Recycled Materials Association

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

February 26, 2025

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"**

Dear Mr. Moon:

The Recycled Materials Association (ReMA)[1], on behalf of its 140+ ReMA member permittees, submits for your consideration the comments below on the MPCA's draft permit, "Authorization to Discharge Stormwater Associated With Industrial Activity under the National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) Program—MNR050000"[2] (the Draft Permit). ReMA supports the comments submitted by the PFAS Regulatory Coalition, of which ReMA is a member.

Concerning the Draft Permit process, ReMA takes this opportunity to express its deep disappointment that the MPCA declined each of ReMA's requests[3,4] to extend the comment period for legitimate reasons. The MPCA did not provide adequate time to the public for

[1] The Recycled Materials Association (ReMA) is the "trade" (or doing-business-as) name of the Institute of Scrap Recycling Industries, Inc. (ISRI). As necessary in these comments for consistency, "ReMA" is used in place of "ISRI" regarding activities that predate April 18, 2024 (see https://www.isri.org/news-publications/news-details/2024/04/18/isri-rebrands-as-the-recycled-materials-association).
[2] Available at https://mpca.commentinput.com/?id=Ca3PiGhHt.
[3] Letter dated February 20, 2025 from David L. Wagger, Ph.D., Chief Scientist / Director of Environmental Management, Recycled Materials Association, to Matthew Moon, Industrial Division, MPCA, about "Comment Period Extension on Draft Industrial Stormwater General Permit (MNR050000)" (ig01il217qh_document).
[4] Letter dated February 25, 2025 from David L. Wagger, Ph.D., Chief Scientist / Director of Environmental Management, Recycled Materials Association, to Matthew Moon, Industrial Division, MPCA, about "Second Request for Comment Period Extension on Draft 2025 ISW General Permit (MNR050000)" (mv01i5z5j6h_document).

thorough review and evaluation of the Draft Permit and its Fact Sheet[5] and further withheld from the public for most of the too-short comment period significant documents mentioned in the Draft Permit.

Headquartered in Washington, DC, ReMA provides education, advocacy, and safety and compliance training, and promotes public awareness of the essential role that recycled materials play in the U.S. economy, global trade, the environment, and sustainable development. The recycled materials industry is a cornerstone of the American economy, transforming obsolete, surplus, or incidentally produced materials into fundamental components of our daily lives — ranging from the roads that we travel and cars that we drive, to the buildings where we work and the packaging that brings consumer goods and food into our households. With more than 1,700 members, ReMA represents companies in the recycled materials industry that process, broker, and consume recycled materials, including metals, paper, plastics, glass, rubber, electronics, and textiles. Nationally during 2024, the recycled materials industry produced a total economic impact of $170 billion, supporting 600,000 jobs with $48 billion in wages and generating $12 billion in federal taxes and $7 billion in state taxes.[6] In the state of Minnesota, the industry produced a total economic impact of $3.7 billion, supporting 13,000 jobs with $1.1 billion in wages and generating $260 million in federal taxes and $190 million in state taxes.[7]

In summary of the comments below, ReMA supports removal of the iron benchmark for the Draft Permit, but has significant concerns on other aspects of the Draft Permit that require correction or removal by the MPCA. The MPCA continues to disregard its own useful distinction between PFAS makers/users and PFAS receivers and must remove the recycled materials industry from the list of PFAS making/using industries in Appendix D. The Draft Permit perpetuates and likely intensifies the challenges with PFAS monitoring, and the MPCA must ameliorate PFAS monitoring requirements for the Final Permit. The MPCA must correct its improper, and remove any impermissible, application of PFAS thresholds in the Draft Permit respecting PFAS monitoring and reporting and the No Exposure exclusion. The PFAS sampling instructions in the Draft Permit are unclear and require clarification. The guidance mentioned in the Draft Permit for PFAS snow sampling is completely impractical. Independent of the other concerns, the MPCA exceeds its legal authority to include Part XI, Per-and Polyfluoroalkyl (PFAS) Monitoring and Reporting Requirements, in the Final Permit and must withdraw Part XI. While not part of the Draft Permit, the PFAS eligibility condition for applying for a No Exposure

[5] *The National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) Permit Program Fact Sheet: Permit Reissuance*.
[6] Data produced at https://www.isri.org/economic-impact on February 18, 2025. "Total economic impact" is the sum of direct, supplier, and induced economic impacts.
[7] Id.

exclusion is arbitrary, if not also capricious, because it is based on only PFAS concentrations in stormwater discharges.

## I. Background

Over the past few years, ReMA has interacted with the MPCA concerning per- and polyfluoroalkyl substances (PFAS) on behalf of ReMA's Minnesota members. In early 2022, ReMA commented on the MPCA's Draft PFAS Monitoring Plan[8] (Draft Plan), identifying some areas of agreement and other areas of disagreement, particularly regarding industrial stormwater. ReMA agreed with the MPCA's useful distinction (if not the exact wording) across all media and industries affected by the Draft Plan "between industrial facilities that may be sources of PFAS pollution and facilities that are likely conduits for PFAS releases into the environment (usually waste management or treatment facilities)". Concerning the recycled materials industry, MPCA has relegated its own useful distinction to merely a theoretical construct without actual use. With regard to industrial stormwater, ReMA disagreed with the MPCA's improper grouping of affected ReMA-member facilities with "source facilities" in the Industrial Stormwater Program Plan—a clear example of the MPCA's failure to use its own useful distinction for its own convenience. ReMA further disagreed with MPCA's requirement for only the Industrial Stormwater Program Plan that "[p]ermittees will be expected to cover the costs associated with sample collection, analysis, and reporting", especially for a purportedly non-regulatory, voluntary program. ReMA also expressed significant concern that the cost of sampling stormwater and analyzing those samples for PFAS would be extremely high due to several factors: the special care needed for sampling stormwater without cross-contamination (almost certainly by a third party with special preparation, clothing, and equipment); the lack of qualified in-state analytical laboratories; and the lack of methods approved and listed under 40 CFR § 136.3 (Identification of test procedures) for analyzing PFAS in stormwater samples and other environmental media. In particular, there was no standardized protocol for stormwater sampling for the purpose of measuring PFAS concentrations.

Besides commenting on the Draft Plan, ReMA also submitted comments on the *MPCA Remediation Division PFAS Guidance (Draft): Life cycle-based guidance for PFAS at Superfund,*

[8] "Draft PFAS monitoring plan (p-gen1-22b)" (November 2021), accessed at https://www.pca.state.mn.us/waste/mpca-pfas-monitoring-plan on December 15, 2021.

*Brownfield, and RCRA sites*[9] (Draft Remediation Guidance). The MPCA stated the following in its response[10] to ReMA's comments:

- "The MPCA acknowledges that scrapyards may generally be characterized as receivers of PFAS materials versus industries that make or intentionally use PFAS containing materials."

- "The MPCA acknowledges that 'scrapyards,' 'scrap yards,' and 'metal salvage facilities' are not defined as solid waste facilities and are therefore not regulated as solid waste facilities."

ReMA's and its member permittees' experiences concerning the PFAS Monitoring Plan, Draft Remediation Guidance, and their aftermath inform the comments below on the Draft Permit.

## II. Comments

Based on ReMA's review of the Draft Permit and its Fact Sheet, ReMA has identified several highly concerning aspects of the Draft Permit, as well as of the Fact Sheet, and some agreement. ReMA's concerns revolve around PFAS and may overlap such that the resolution of one concern effectively resolves one or more other concerns. The comments below address each concern independently without regard to any overlap.

### A. The MPCA Properly Removed Iron as a Benchmark Parameter.

The Draft Permit discontinues the inclusion of iron as a benchmark parameter. ReMA agrees with the MPCA's removal of the iron benchmark.

### B. In the Draft Permit, the MPCA Continues to Disregard Its Own Useful Distinction Between PFAS Makers/Users and PFAS Receivers and Must Remove the Recycled Materials Industry from the List of PFAS Making/Using Industries in Appendix D.

In the Draft Permit, the MPCA continues to disregard its own useful distinction between PFAS makers/users and PFAS receivers with respect to the recycled materials industry (Sector N; SIC Code 5093). As noted above (Sec. I), "[t]he MPCA acknowledges that scrapyards may generally be characterized as receivers of PFAS materials versus industries

[9] Available for download at https://scs-public.s3-us-gov-west-1.amazonaws.com/env_production/oid333/did200071/pid_207193/project-documents/PFAS%20guidance%20document.pdf.

[10] Letter delivered by the U.S. Postal Service to ReMA from the MPCA dated May 3, 2024, captioned "Minnesota Pollution Control Agency (MPCA) Response to comment letter dated October 6, 2023, from the Institute of Scrap Recycling Industries, Inc. (ISRI) on the MPCA Draft Remediation Per- and Polyfluoroalkyl Substances (PFAS) Guidance document".

that make or intentionally use PFAS containing materials." PFAS provide neither function nor value to recycling processes and no value to either recyclable materials (process inputs) or recycled materials (process products). Nonetheless, for its own convenience (a common theme in these comments), the MPCA includes Sector N (SIC Code 5093; also known as "scrapyards", "scrap yards", and "metal salvage facilities") among 43 PFAS-making/using industries in Appendix D, Primary SIC Codes that Require Per- and Polyfluoroalkyl[11] Substances (PFAS) Monitoring and PFAS Monitoring Parameters. Because such inclusion is inconsistent with the MPCA's own useful distinction between PFAS makers/users and PFAS receivers, the MPCA must withdraw Sector N from Appendix D.

**C. Because the Draft Permit Perpetuates and Likely Intensifies the Challenges with PFAS Monitoring, the MPCA Must Ameliorate PFAS Monitoring Requirements for the Final Permit.**

The Draft Permit perpetuates and probably intensifies the challenges with PFAS monitoring that ReMA and its MN members pointed out concerning the Draft Plan years ago and since. Stormwater sampling for PFAS analysis remains challenging and expensive because it is necessary for third parties with special preparation, clothing, and equipment to conduct sample collection to ensure no cross-contamination by external sources of PFAS (e.g., clothing, food packaging, dental floss, sampling equipment and containers). Qualified MN analytical laboratories (i.e., those "certified by the Minnesota Department of Health (MDH) and/or registered with the MPCA or be another MPCA-approved accredited lab" (§ 390.3)) remain scarce.

Also, the required analytical test method, U.S. EPA Method 1633, is not the current U.S. EPA method for quantifying PFAS in aqueous, solid, biosolids, and tissue samples. The current U.S. EPA method is Method 1633A, and its Notice reads in pertinent part:

> *…*
> *EPA issuing this method does not require its use for Clean Water Act compliance monitoring at the Federal level; that will only occur after it has been proposed and promulgated through rulemaking (e.g., added to 40 CFR Part 136). …*
>
> *This December 2024 version of the method is identified as Method 1633A and it supersedes all previous versions, addresses various minor editorial issues noted in the January 2024 version, as well as clarifying several technical concerns (see the version history below).*

[11] In the Draft Permit, "Polyfluoroalkyl" is misspelled as "Polyfluoroalkl".

To date, Method 1633A has not been promulgated via rulemaking and is thus not listed under 40 CFR § 136.3. It contains warnings concerning certain kinds of samples and sampling that have to be coordinated between laboratories and entities collecting samples. This is not to say that the MPCA may not require use of Method 1633A—U.S. EPA recommends its use—but it is not fully proven either.

By way of the Draft Permit and Appendix D, having facilities in more than 40 industries required to conduct stormwater sampling and analysis for PFAS—whether for PFAS monitoring and reporting (Part XI) or for determining eligibility for the No Exposure exclusion—will almost certainly intensify all of the challenges evident when relatively few facilities in selected industries (including Sector N) were conducting voluntary sampling and analysis for PFAS under the larger Minnesota PFAS Blueprint. It is likely that the numerous permittees subject to Appendix D will encounter difficulties and thus greater expense securing timely third-party stormwater sampling and analytical laboratory services.

The MPCA must consider these likely challenges for PFAS monitoring in the Draft Permit and ameliorate PFAS monitoring requirements for the Final Permit.

**D. The MPCA Must Correct Its Improper, and Remove Any Impermissible, Application of PFAS Thresholds in the Draft Permit Respecting PFAS Monitoring and Reporting and, Via its Fact Sheet, the No Exposure Exclusion.**

In the Draft Permit, the MPCA improperly, if not impermissibly, applies PFAS thresholds to PFAS Monitoring and Reporting and, via its Fact Sheet, to eligibility to apply for the No Exposure exclusion. Part XI, Per- and Polyfluoroalkyl Substances (PFAS) Monitoring and Reporting Requirements, of the Draft Permit (§ 386.1), includes the following PFAS monitoring thresholds (Table 2) for the purpose of determining whether a permittee subject to Appendix D (see Sec. II.B above) must "complete and implement a PFAS Source and Exposure Reduction Plan (SERP)":

- 10 ng/L each for PFOA and PFOS, unless the facility is within one mile of a Drinking Water Supply Management Area (DWSMA) or a Class 1 Water of the State (§ 393.4); or

- 4 ng/L each for PFOA and PFOS and 10 ng/L each for PFHxS, PFNA, and HFPO-DA (aka GenX) if the facility is within one mile of a DWSMA or Class 1 Water of the State.

The Draft Permit contains no explanation for these PFAS thresholds, not even a citation for the MPCA's legal or regulatory authority to impose them.

In contrast, the Fact Sheet provides background for these PFAS thresholds (p. 10; **emphasis** added):

> *[T]he U. S. Environmental Protection Agency (EPA) established legally enforceable Maximum Contaminant Levels (MCLs) for six PFAS analytes in drinking water. As a result, **water quality criteria** for PFAS analytes: PFOA, PFOS, PFHxS, PFNA, and HFPO-DA (commonly known as GenX chemicals), took effect in Minnesota specifically for Class 1 Waters of the State as the Minnesota Legislature outlined in Minnesota Session Law – 2023, Chapter 60, Sec. 33.*

The cited 2023, Chapter 60, Sec. 33 law consists of the following text[12] (**emphasis** added):

> *Sec. 33. PFAS **WATER QUALITY STANDARDS**.*
>
> *(a) The commissioner of the Pollution Control Agency must adopt rules establishing **water quality standards** for:*
>
> *(1) perfluorooctanoic acid (PFOA);*
>
> *(2) perfluorooctane sulfonic acid (PFOS);*
>
> *(3) perfluorononanoic acid (PFNA);*
>
> *(4) hexafluoropropylene oxide dimer acid (HFPO-DA, commonly known as GenX chemicals);*
>
> *(5) perfluorohexane sulfonic acid (PFHxS); and*
>
> *(6) perfluorobutane sulfonic acid (PFBS).*
>
> *(b) The commissioner must adopt the rules establishing the **water quality standards** required under this section by July 1, 2026, and Minnesota Statutes, section 14.125, does not apply.*

While the Fact Sheet's reference to "water quality criteria" is different than the cited law's scope of "water quality standards" and may be unintentionally different, the MPCA states very clearly that "[s]ite-specific **standards** differ from site-specific **criteria**"[13] (emphasis original). There appear to be no current site-specific water quality standards for PFAS.[14] In contrast, there are site-specific water quality criteria for PFBA, PFBS, PFHxA, PFHxS, PFOA, and PFOS (and their salts). The MPCA explicitly notes:[15]

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[12] https://www.revisor.mn.gov/bills/text.php?number=HF2310&type=bill&version=4&session=ls93&session_year=2023&session_number=0.

[13] https://www.pca.state.mn.us/business-with-us/site-specific-water-quality-standards, viewed February 21, 2025.

[14] No PFAS are identified at https://www.pca.state.mn.us/business-with-us/site-specific-water-quality-standards, viewed February 21, 2025.

[15] https://www.pca.state.mn.us/air-water-land-climate/developing-water-quality-criteria-for-pfas.

> *These are not statewide standards. These are targeted site-specific water quality criteria for Lake Elmo (new values) and connected bodies of water, Bde Maka Ska, and the Mississippi River from Ford Dam to River Mile 820.*

It is difficult to identify the MPCA's legal or regulatory authority to impose PFAS monitoring thresholds in the Draft Permit to any permittee subject to Appendix D when (1) there are no current PFAS water quality standards[16] and (2) the current PFAS water quality criteria are site-specific (few) and not statewide. The 2023, Chapter 60, Sec. 33 law cited by the MPCA to establish PFAS water quality standards does not provide the authority to the MPCA to impose statewide PFAS monitoring thresholds in the Draft Permit in the absence of their establishment, if at all. It is relevant that the Draft Permit lacks PFAS benchmark parameters for stormwater discharges to receiving waters of the state; it implies that the MPCA has not undertaken a regulatory process to do so.

In the case of the No Exposure exclusion, the Draft Permit makes reference to its existence in §§ 5.2, 5.7, 10.3, 381.2, and 395.25 (regulatory definition) and Appendix E (Example of Copy of Record for Permit Coverage), but contains no details about it.

In contrast, the Fact Sheet identifies the No Exposure exclusion as an alternative to obtaining Permit coverage and specifies the following conditions for applying for this exclusion (p. 8):

> *The Owner/Operator of a facility identified within a SIC code listed in Appendix D of the draft permit must provide verification that they have sampled stormwater for per-and polyfluoroalkyl substances (PFAS) using Method 1633 at least four times, 72-hours apart, prior to applying for a No Exposure exclusion. By Dec. 21, 2025, the Owner/Operator of a facility seeking a No Exposure exclusion must complete the required PFAS monitoring and analysis, submit the averaged results of those samples to the MPCA, and apply for the No Exposure exclusion. The averaged results of the PFAS samples must be below the identified thresholds (Table 2) to qualify for No Exposure.*

Per Minn. R. 7090.3000, the state's industrial stormwater program is "regulated in accordance with Code of Federal Regulations, title 40, section 122.26(a)(1)(ii), section 122.26(g)(1)-(4), and Minnesota Statutes, section 115.03." Section 122.26(g)(1)-(4) provides the details of conditional No Exposure exclusions for Federal and State NPDES programs. Section 122.26(g)(3)(iv) articulates the following limitation:

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[16] See https://www.pca.state.mn.us/business-with-us/mpcas-water-quality-standards-work-plan-2021-2023, viewed February 26, 2025.

> *Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.*

This limitation is predicated on the existence of applicable water quality standards, as well as designated uses. In the case of PFAS, there are currently no applicable water quality standards, but there are water bodies with designated uses.

Based on the review above, the MPCA has no legal or regulatory authority to impose PFAS monitoring thresholds in the Draft Permit to <u>any</u> permittee, subject to Appendix D or not, respecting PFAS Monitoring and Reporting and eligibility to apply for a No Exposure exclusion. In the absence of PFAS water quality standards, the MPCA's authority to impose PFAS monitoring thresholds is limited to permittees with receiving waters that have site-specific PFAS water quality criteria or designated uses, which presumably include a DWSMA and a Class 1 Water of the State.

The MPCA must revise the Draft Permit to conform to its legal and regulatory authorities to impose PFAS monitoring thresholds and may not retain these thresholds unaltered in the Final Permit for its own convenience.

**E. The PFAS Sampling Instructions in Part XI of the Draft Permit Are Unclear and Require Clarification.**

Several aspects of the PFAS sampling instructions in Part XI of the Draft Permit are unclear.

Regarding where to collect a PFAS sample, § 388.3 states:

> *PFAS Stormwater samples must be collected for at least four calendar quarters. Sampling requirements begin the first full calendar quarter following the facility's coverage issuance date. Sample quarters do not need to be concurrent.*

That last sentence is difficult to understand without more context. If it means that PFAS stormwater sampling from different AOC do not have to follow the same calendar quarters, then it should say so. Alternatively, it could be that "concurrent" should have been "consecutive". More specificity is required.

Regarding when to collect a PFAS sample, § 389.2 states:

> *Permittees shall collect PFAS stormwater samples for four calendar quarters after receiving coverage. Permittees must collect samples from a measurable runoff event or acceptable snowfall event at each of the facility's at the AOC* [sic]*, provided there is a gap of three days between measurable runoff events.*

There are four unclear aspects of § 389.2. First, this section specifies four calendar quarters, not "at least four calendar quarters" as in § 388.3.

Second, the term, "acceptable snowfall event" is not defined anywhere in the Draft Permit; it is a new term that is not present in the current Permit expiring March 31, 2025. Even the MPCA's *Industrial Stormwater: Per- and polyfluoroalkyl substance (PFAS) Snow Sampling Guidance* document[17] (PFAS Snow Guidance) does not define "acceptable snowfall event"; however, the PFAS Snow Guidance does seem to describe it:

> *PFAS snow sampling may be conducted once a facility has received at least a three-inch accumulation of snow over a period of three weeks. PFAS snow sampling must not be completed immediately after a snowfall event.*

It seems that "a three-inch accumulation of snow over a period of three weeks" constitutes an "acceptable snowfall event". This term must be defined in the Permit itself.

Third, the phrase "at each of the facility's at the AOC [sic]" is not grammatically correct; it seems likely that "at each of the facility's AOC" was intended.

Fourth, it is unclear whether "a gap of three days between measurable runoff events" applies also to "an acceptable snowfall event".

All of these issues with the PFAS sampling instructions must be clarified.

### F. The PFAS Snow Guidance Mentioned in Part XI of the Draft Permit Is Completely Impractical.

Mentioned in § 390.5 in Part XI of the Draft Permit, the PFAS Snow Guidance is completely impractical because of its complexity and the great expected expense arising from the requirement that "[s]now samples collected for PFAS analysis must be collected by an individual from an MDH certified laboratory using the protocols provided in the current edition of the [PFAS Snow Guidance]". As noted in Section II.C, qualified MN analytical

[17] The MPCA made this document available at https://www.pca.state.mn.us/sites/default/files/wq-strm3-102c.pdf on February 21, 2025, with only five days left in the comment period.

laboratories are scarce, and individuals from MDH certified laboratories to conduct the snow sampling are undoubtedly scarcer, especially with so many permittees trying to engage the same small set of MHD individuals at about the same time. PFAS snow sampling would certainly be challenging, and likely practically impossible, for an "individual(s) responsible for conducting the facility's PFAS stormwater monitoring" (§ 387.3) to conduct given the protocol and supplies needed.

Also, it is difficult to see how PFAS snow sampling would work if "a gap of three days between measurable runoff events" (§ 389.2) also applies to it.

One has to wonder whether such PFAS snow sampling is worth doing.

**G. The MPCA Exceeds Its Legal Authority to Include Part XI, Per-and Polyfluoroalkyl (PFAS) Monitoring and Reporting Requirements, in the Final Permit and Must Withdraw Part XI.**

As shown below, the MPCA exceeds its legal authority to propose Part XI, Per-and Polyfluoroalkyl (PFAS) Monitoring and Reporting Requirements, in the Draft Permit for inclusion in the Final Permit.[18] As a consequence, the MPCA must withdraw Part XI.

In the Draft Permit, the MPCA includes a new Part XI (§ 386.1), described in § 386.2:

> *The Permittee of a facility with a primary SIC Code listed in Appendix D shall monitor for PFAS in stormwater at its facility's area(s) of concern (AOC). The permittee shall abide by all requirements and monitor for PFAS using the procedures outlined in this section of the Permit. [Minn. R. 7090][19]*

Part XI includes the following subparts:

- SWPPP and PFAS Stormwater Monitoring Plan Requirements. (§ 387.1)
- Where to Collect a PFAS Sample; Number of Samples. (§ 388.1)
- When to Collect a PFAS Sample. (§ 389.1)
- How to Collect a PFAS Sample. (§ 390.1)
- Reporting PFAS Monitoring Results. (§ 391.1)
- Unable to Collect a PFAS Sample. (§ 392.1)
- PFAS Monitoring Thresholds. (§ 393.1)
- PFAS Source and Exposure Reduction Plan Requirements. (§ 394.1)

[18] The Fact Sheet misidentifies Part XI of the Draft Permit as "Part XII".

[19] Because every subsection of the Draft Permit ends with a bracketed regulatory or statutory reference (e.g., "[Minn. R. 7090]" and "[Minn. Stat. 115.03]"), such references are henceforth omitted for conciseness.

All of the Part XI subparts and activities relate to and revolve around the new concept of "Area of Concern" (AOC), defined as follows in the Draft Permit:

> *"Area of Concern" means 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.* (§ 395.3)

Based on the listed subparts alone (e.g., PFAS Monitoring Thresholds, PFAS Source and Exposure Reduction Plan Requirements), a fair description of Part XI is that it is effectively a permit within a permit. A detailed read of Part XI shows that Part XI applies to an AOC just like the Permit applies to areas of industrial activity at an industrial facility. PFAS sample collection (§ 388.2) and PFAS monitoring thresholds (§ 393.4) are particularly relevant, respectively (emphasis added):

> *The Permittee shall monitor for PFAS by **collecting stormwater samples from each facility's AOC** as identified in the facility's PFAS stormwater monitoring plan. The Permittee shall collect samples where stormwater leaves the area of concern at the most representative location.*
>
> *If the averaged results are at or greater than the following thresholds, the **Permittee shall be required to complete and implement a PFAS Source and Exposure Reduction Plan (SERP).***
>
> *10 ng/L for PFOS*
> *10 ng/L for PFOA.*
>
> *An exceedance of these threshold(s) does not constitute a violation(s).*

These two excerpts from Part XI clearly demonstrate that Part XI regulates industrial stormwater leaving an AOC to elsewhere inside the facility, just like the Draft Permit regulates a discharge of industrial stormwater from the facility to an external receiving water.

However, in one important respect, Part XI differs from the overall (Draft) Permit: Stormwater samples collected for monitoring under Part XI are not "discharges". First, Minn. Stat. 115.01[20] includes the following relevant definitions:

[20] Viewed at https://www.revisor.mn.gov/statutes/cite/115.01#stat.115.01.4 on February 18, 2025.

> *Subd. 4. Discharge. "Discharge" means the addition of any pollutant to the waters of the state or to any disposal system.*
>
> *Subd. 22.Waters of the state. "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof.*

Through incorporation by reference[21], the definition of "discharge of a pollutant" and other relevant definitions in Minn. R. 7001.1020 apply to NPDES permits generally (e.g., the Final Permit from this reissuance process) (**emphasis** added):

> *Subp. 12. Discharge of a pollutant. "Discharge of a pollutant" means the addition of any pollutant to **surface** waters of the state. "Discharge of a pollutant" does not include the addition of pollutants into the waters of the state by an "indirect discharger."*
>
> *Subp. 15. Indirect discharger. "Indirect discharger" means a nondomestic discharger that introduces pollutants into a publicly owned treatment works.*

Given these applicable definitions, it would be incorrect for the MPCA to claim that a surface flow of industrial stormwater from an AOC to elsewhere inside the facility is a "discharge" (of a pollutant) to surface "waters of the state". It would be arbitrary and capricious for the MPCA to make this (incorrect) claim simply because such an interior stormwater flow from an AOC contains a non-zero quantity of PFAS and to do so for its own convenience. The MPCA has never made that claim concerning such an interior stormwater flow with respect to any other "pollutant". The reason is that the MPCA may not make such a claim. The interior stormwater flow is not contacting "waters of the state". If precipitation on the ground were somehow "waters of the state", then an actual discharge of industrial stormwater from a facility, prior to entering an external "surface waters of the state", would itself be a "water of the state". Such an outcome would overturn and mock the entire concept of industrial stormwater permitting, so such a claim cannot be correct. Lest there be any doubt, the definition of "waters of the state" does not depend in any way on "pollutant". Consequently, an interior stormwater flow from an AOC cannot be a "discharge of a pollutant".

[21] See § 358.2 in Part IX, General Provisions, of the Draft Permit.

This issue of what is and what is not a "discharge of a pollutant" gets to the question of the extent and limitations of the MPCA's authority to issue this Draft Permit and the provisions within it. The Draft Permit itself specifies its goal (**emphasis** added):

> *The goal of this permit is to reduce pollutant levels in **point source discharges** and protect water quality in accordance with the U.S. Clean Water Act, Minnesota statutes and rules, and federal laws and regulations.*

Respecting the permit goal, Minn. R. 7001 defines "point source" (**emphasis** added):

> *Subp. 23. Point source. "Point source" means a discernible, confined, and discrete conveyance, including, but not limited to, a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be **discharged**.*

An interior stormwater flow from an AOC cannot be a "discharge" from a "point source".

Respecting the MPCA's authority, Minn. Stat. 115.03 is clarifying (**emphasis** added):

> *Subd. 5c.Regulating stormwater discharges. (a) The agency may issue a general permit to any category or subcategory of **point source stormwater discharges** that it deems administratively reasonable and efficient without making any findings under agency rules. Nothing in this subdivision precludes the agency from requiring an individual permit for a point source stormwater discharge if the agency finds that it is appropriate under applicable legal or regulatory standards.*
>
> *(b) Pursuant to this paragraph, **the legislature authorizes the agency to adopt and enforce rules regulating point source stormwater discharges**. No further legislative approval is required under any other legal or statutory provision whether enacted before or after May 29, 2003.*

A plain reading of Minn. Stat. 115.03, Subd. 5c(b) is that the MPCA is authorized to regulate "point source" stormwater "discharges" **only**. Because an interior stormwater flow from an AOC is not a "point source" stormwater "discharge", the MPCA has no authority to regulate such interior stormwater flows (e.g., via Part XI) in a NPDES permit (e.g., MNR050000) for any reason. Such regulation would exceed the authority conferred to the MPCA by the Minnesota legislature. It **necessarily** follows that Part XI is not lawful for inclusion in the Final Permit and must be withdrawn.

**H. Although Not Part of or Discussed in the Draft Permit, the Eligibility Condition for Applying for a No Exposure Exclusion Is Arbitrary, if Not Also Capricious, Because It is Based on Only PFAS Concentrations in Stormwater Discharges.**

While not part of or discussed in the Draft Permit, notwithstanding references to its existence (§§ 5.2, 5.7, 10.3, 381.2, and 395.25 and Appendix E), the No Exposure exclusion has a new eligibility condition for applying for it that is discussed in the Fact Sheet (p. 8):

> *The Owner/Operator of a facility identified within a SIC code listed in Appendix D of the draft permit must provide verification that they have sampled stormwater for per-and polyfluoroalkyl substances (PFAS) using Method 1633 at least four times, 72-hours apart, prior to applying for a No Exposure exclusion. By Dec. 21, 2025, the Owner/Operator of a facility seeking a No Exposure exclusion must complete the required PFAS monitoring and analysis, submit the averaged results of those samples to the MPCA, and apply for the No Exposure exclusion. The averaged results of the PFAS samples must be below the identified thresholds (Table 2) to qualify for No Exposure.*

Minn. R. 7090.3060 articulates the conditions of and requirements for a conditional exclusion for No Exposure under Subpart 1:

> *Discharges composed entirely of stormwater are not discharges associated with industrial activity if there is no exposure of industrial materials and activities to rain, snow, snowmelt, or runoff, and the facility meets the requirements of this part.*

No condition or requirement in Minn. R. 7090.3060 hinges on the results from analyzing samples of stormwater discharges from a facility seeking a No Exposure exclusion. Appendix E of the Draft Permit confirms this because the No Exposure certification application within it does not make any reference to prior results from analyzing samples of stormwater discharges. Neither does the MPCA's webpage for certifying no exposure.[22]

Subpart 3 states the application requirements:

> *An operator certifying a condition of no exposure must submit to the commissioner an application for no-exposure certification on a form provided by the agency.*

[22] https://www.pca.state.mn.us/business-with-us/step-2-certify-for-no-exposure, viewed February 21, 2025.

Presumably and logically, an eligibility condition for applying for a No Exposure certification would be part of the application itself. It would be wrong to argue that Subpart 3 allows "an application for no-exposure certification on a form provided by the agency" to contain **any** condition that the MPCA wishes to impose, including one for its own convenience, beyond the definition of "no exposure" (Minn. R. 7090.0080, Subpart 9):

> *"No exposure" means that all industrial materials or activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snow melt, or runoff. "Industrial materials or activities" include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, or waste product.*

Using Subpart 3 to impose any condition on eligibility for a No Exposure certification or exclusion would be generally arbitrary, if not also capricious.

It seems specifically arbitrary, if not also capricious, that the MPCA would suddenly (1) impose a new condition on a facility's eligibility to apply for a No Exposure exclusion based on the facility's prior results from monitoring stormwater discharges for any "pollutant"—benchmark parameter or not—and then (2) do so for PFAS only. The MPCA has never done (1), which is a prerequisite for (2).

In summary, this new eligibility condition for applying for a No Exposure exclusion does not seem to have a basis in regulation and is arbitrary, if not also capricious.

It is interesting to consider the implications of the new eligibility condition for applying for a No Exposure exclusion that requires prior proof that a facility's stormwater discharges contain PFAS concentrations below the PFAS monitoring thresholds (Table 2). If a facility achieves a state of "no exposure" per the above definition, the question for the MPCA is: Whence the PFAS in stormwater discharges if not from industrial materials or activities at a facility?

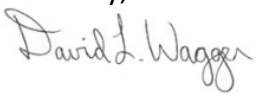
## III. Summary

ReMA supports removal of the iron benchmark, but has significant concerns on other aspects of the Draft Permit, some of which are overlapping. The MPCA continues to disregard its own useful distinction between PFAS makers/users and PFAS receivers and must remove the

recycled materials industry from the list of PFAS making/using industries in Appendix D. The Draft Permit perpetuates and likely intensifies the challenges with PFAS monitoring, and the MPCA must ameliorate PFAS monitoring requirements for the Final Permit. The MPCA must correct its improper, and remove any impermissible, application of PFAS thresholds in the Draft Permit respecting PFAS monitoring and reporting and the No Exposure exclusion. The PFAS sampling instructions are unclear and require clarification. The PFAS Snow Guidance mentioned in the Draft Permit is completely impractical. Independent of the other concerns, the MPCA exceeds its legal authority to include Part XI, Per-and Polyfluoroalkyl (PFAS) Monitoring and Reporting Requirements, in the Final Permit and must withdraw Part XI. While not part of the Draft Permit, the PFAS eligibility condition for applying for a No Exposure exclusion is arbitrary, if not also capricious, because it is based on only PFAS concentrations in stormwater discharges.

In closing, ReMA appreciates this opportunity to provide comments on the MPCA's Draft Permit and its consideration of these comments. If you have any questions, please feel free to contact me at DWagger@recycledmaterials.org or 202-662-8533.

Sincerely,



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