Via electronic submission at https://mpca.commentinput.com/?id=Ca3PiGhHt

February 26, 2025

Mr. Matthew Moon
Industrial Division
Minnesota Pollution Control Agency
504 Fairgrounds Rd, Suite 200
Marshall, MN 56264

Re: Draft "Authorization to Discharge Stormwater Associated With Industrial Activity under the National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) Program—MNR050000" ("Draft Permit")

Dear Mr. Moon:

On behalf of the Upper Midwest Chapter of the Recycled Materials Association[1] ("UMC"), I am submitting the following comments for consideration by the MPCA in response to its request for comments on the Draft Permit.

UMC serves the Upper Midwest region, representing companies that process, broker, and consume recycled materials, including metals, paper, plastics, glass, rubber, electronics, and textiles. Within the U.S., UMC includes the entire states of Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin. UMC represents about 100 member companies with hundreds of locations within these states, in an industry that directly employs nearly 12,000 people with well-paying jobs, supports more than 14,000 indirect jobs, and induces more than 14,000 additional jobs. The industry's direct economic impact in this region amounts to more than $4.7 billion, with $11.8 billion in total economic impact. In the state of Minnesota, the industry directly employs more than 3,600 people, supports more than 4,300 indirect jobs, and induces an additional 4,800 jobs, providing nearly $1.5 billion in direct economic impact and a cumulative $3.7 billion in total economic impact. This substantial contribution underlines the crucial role our sector plays not only in driving local economies but also in managing supply chains of critical minerals and other valuable recyclable materials.

Many of UMC's members, including those members located and operating in Minnesota, conduct operations on sites that generate "stormwater associated with industrial activity," which is subject to industrial stormwater general permits issued by MPCA. The Draft Permit specifies monitoring and control requirements for Per- and Polyfluoroalkyl Substances ("PFAS"). Draft Permit

[1] The Recycled Materials Association (ReMA) is the "trade" (or doing-business-as) name of the Institute of Scrap Recycling Industries, Inc. (ISRI).

Sections 386.1 – 394.2. When the Draft Permit is finalized by MPCA, those PFAS requirements (if they remain in the final permit) will apply to the UMC members located in Minnesota. As such, UMC has a direct interest in the Draft Permit.

The PFAS requirements in the Draft Permit are unauthorized, inappropriate and unnecessary, and they should be removed from the Draft Permit before it is finalized. The specific defects in the Draft Permit are outlined below.

The MPCA's authority is limited to regulating stormwater discharges.

The implementing statute, Minn. Stat. § 115.03, Subd. 5c(a), limits MPCA's authority to that of ***"stormwater discharges"***: *"[MPCA] may issue a general permit to any … point source stormwater discharges that it deems administratively reasonable and efficient without making any findings under agency rules."* Minn. Stat. § 115.01 *et seq*. defines a stormwater "discharge" as "the addition of any pollutant to the waters of the state or to any disposal system." The accompanying rule provides: "This chapter establishes the stormwater permit program to *regulate discharges of stormwater* from … industrial activities for purposes of abating water pollution associated with *stormwater discharges* from these sources." Minn. R. 7090.0010 (emphases added).

The Draft Permit defines "stormwater discharge" as follows: "the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant." Draft Permit Section 395.37, *citing,* in part, Minn. R. 7090. Conveyance is defined synonymously with the meaning of *point source.* Minn. Stat. § 115.01 Subd. 11. The terms "discharge," "point source," and "conveyance" generally relate to discrete locations. *See generally West McDonald Lake Ass'n v. Minn. Dep't of Natural Res.*, 899 N.W.2d 832, 843, 2017 Minn. App. LEXIS 76, *22-23, 47 ELR 20080, 2017 WL 2625563. The Clean Water Act regulates point source pollutants with permits, yet MPCA seeks to impermissibly expand the meaning of stormwater discharge to include more than the discrete discharge locations MPCA has authority to regulate. *See id; see also Puget Soundkeeper Alliance v. Cruise Terminals of America, LLC*, 216 F. Supp. 3d 1198, 1209-1210.

Part XI of the Draft Permit exceeds MPCA's statutory authority to regulate stormwater discharges by requiring permitted facilities to conduct PFAS monitoring and reporting at "areas of concern" (AOCs). Draft Permit section 395.3 defines an "Area of Concern" as "the area(s) of the facility where the Permittee, through an industrial activity, makes, uses, stores, or processes PFAS containing materials and/or where vents or exhausts are located on buildings that make, use, store, or process PFAS, or areas of the facility where PFAS would become exposed, if potentially present at the facility." According to MPCA guidance, AOCs may include loading docks, downspouts, near PFAS collection sites including air conditioners, and upholstery, or even simply products wrapped in industrial plastic, including automotive items. These AOCs are not stormwater discharge points, but entire swaths of a facility's operations unrelated to whether these areas impact (or not) a facility's actual stormwater discharge.

The requirement that permittees monitor for PFAS and collect stormwater samples at the AOCs in Draft Permit section 388.2 is without the requisite statutory authority. MPCA's statutory authority relates to regulating stormwater *discharges*. Minn. Stat. § 115.03, Subd. 5c. Stormwater

leaving an AOC does not meet the definition of a stormwater discharge. Minn. Stat. § 115.01. As such, MPCA lacks express authority to regulate the proposed Areas of Concern (AOC).

MPCA invalidly seeks to regulate stormwater that may never reach waters of the state or otherwise become a stormwater discharge.

By requiring permit recipients to sample AOCs rather than discharge points, MPCA seeks to invalidly regulate stormwater *that may never become a discharge*. For example, small amounts of stormwater may accumulate at and leave AOCs at a facility only to travel on impervious surfaces within the site before the water is completely evaporated. If the stormwater does not reach a *water of the state,* it does not constitute a stormwater discharge. MPCA lacks the authority to require a discharge permit based on sampling results from an area of a site (i.e., AOC) that is not a discharge, nor is it the functional equivalence of a discharge or conveyance from a point source. *See e.g., Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 183,140 S. Ct. 1462, 1476 (2020). MPCA disregards whether the Draft Permit regulates points source discharges and their functional equivalents by requiring much broader monitoring (and then remedial action) through this expanded interpretation.

Moreover, MPCA's Draft Permit Section 393.5 apparently recognizes that a "discharge from an [AOC]" must actually reach a Class 1 Water of the State to be subject to the more stringent PFAS levels compared to section 393.4, where there is no requirement that sampling from an AOC actually relate to a discharge of stormwater. This distinction evidences MPCA's acknowledgement that AOCs are, by definition, unrelated to *actual* stormwater discharges in contravention of MPCA's statutory authority.

Even if MPCA claims the meaning of stormwater discharge is ambiguous, it is not a reasonable interpretation for the purpose.

When a rule is ambiguous, MPCA is given deference based on, in part, whether the interpretation is reasonable. *C.f.* Minn. Stat. § 14.69. The interpretation of AOC as part of the discharge is *not* reasonable based on the stringent standards for the select PFAS imposed – which are as strict as federal *drinking* water standards. Considering the Draft Permit regulates *stormwater* discharge rather than *drinking* water, the standards are unreasonable.

MPCA's Draft Permit requires AOC PFAS testing to receive no exposure certification and is likely preempted.

The Draft Permit requires AOC PFAS testing as a prerequisite to receive the state no exposure certification. Draft Permit section 5.2. This would entirely displace the conditional no exposure exception for NPDES permits subject to 40 C.F.R. § 122.26(g). MPCA's actions are federally preempted. When a permit recipient follows the conditional best management practice, but would violate this requirement, the conflict preempts MPCA's interpretation.

MPCA seeks to implement enforceable remediation requirements through invalid rulemaking.

MPCA is required to follow official rulemaking procedure for both legislative and interpretive rules, such as a novel interpretation of the extent of the meaning of stormwater discharge to include

AOCs. Minnesota courts have held that new modeling requirements intended for general applicability require rulemaking procedures. By invoking a new interpretation of remediation standards through stormwater discharge permits, MPCA has engaged in invalid rulemaking procedures. *See United States Steel Corp. v. Minn. Pollution Control Agency*, No. A14-1789, 2015 Minn. App. Unpub. LEXIS 730, 1, 6-8 (July 27, 2015).

Without conducting the required rulemaking, MPCA's application of EPA's PFAS drinking water limits for *public water systems* as a trigger to require *on-site soil remediation* of PFAS associated with AOCs is unlawful and invalid.

For example, MPCA has created site-specific water quality criteria for certain PFAS in a limited number of water bodies. The Draft Rule does not even consider these site-specific water quality criteria, nor does it address the lack of promulgated water quality standards for PFAS generally. Even if there were lawfully promulgated water quality standards applicable to PFAS discharges, such standards would not apply to AOCs or discharges from AOCs that are, by definition, not "stormwater discharges."

In the same way, MPCA lacks the authority to impose soil remediation standards without promulgating rules specific to soil remediation standards. Without the requisite authority, MPCA has attempted to insert federal *drinking water standards* as the limit associated with required action for PFAS sampling on private property within areas that may have no connection to a discharge and may never actually become a stormwater discharge subject to state regulatory authority.

Despite lacking the authority to regulate PFAS via Source and Exposure Reduction Plan (SERP) implementation at AOCs based on the above lack of standards, MPCA then requires SERP implementation in direct contrast to MPCA's *existing* PFAS remediation *guidance* (as opposed to promulgated soil remediation standards). MPCA's current PFAS remediation guidance requires site investigations for PFAS remediation with the use of water supply receptor surveys and other site investigation measures. The site remediation survey includes receptor analysis of surface water near the release site. However, the receptor analysis is predicated on a *release* of PFAS and emphasizes monitoring water supply wells and groundwater contamination, rather than any storm water contained within a site's AOC. Not only is MPCA's AOC and SERP implementation requirement via the Draft Permit outside of their authority because they failed to conduct the requisite rulemaking to establish limits for PFAS remedial action, the subsequent testing and remediation obligations required by the SERP do not even align with MPCA's published remediation guidance.

While the PFAS remediation guidance is inapplicable to the Draft Permit, this example demonstrates how the Draft Permit is requiring more remedial action, without the requisite process included in other state remediation programs, all in areas of a facility that may never actually contribute to a discharge from that facility. Again, requiring PFAS remedial actions via a SERP based on sampling discrete stormwater within an AOC is beyond MPCA's statutory authority to regulate stormwater *discharges.*

MPCA's required PFAS Source and Exposure Reduction Plan (SERP) exceeds the agency's regulatory authority in an attempt to implement PFAS remediation standards in a general permit.

MPCA requires SERP implementation in 180 days if the testing exceeds 10ng/L PFOS and PFOA, among others. Draft Permit section 393.4. This effectively amounts to invoking a de facto soil remediation requirement and performance standard. By MPCA's own admission, the 2025 permit controls are designed, in part, to "prevent[] potential pollutant mobilization through subsurface soils." Draft Permit Fact Sheet at 8. The Draft Permit's requirement that recipients "prevent[] potential pollutant mobilization through subsurface soils" references a statute that has been appealed and, therefore, does not provide authority to require soil remediation. The additional authority cited provides the MPCA's policy to "provide maximum protection to all underground waters." Minn. R. 7060.0200. This, of course, does not authorize MPCA's imposition of PFAS soil standards.

Minnesota Statutes 115B *et seq.* provides broad liability for releases of hazardous substances. Though federal rulemaking has declared PFOA and PFOS to be hazardous, 89 Fed. Reg. 39,124, this requires a *release* – or threatened release – of PFAS. To regulate PFAS as MPCA intends, essentially declares any use of PFAS on-site to be a release, requiring remediation standards. By invoking the Minnesota Environmental Release Liability Act with the stormwater discharge program, MPCA exaggerates their jurisdictional authority to invoke remedial standards through the inclusion of AOC monitoring and SERP obligations.

MPCA's proposed AOC and SERP requirements violate the permit recipients' due process rights.

The conditional exclusion rule provides that "discharges composed entirely of stormwater are not discharges associated with industrial activity if there is no exposure of [the materials] and activities to …runoff, and the facility meets [the following] requirements…" Minn. R. 7090.3060 Subp. 1.

By providing that select discharges are exempt if they have not been exposed to PFAS by the above rule, but also requiring AOC PFAS testing by permit, MPCA essentially requires facilities covered under this permit to ensure PFAS are not onsite at all. This is without statutory authority and effectively amounts to a regulatory taking. *See generally Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). The economic impact on such facilities, in contrast to their investment-backed and industry-wide expectations, further demonstrates the nature and severity of the regulatory taking.

Further, MPCA's AOC sampling/SERP remedial requirements fail to acknowledge the reality of continued essential uses of PFAS that impact this industry. For example, Minnesota's "Amara's Law" requires a phase-out of nonessential PFAS over several years. The Draft Permit's SERP process does not appear to recognize that so long as some PFAS will continue to be considered an essential use, PFAS-containing components will be part of the automobile supply chain that must be recycled in the state. This leaves certain industries in Minnesota with no viable path for compliance with the Draft Permit, particularly when MPCA is regulating on-site AOCs as if they are direct stormwater discharges without the requisite authority or process rights.

Thank you for the opportunity to provide comments to MPCA regarding the above-referenced Draft Permit.

Sincerely,

Ean Kuhlmey
President
Upper Midwest Chapter, Recycled Materials Association