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Submitted electronically via mpca.commentinput.com and via e-mail to MPCA

Matthew Moon
Industrial Division
Minnesota Pollution Control Agency
504 Fairgrounds Road, Suite 200
Marshall, Minnesota 56264
matthew.moon@state.mn.us

Re: Proposed Reissuance of the Industrial Stormwater General Permit National Pollutant Discharge Elimination System/State Disposal System No. MR0500000

Dear Mr. Moon:

The American Chemistry Council (ACC) appreciates the opportunity to submit these comments on the Minnesota Pollution Control Agency's (MPCA or the Agency) draft Industrial Stormwater General Permit, No. MR0500000 (the Draft Permit). ACC member companies own and operate chemical manufacturing facilities in Minnesota and across the country in compliance with existing local, state, and federal statutory requirements. Several of ACC's members in Minnesota operate facilities that hold coverage under the current Industrial Stormwater General Permit that expires on March 31, 2025, or hold "no exposure" certifications exempting them from the need to obtain permit coverage. *See* Minn. R. 7090.3060. ACC provides these comments with the objective of informing MPCA's efforts and helping to ensure that the final version of the Draft Permit will set clear, reasonable requirements for its members that protect water quality consistent with applicable law and sound science.

The materials that MPCA published for comment, however, do not provide ACC and other stakeholders sufficient information to provide meaningful comments on the Draft Permit's proposed requirements addressing per- and polyfluoroalkyl substances (PFAS). The Draft Permit would impose a novel suite of PFAS monitoring and source reduction requirements, but the accompanying Fact Sheet provides virtually no explanation of the legal or methodological basis for these provisions. MPCA also failed to initially publish the template with the Draft Permit that will dictate the PFAS source and exposure reduction measures that certain Permittees will have to implement, instead publishing this template without announcement less than a week before comments are due. ACC and its members request that MPCA not finalize this permit until it allows the public a proper opportunity to review and comment on this template. Aditionally, ACC requests that MPCA provide an updated Fact Sheet that fully explains the basis for the Draft Permit's PFAS-related requirements.

As discussed below, portions of the Fact Sheet and Draft Permit also impose unlawful or arbitrary requirements. Among other things, MPCA does not possess authority to impose PFAS and source exposure reduction requirements on Permittees discharging into non-Class 1 waters. Moreover, the Agency's proposal to withhold no exposure certifications from otherwise eligible facilities based on the results of PFAS monitoring violates the Agency's regulations. The Draft

Permit also violates MPCA's rules by requiring PFAS monitoring at unrepresentative locations. ACC requests that MPCA address the concerns outlined below before it finalizes this permit.

ACC's Comments

I. The Fact Sheet does not provide a meaningful opportunity for the public to comment on the Draft Permit's PFAS monitoring and source reduction requirements.

A. The Fact Sheet's explanations for the Draft Permit's PFAS-related requirements are inadequate to facilitate public comment.

The Fact Sheet does not contain sufficient information to allow meaningful public comment on the Draft Permit's requirements for certain facilities to conduct PFAS monitoring and, if necessary, implement Source and Exposure Reduction Plans (SERPs). *See* Draft Permit §§ 386.1-394.2. ACC and other stakeholders cannot fully assess these new requirements and provide informed comments unless MPCA discloses the legal, factual, and technical reasons for its proposal. For that reason, federal and state law require that MPCA write a robust Fact Sheet that "set[s] forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit."[1] This explanation of the Agency's rationale must include "a summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions." Minn. R. 7001.0100, Subp. 3.C.; 40 C.F.R. § 124.8(b)(4).

Contrary to these requirements, the Fact Sheet leaves ACC and the rest of the public in the dark about the legal and factual bases for this new suite of PFAS-related requirements. MPCA has not identified the statutory or regulatory provisions that authorize these permit terms, nor has the Agency explained why they are needed to protect water quality. The Fact Sheet also contains no discussion of how the Agency set the Draft Permit's PFAS monitoring thresholds. ACC urges MPCA to facilitate meaningful stakeholder input by revising the Fact Sheet to correct these omissions and inviting a second round of public comment.

1. MPCA has not explained the basis for the PFAS monitoring and source reduction provisions.

The Fact Sheet says virtually nothing about MPCA's legal authority to require Permittees to monitor their stormwater for PFAS and implement source reduction measures. The only legal authority referenced in the Fact Sheet's discussion of these requirements is a statutory provision that addresses the promulgation of water quality standards. *See* Fact Sheet. 10 (discussing Minn. Session Law – 2024, Ch. 60, § 33). That provision says nothing about MPCA's authority to impose terms in NPDES permits, and the Fact Sheet otherwise identifies no statutory or regulatory basis for MPCA's decision to impose the Draft Permit's monitoring and source

[1] Minn. R. 7001.0100, subp. 3; 40 C.F.R. § 124.8(a) (same); *see also* 54 Fed. Reg. 18716, 18768 (May 2, 1989) ("The purpose of the fact sheet is to explain the basis for any permit condition and *thus allow meaningful public comments on the draft permit*." (emphasis added)).

reduction requirements.[2] *See* Fact Sheet 10-11, 22. These omissions prevent the public from assessing and commenting on whether MPCA has the authority to impose these requirements or whether the Agency accounted for the various factors and legal requirements it must consider when setting NPDES permit terms. Minn. R. 7001.1080, subp. 2.B.

ACC and other stakeholders also cannot meaningfully comment on the Draft Permit because the Fact Sheet does not disclose MPCA's rationale—including the facts or methods it considered—for imposing these requirements. For instance, the Fact Sheet does not explain whether MPCA imposed these requirements because MPCA believes they are "necessary to … [a]chieve water quality standards," 40 C.F.R. § 122.44(d)(1), or are needed to serve an entirely different purpose. Likewise, MPCA has not explained why it selected the SIC codes and PFAS analytes listed in Appendix D. The ACC and its members request that MPCA correct these omissions from the Fact Sheet.

2. MPCA has not justified the PFAS monitoring thresholds.

ACC also requests that MPCA revise the Fact Sheet so the public can meaningfully comment on the Draft Permit's PFAS thresholds. *See* Draft Permit §§ 393.4, 393.5. These thresholds play a critical role in the Draft Permit's requirement to implement source and exposure controls, but the Fact Sheet sets forth virtually none of "the significant factual, legal, methodological, and policy questions" that MPCA considered when setting them. Minn. R. 7001.0100, subp. 3. It is critical that MPCA disclose these considerations so the public can provide substantive comments on the Agency's methodology and assist the Agency with setting final thresholds that are reasonable and consistent with the law and relevant facts.

The Fact Sheet provides no explanation for how MPCA derived the Draft Permit's 10 ng/L thresholds for PFOS and PFOA nor any description of what regulatory purpose they serve. *See* Draft Permit § 393.4. On their face, these thresholds bear no relationship to any Minnesota water quality standard. Instead, the Fact Sheet says only that these thresholds are "conservative" and can be found in MPCA's 2022 *PFAS Monitoring Plan*. Fact Sheet 11. The *Monitoring Plan*, however, sets a 10 ng/L threshold for PFOS only but none for PFOA. MPCA, *PFAS Monitoring Plan* 25-26 (Mar. 2022). Moreover, neither the Fact Sheet nor the *Monitoring Plan* provide a technical or legal justification for why MPCA believes it necessary to impose 10 ng/L thresholds for PFOA and PFOS on facilities discharging into non-Class 1 waters of the state. Neither ACC nor the rest of the public can critique these proposed thresholds unless MPCA shows its work.

The Fact Sheet likewise does not explain why MPCA chose to use five federal MCLs as the PFAS thresholds in Section 393.5. Although the Class 1 water quality standards incorporate the federal MCLs by reference, MPCA has no obligation to use them as thresholds. To the contrary, MPCA must set these thresholds only at a level "necessary" to attain the water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d). When determining what level of control is "necessary" for a permit requirement, permit writers routinely consider factors like

[2] For the reasons discussed in Section II below, ACC submits that MPCA will be unable to provide a valid regulatory or statutory basis for the Draft Permit's requirements for Permittees discharging into non-Class I waters to conduct PFAS monitoring and implement SERPs if monitoring values exceed certain thresholds.

dilution of the pollutants in a facility's discharge and other sources.[3] Accounting for dilution, other sources, and other factors may require MPCA to set thresholds that are less stringent than the MCLs but nonetheless provide adequate protection for Class 1 waters.

MPCA has not disclosed whether it considered dilution or any other factor that would warrant setting Section 393.5's thresholds higher than the MCLs. The Fact Sheet identifies none of the facts or methods that played a role in MPCA's decision. *See* Fact Sheet 10-11. Until MPCA provides this information in an updated Fact Sheet and re-issues the Draft Permit for public comment, the public cannot provide meaningful comments on these thresholds.

B. The public has not had an adequate opportunity to review and comment on the Source Exposure and Reduction Plan template.

Unless MPCA extends or re-opens the comment period, ACC and other stakeholders will have been deprived of a meaningful opportunity to comment on the Draft Permit's PFAS source and exposure reduction requirements. Section 394.2 requires that Permittees whose averaged PFAS monitoring data exceed the Draft Permit's monitoring thresholds develop a SERP, but neither the Draft Permit nor the Fact Sheet describe what a SERP must contain or the measures a Permittee must implement. *See* Draft Permit § 394.2; Fact Sheet 10-11. Instead, the Draft Permit indicates that these requirements will be set forth in a "SERP template provided by the MPCA." Draft Permit § 394.2.

MPCA, however, never published this template as part of the package it released for public comment and has not provided the public a full 30 days to review and comment on the template. *See* Minn. R. 7001.000, Subp. 4.G (requiring a 30-day comment period for draft permits). Instead, MPCA posted the template on a separate website—without any announcement—mere days before the closure of the current comment period.[4] ACC and the rest of the public have had virtually no time to review the template (or the other PFAS-related documents posted to this website) and formulate comments.

The law requires that MPCA provide the public a full 30 days to review and comment on the entire Draft Permit, including the template that will dictate certain Permittees' obligations to reduce PFAS in their stormwater discharges. *See* Minn. R. 7001.0100, 7001.0110. MPCA's unannounced publication of the SERP template on a separate website less than a week before comments were due falls well short of meeting this requirement. It is critical that ACC and its members have an adequate opportunity to comment on this template, and ACC thus requests that MPCA extend or re-open the comment period.

[3] *See* 40 C.F.R. § 122.44(d)(1)(ii) (allowing consideration of other "point and nonpoint sources of pollutants" and, "where appropriate, the dilution of the effluent in the receiving water"); EPA, *NPDES Permit Writers' Manual* at p. 6-15 (Sep. 2010) (Section 6.2.2.); *see also* Minn. R. 7050.0210, Subp. 5 ("Reasonable allowance will be made for dilution of the effluents … following discharge into waters of the state.").

[4] *See* MPCA, *Industrial stormwater & PFAS*, **https://perma.cc/2VJS-GZGN**; *see also* Letter from D. Wagger (Recycled Materials Ass'n) to MPCA at 2 (Feb. 25, 2015), **https://perma.cc/Q922-Y5YC** (discussing the timeline of MPCA posting documents to the new website).

II. MPCA lacks the authority to require PFAS monitoring and source reduction measures from Permittees discharging into all waters of the state.

MPCA has no legal basis to require Permittees discharging into non-Class 1 waters to conduct PFAS monitoring and implement measures to reduce PFAS sources and exposure. *See* Draft Permit § 386.2 (requiring all Permittees with an SIC code in Appendix D to monitor stormwater for PFAS); *id.* § 393.4 (requiring such measures if averaged PFAS monitoring data exceed thresholds). The only possible legal foundation for these requirements would be MPCA's authority to impose permit requirements to promote the attainment of water quality standards applicable to non-Class 1 waters,[5] but Minnesota has no statewide PFAS standards applicable to this wide range of waters. MPCA thus has no authority to require every facility with an SIC code listed in Appendix D to monitor PFAS in its stormwater and potentially implement a SERP.

Accordingly, ACC requests that the MPCA revise Section 386.2 and delete Section 393.4 from the final version of the Draft Permit. MPCA has no statutory or regulatory basis for imposing these requirements, and requiring Permittees to conduct monitoring and implement source reduction measures that would not advance the attainment of any water quality standard would violate the Agency's statutory obligation to issue only "reasonable" permits. Minn. Stat. § 115.03, Subd. 1(a)(5).

III. MPCA's rules prohibit conditioning no exposure certificates on the results of PFAS sampling.

MPCA's own rules prohibit the Agency's attempt to condition the availability of "no exposure" certificates on PFAS monitoring results. Consistent with federal law, MPCA's regulations excuse industrial facilities discharging stormwater from the obligation to obtain an NPDES permit if they certify that they maintain a condition of "no exposure." Minn R. 7090.360, subp. 2; 40 C.F.R. § 122.26(g). These regulations define "no exposure" to mean circumstances where "there is no exposure of industrial materials and activities to rain, snow, snowmelt, or runoff." Minn. R. 7090.3060, subp. 1. Consistent with this definition, MPCA "must" issue a certificate of no exposure so long as "there is no contact of storm water with industrial activities at a facility." *Id.* at subp. 4.B. Thus, MPCA's rules leave the Agency no discretion to withhold a certificate from a facility that shields its industrial activities from the elements.

The Fact Sheet, however, announces that MPCA will impermissibly withhold no exposure certificates from otherwise eligible facilities unless they submit sampling data showing PFAS levels below the thresholds listed in Table 2. Fact Sheet 2. According to the Fact Sheet, simply shielding industrial activities and materials from the elements is no longer sufficient for facilities with SIC codes listed in Appendix D of the Draft Permit. Even though maintaining

[5] *See* Minn R. 7001.1080, Subp. 2.B.(3) (requiring MPCA to set permit limitations based on, among other things "the applicable water quality standards"); Minn. Stat. § 115.03, Subd. 1(a)(5)(viii) (empowering MPCA to adopt more stringent limitations "to meet any applicable water quality standard"); *see also* 33 U.S.C. § 1311(b)(1)(C) (requiring more stringent effluent limitations when "necessary to meet water quality standards … or … implement any applicable water quality standard"); 40 C.F.R. § 122.44(d)(1) (permit writers must impose more stringent requirements when "necessary to … [a]chieve water quality standards").

such a condition of no exposure entitles these facilities to a certificate under federal and state law, Minn. R. 7090.3060, subp. 4.B, MPCA now claims it will deny certificates for these facilities unless they prove that PFAS concentrations in their stormwater fall below certain levels. Fact Sheet 2. MCPA's regulations do not allow the Agency to withhold certificates on this basis, and the ACC and its members request the MPCA remove this PFAS sampling requirement from the final Fact Sheet.

IV. The Draft Permit's sampling requirements will generate unrepresentative data.

The Draft Permit impermissibly requires Permittees to take PFAS monitoring samples at locations that are not representative of their facilities' stormwater discharges. Regulations issued by both MPCA and the U.S. Environmental Protection Agency (EPA) require that sampling be representative of a facility's discharges. Minn. R. 7001.0150, Subp. B, 40 C.F.R. § 122.44(j)(1). Section 388.2, however, requires Permittees to collect PFAS monitoring samples from their facilities' areas of concern (AOCs). Samples from AOCs are not representative because concentrations of PFAS are likely to be higher at AOCs than anywhere else at a facility due to exposure to PFAS-containing materials. *See* Draft Permit § 395.3 (defining AOC).

Consequently, the Draft permit's approach to PFAS monitoring will, contrary to law, yield results that do not represent a Permittee's effluent quality or that effluent's impact on receiving water quality. Generally, stormwater from non-AOC portions of a facility will mix and dilute stormwater from AOCs, resulting in a facility's final stormwater discharge having lower PFAS concentrations than samples from AOCs. As a result, facilities discharging stormwater that poses no risk of impairing receiving waters may nonetheless be required to implement source and exposure reduction measures.

No Permittee should be burdened with implementing measures that are unnecessary to protect water quality or comply with the law. ACC requests that MPCA help ensure this does not happen by revising the Draft Permit's monitoring requirements to Permittees to conduct monitoring at locations that are representative of a Permittee's final stormwater discharge.

V. Proximity to a Drinking Water Supply Management Area (DWSMA) is not a proper basis for imposing more stringent PFAS thresholds.

ACC requests that MPCA delete the Draft Permit's arbitrary and capricious attempt to apply more stringent PFAS thresholds based on facilities' proximity to DWSMAs. Section 393.5 purports to promote attainment of Class 1 water quality criteria by making those criteria monitoring thresholds for implementing PFAS source and exposure reduction measures. *See* Fact Sheet 10-11. These more stringent thresholds, however, would also apply to facilities that may never discharge stormwater to or otherwise affect Class 1 receiving waters. Section 393.5 imposes these thresholds on facilities solely by virtue of being "in or within one mile of a [DWSMA]," even if the facility is downstream or downgradient from any surface or ground water that has been designated Class 1.

It would be unreasonable for MPCA to impose monitoring thresholds intended to protect Class 1 waters on such a facility. Requiring facilities to implement a SERP even when they have no chance to discharge to Class 1 waters does nothing to promote attainment of Class 1 criteria.

Deleting the proximity requirement will not undermine the protection of Class 1 waters because the permit imposes more stringent PFAS monitoring thresholds on facilities that are within one mile of and discharge into Class 1 waters. Draft Permit § 393.5.

VI. The Draft Permit's definition of "area of concern" (AOC) is overly broad and vague.

As stated in Section IV, ACC requests that MPCA revise the Draft Permit to modify the Draft Permit's requirement to monitor stormwater from AOCs because that approach will not generate data that is representative of a facility's stormwater discharges. If, however, the final permit maintains the requirement to sample stormwater from AOCs, then ACC objects to the definition of AOC. In Section 395.3, the definition of AOC sweeps so broadly that Permittees will not be able to identify which parts of their facilities they must sample. The definition refers simply to "PFAS" and "PFAS containing materials," without identifying specific compounds or requiring that a Permittee have knowledge that PFAS are present. Consequently, the Draft Permit would require Permittees to sample any portion of a facility where raw materials, products, or wastes contain even trace amounts of potentially thousands of undefined compounds, regardless of whether the Permittee knows they are present.[6] Such expansive coverage provides Permittees virtually no guidance on where they must conduct sampling required by the draft permit, contrary to basic notions of due process. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (due process imposes a "requirement of clarity in regulation").

The Draft Permit's definition of AOC compounds these due process concerns by covering "areas … where PFAS would become exposed, *if potentially present at the facility*." Draft Permit § 395.3. Areas where PFAS would be exposed if "potentially present" could include every surface exposed to the elements or, alternatively, only those areas where PFAS would likely be found. The Draft Permit and Fact Sheet, however, do not clarify which it is, making it impossible for Permittees to know which parts of their facility they must sample.

ACC requests that the MPCA revise the Draft Permit's definition of AOC so that Permittees can reasonably determine where they need to sample. MPCA should do so by adopting a definition that (a) limits the PFAS covered by the definition to those listed in Appendix D, (b) cabins its coverage to PFAS that the Permittee knows to be present at their facilities, and (c) strikes the clause covering "areas of the facility where PFAS would become exposed, if potentially present at the facility." Accordingly, ACC suggests that MPCA revise Section 395.3 so it reads,

> "Area of Concern" means the area(s) of a facility (i) where the Permittee, through an industrial activity, makes, uses, stores, processes materials known to the Permittee to contain one or more of the PFAS analytes listed in Appendix D or (ii) where vents or exhausts are located on buildings that make, use, store, or process

[6] *See* EPA, *Navigation Panel to PFAS Structures List*, CompTox Chemicals Dashboard, https://comptox.epa.gov/dashboard/chemical-lists/PFASSTRUCT.

materials known to the Permittee to contain one or more of the PFAS analytes listed in Appendix D.

VII. Additional changes are needed to clarify the permit's PFAS monitoring and source reduction requirements.

Several Draft Permit provisions fail to define Permittees' obligations clearly or contain inconsistencies that MPCA needs to resolve. ACC urges MPCA to make the following revisions:

A. *Delete the requirement to update PFAS Stormwater Monitoring Plans annually*. The Draft Permit's requirement for Permittees to review and update their PFAS Stormwater Monitoring Plans annually serves no purpose. *See* Draft Permit § 387.2. The Draft Permit requires Permittees to collect samples for PFAS monitoring purposes only "for at least four calendar quarters," starting in "the first full calendar quarter following the facility's coverage issuance date. *Id.* § 388.3. Permittees will have no need to monitor for PFAS or consult these Plans more than one year after obtaining permit coverage. Accordingly, there is no need for Permittees to review and update their Plans, and ACC requests that MPCA delete the requirement to do so.

B. *Revise section 386.2 to specify that a facility has no obligation to conduct PFAS monitoring if no part of a facility meets the definition of an AOC*. Facilities that maintain SIC codes listed in Appendix D may nonetheless have no locations that meet the definition of an AOC. When this occurs, a facility will have no locations to monitor for PFAS. *See* Draft Permit § 386.2 (requiring PFAS monitoring only "at its facility's area(s) of concern (AOC)."). ACC asks that MPCA remove any doubt by revising the Draft Permit to state explicitly that a facility need not conduct monitoring if it has no AOCs.

C. *Revise Section 390.2 to identify the PFAS compounds that Permittees must monitor*. Although Appendix D identifies the PFAS compounds MPCA intended Permittees to monitor, none of the Draft Permit's substantive provisions do so. ACC requests that Section 390.2 be revised to start, "All stormwater samples collected for the purpose of analyzing PFAS must be collected and analyzed **for the compounds listed Appendix D** . . . ."

D. *Clarify that SERPs must address only those AOCs where monitoring data showed exceedances of PFAS thresholds*. The Draft Permit's requirements for Permittees to develop SERPs do not specify which parts of a facility these plans must address. *See* Draft Permit §§ 393.4, 393.5, 394.2. ACC asks that MPCA revise these provisions to specify that SERPs need only address those AOCs where PFAS sampling values exceeded the applicable thresholds in Section 393.4 or 393.5. Doing so will help ensure that Permittees target those areas where data show PFAS concentrations of concern for source and exposure reduction efforts.

E. *Revise Section 393.2 to address facilities that are subject to the Draft Permit's more stringent PFAS monitoring thresholds*. The Draft Permit's provision specifying that Permittees must average their quarterly PFAS sampling values mentions only PFOA and PFOS. *See* Draft Permit § 393.2. Section 393.5, however, sets sampling thresholds for three additional compounds (PFHxS, PFNA, and HFPO-DA) and contemplates that sampling results will be

"averaged." ACC asks that MPCA ensure consistency with Section 393.5 by revising Section 393.2 to specify that Permittees who are subject to Section 393.5 must also average their quarterly sampling results for PFHxS, PFNA, and HFPO-DA.

F. *Revise Section 393.5 to specify that exceedances of the monitoring thresholds do not violate the permit*. Section 393.4 provides that an exceedance of one or more PFAS monitoring threshold "does not constitute a violation(s)," but Section 393.5 contains no similar language. Exceedances of Section 393.5 likewise should not be a violation of the permit, and ACC requests that MPCA revise this provision to remove any doubt that exceedances of the thresholds are not violations.

G. *Clarify that sampling results must exceed all applicable PFAS monitoring thresholds to trigger the requirement to develop and implement a SERP.* Sections 393.3 and 393.5 both provide that a Permittee must develop a SERP "[i]f the averaged results are at or greater than the [applicable] thresholds." ACC asks that MPCA revise both sections to make clear that a Permittee must develop a SERP only if its averaged sampling results exceed *all* the applicable thresholds.

Conclusion

ACC appreciates MPCA's consideration of the foregoing and urges the Agency to provide a second round of public comment. ACC urges the Agency to make this second comment period meaningful by fully describing the legal and factual basis for the Draft Permit's PFAS requirements in a revised Fact Sheet and giving the public an opportunity to fully review its SERP template. ACC also asks that MPCA revise the Draft Permit to ensure that it defines Permittees' obligations clearly and consistent with applicable law.

If you have any questions regarding these comments or if we can provide any additional information to inform MPCA's work, please contact Robert Simon of ACC's Chemical Products and Technology Division at robert_simon@americanchemistry.com.