permittees.	13