CITY OF KNOXVILLE

Engineering
James R. Hagerman, P.E.
Director of Engineering

January 17, 2014

Mr. Paul Higgins
Tennessee Department of Environment and Conservation
Division of Water Resources
312 Rosa L. Parks Avenue, 11th Floor
Nashville, TN 37243-1102

Re: Comments and Objections to the Memphis Draft MS4 NPDES Permit Sent via Email & USPS

Dear Mr. Higgins:

The City of Knoxville has reviewed the Draft NPDES Permit for the City of Memphis and appreciates the opportunity to respectfully submit the following comments and objections for TDEC and EPA consideration:

Global comments for new Permit

1. **Comment** – The City objects to the apparent "reset" of the optimization that has occurred in the Phase 1 permits over the past two decades by disregarding the Phase 1 permit program and creating a general one size fits all permit based on a blend of Wastewater, Industry, Phase 1 and Phase 2 MS4 language. Some sections simply do not apply to a Phase 1 MS4 permit but do add an enormous amount of busywork. The intent of the Phase 1 NPDES permit program is to allow each municipality to propose a Stormwater Management Program (SWMP) that will best meet the water quality needs and goals of that community. Each year, the MS4 evaluates, optimizes, and reports on the progress of the SWMP. Rather than responding to the Phase 1 reapplications that were required in the existing permit, a new form of permit was created by cutting and pasting from various sources or in some cases simply fabricating references to support the changes. For example, Section 5.1.1 has obviously been added from wastewater/industry since it includes, *"...the discharge of treated wastewater..."*, and *"...conduct its wastewater treatment..."* when this permit clearly is being issued for Stormwater discharges from an MS4.

2. **Comment** - The City objects to the apparent disregard for the individual Phase 1 permit reapplication process and requirements but most of all the City objects to the fabricated rationale for the change. Even after it was pointed out during the first round public comments for this permit in 2012, TDEC failed to alter the inaccurate statements that now serve as the basis for this form of the Phase 1 permit. Specifically, Section 1.5 of the rationale on page R-5 of 15 states, ***"The six minimum measures, as written by the EPA in the Phase 1 final rule (December, 1999, 40 CFR122.3), serve as the basis for NPDES permit conditions. These will form the backbone of the proposed permit requirements, as follows:"*** The City objects to TDEC issuing a permit with this fabricated language serving as the backbone of the requirements. This statement is wrong on all accounts, including:
   a. The six minimum measures were not "***written by the EPA in the Phase 1 final rule***". It is simply not true. The six minimum measures were actually part of the final rule for "small" phase 2 MS4s and can be referenced at 40 CFR 122.34(b). In fact, paragraph (a) precedes the small MS4's six minimum measures requirements with a clear warning that reads, "***Your stormwater management program***

must include the minimum control measures described in paragraph (b) of this section unless you apply for a permit under 122.26(d)."

b. The Phase 1 rule was not finalized in "1999". In fact, the Phase 1 communities in Tennessee were in the fourth year of their first permit and preparing their Reapplications that year in anticipation of being issued their second 5-year permit, which is still in effect in Memphis and Knoxville today.
c. The Phase 1 requirements are not listed at "40 CFR122.3", which is entitled "Exclusions". In fact, this section is the very opposite of requirements for NPDES since it describes those operations that do not require NPDES permits at all.
d. Since all of these statements are incorrect, they cannot "***serve as the basis***" and "***backbone***" for Phase 1 NPDES permit conditions.

Page 2, section 1.4, Responsibilities of Permittee

3. **Comment –** The draft Permit states, *"However, if the actions or activities within the jurisdiction of another MS4 produce a discharge* [of a pollutant] *which enters the Memphis MS4 storm sewer system, the Memphis MS4 will be held responsible in whole or in part for such a discharge."* The City objects to this scenario which obviously is a case for TDEC involvement if the discharge originates from another permitted MS4. For example, should polluted runoff from the State's Department of Transportation or University MS4s enter the local MS4, the local MS4 is responsible but powerless to do anything about it due to the State's sovereign immunity. This provision appears to be self serving. In other scenarios where a second MS4 is violating the terms of their permit, the first MS4 cannot enforce TDEC's issued permit to the second MS4 and cannot enforce their ordinances on the violator since they are outside the jurisdiction of the first MS4. This statement also seems to be in direct conflict with the preceding statement that claims the MS4 will not be responsible for violations in another MS4's jurisdiction. The City recommends that the last sentence of this section be deleted since it doesn't make sense.

Page 3, Section 1.6 c, d, & e, Limitations of Coverage

4. **Comment -** The City agrees that no permit should be issued that allows, authorizes, or results in a "Take" of Threatened and Endangered (T&E) aquatic species. In the State's own permit issued to the Department of Transportation #TNS077585, these sections include a statement, " If the division [TDEC] finds that storm water discharges ... are likely to result in any of the above effects, the director will deny the coverage under this general permit..." This certainly implies appropriately that TDEC, rather than TDOT, will assess the SWMP and T&E species and deny or withhold coverage until the discharges are resolved. The City objects to the apparent preferential treatment shown to TDOT by the lack of this same language and assessment for all MS4s.

5. **Comment -** Furthermore, the City objects to the implication that TDEC would issue a permit without evaluating if the MS4's stormwater discharge would result in a "Take". The State has created a website with the T&E species data and watersheds for each MS4. The Phase 1 SWMP and outfalls were submitted to TDEC over 2 decades ago with annual reports, updates, and reapplications submitted for 17 of those years. TDEC has had ample opportunity to review these submitted documents over the past twenty one years and has in fact issued two separate five-year permits to this MS4 since the original application in 1993. Therefore, since TDEC, TWRA, and US Fish and Wildlife are the undisputed experts, are in possession of the approved SWMPs and are stewards of the T&E data, it is appropriate, reasonable, and prudent for the Division to determine if a take will occur and obtain comments from all concerned parties/experts before issuing this permit.

Page 4 Section 2.2, Discharges into Waterbodies with EPA-Approved or Established TMDL's

6. **Comment** - The City objects to the unreasonable and unattainable requirement that BMPs shall be implemented within 18 months or within 32 months for BMPs that require engineering design and construction. As late as 2012, the permit writers had not consulted with the TMDL writers before deciding to include arbitrary timelines for TMDL compliance within the NPDES permit. In some cases where a watershed has a TMDL for siltation and habitat alteration, the BMP to achieve compliance would require many miles of streambank restoration. TDEC could not possibly process all the necessary ARAP applications within the BMP implementation time frame if all MS4s tried to meet this deadline for all listed creeks. TDEC should abandon the arbitrary deadlines, refer to the specific Phase 1 MS4 tasks listed in each TMDL implementation plan, and accept the EPA approved language that recognizes that "compliance with the performance standards and provisions ... of this permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term."

Page 5, Section 2.4, Protection of State or Federally Listed Species

7. **Comment** - Although the City agrees that T&E aquatic species should be protected, the City strongly objects to the inclusion of this particular requirement or this particular form for the following reasons:
   - The September 2010 EPA NPDES Permit Writer's Manual (EPA-833-K-10-001) on page 11-1, specifically notes in reference to other federal laws that, ***"Permits issued by States authorized to administer the NPDES program are not subject to the requirements of these statutes."*** It goes on to list the statutes in a table to include the Endangered Species Act (ESA) as well as NEPA, NHPA, CZMA, WSRA, FWCA, and EFH.
   - 40 CFR 122.26 specifies the NPDES requirements for Phase I communities but intentionally does not require or mention T&E.
   - The Endangered Species Act requires Federal agencies to determine detrimental impacts rather than local communities. We are unaware of any State Law that requires the MS4 to mimic the requirement of the Federal Agencies with respect to ESA or T&E Species.
   - This is an incorrect application of the ESA and intent of T&E species protection. A more accurate representation of the intent would be for the State to certify that the allowable discharges under the permit do not endanger the T&E species. This section should therefore be removed from this MS4 permit requirements.

8. **Comment** – As stated above in comments 4 and 5, the City objects again to the fact that TDEC is ready to issue a permit without knowing whether or not the discharge would be a "Take" or endanger T&E Species. Since the State maintains the website with the T&E species data and watersheds for each MS4, the City will simply be regurgitating, to the best of their ability, the data provided by the State and other expert agencies back to those experts that created the data in the first place. The Phase 1 BMPs, activities, and outfalls were submitted to TDEC over 2 decades ago with annual reports, updates, and reapplications submitted for 17 of those years. TDEC and 3rd party agencies have had ample time to review the SWMPs/ reapplications carefully over the past twenty one years to determine if a "Take" would occur as a result of issuing the new permit. The new permit includes enhancements to the SWMP (e.g. green infrastructure, bmp maintenance certifications, etc) that TDEC added to make the SWMP more protective than the previous two versions that have already been in place for two decades. If T&E species exist, TDEC should require additional protections in the new SWMP to ensure that it is protective of T&E species before the permit is issued. Obviously, TDEC, TWRA, and US Fish and Wildlife are the undisputed experts. They are in possession of the Plans/SWMPs/reapplications or can access readily online. They created and maintain

watershed and T&E data. It is appropriate, reasonable, and prudent for the Division to determine if a take will occur and obtain comments from all concerned parties/experts before issuing this permit.

9. **Comment** – The City objects to the requirement to certify and send the Plans/SWMPs within 12 months to non-regulatory agencies when the annual report to TDEC with the same data will not be due until 18 months. Neither of those agencies are co-permittees. However, since the BMPs in the SWMP are already available via the reapplication and/or TDECs draft permit, those agencies are welcome to review and comment now. If there is in fact a concern for a "Take" from the stormwater discharges, it is not acceptable for TDEC to allow this "Take" to continue for another 12 to 18 months. These other agencies should be ready to comment now since they have had over two decades to evaluate the old SWMP and several years to evaluate this new improved SWMP version that TDEC is ready to issue in a permit. Furthermore, there is no mention of what purpose the comments from the 3rd party experts will serve since these 3rd party experts cannot change the SWMP and neither can the MS4 without TDEC's approval. Therefore, TDEC work with the MS4 now to change the SWMP with specifically targeted BMPs, if necessary, before issuing the permit.

10. **Comment** – In 2013, TDEC issued a new General NPDES Permit for Discharges of Treated Groundwater associated with Underground Storage Tank Remediation (Permit No. TNG830000). On page 4 of 28 of that permit, TDEC included T&E language that is another example of more appropriate language to include in all NPDES permits if TDEC is determined to add a T&E section to their State issued permits. This language recognizes TDEC as the appropriate entity to determine if their issued permits will be compliant with the ESA if TDEC believes that it ESA applies. TDEC, not the MS4, should certify compliance.

"1.3.4. Threatened and Endangered Species Protection

a) Issuance of a Notice of Coverage (NOC) under this permit will constitute confirmation of the division's finding that, with properly developed and implemented groundwater treatment methods and control measures selected for the pollutants of concern, the discharges authorized hereunder are not likely to result in the taking of threatened and
endangered species.
b) Should the division later determine that the discharges covered by this permit would result in the taking of threatened or endangered species, or are otherwise not in compliance with the Endangered Species Act, the director, after written notification to the permittee, shall either:
(i) Notify the permittee that it is no longer eligible for coverage under this permit and require coverage under an individual NPDES permit. The permittee will continue to be covered under this permit until the division issues an individual NPDES permit for its treated groundwater discharges, provided a timely application for an individual permit is
made. A timely application is defined as submitting to the division a complete permit application, including sampling, within 90 days of the notice from the director requiring the application. A permittee may request a later date for the timely submission of an individual NPDES permit application for just cause; or
(ii) Notify the permittee that it must modify its groundwater treatment methods and control measures selected for the pollutants of concern such that as a consequence, the discharges authorized by this permit will not result in the taking of threatened and endangered species and otherwise be in compliance with the Endangered Species Act.
The permittee shall have 60 days after such notice to make such modifications to the groundwater treatment methods and control measures, and then 12 weeks to implement these modifications, unless the permittee justifies to the division that a longer time is necessary for their implementation. Should a longer time be required, the permittee shall submit to the division's local Environmental Field Office (see subpart 1.2 above) a brief summary of the proposed modifications of groundwater treatment methods and control measures, including a timetable for implementation.""

Page 6, Section 2.4.1, Threatened and Endangered Species Documentation and Reporting

11. **Comment** - The City objects to this procedure since it is circular in nature, not required by law, and not clear since the word "found" is not defined. There is a vast difference in "found" in the creek vs. "found" on the State's website. Some species are now ghosts and are only "found" on the State's website. This procedure requires the MS4 to report to other State and Federal agencies and wait on comments to determine if the Phase 1 NPDES permit program will impact listed species or habitat. This in effect, allows these other entities to hold significant leverage over the MS4s ability to comply with the permit. The City objects to these other agencies and organizations being required for compliance with the MS4 permit unless they are specifically and legally bound as Co-Permittees. As stated in section 4 above, if a search of state and federal websites must take place to determine if the permit is in compliance with other State and Federal Requirements, then the State should search their own data and/or that of the other expert agencies to determine and certify compliance before issuing the permit to the MS4. The MS4 is not the T&E species expert since they are limited to doing internet research from TDEC's website. There is no added protection for T&E species or water quality benefit by requiring MS4s to send TDEC data that TDEC already has in their databases.

Page 6, Section 2.4.2, Threatened and Endangered Species Annual Review Process

12. **Comment** – As stated in comment 11 above, the City objects to this procedure since it is circular in nature and not required by law. Furthermore, this specific proposal by TDEC suggest that there is some benefit to sending a letter to 3rd parties, certified under penalty, that there were or were not any changes in the permit programs this year. This is simply a drain on resources. Any changes to the permit programs must be approved by TDEC in advance (see 3.4.1, 5.16, and 5.17). Therefore, any changes to the program are known by TDEC in advance and any changes in the State and Federal websites' T&E data are also known by those concerned agencies since they generated those changes. A requirement for the MS4 to print out and send duplicated information back to 3rd parties who are not co-permittees or even to TDEC who is already in possession of that information, is wasteful and without any benefit for water quality or protection of T&E species.

Page 9, Section 3.2.2, Public Involvement/Participation

13. **Comment** - The City strongly objects to the inclusion of this Phase 2 NPDES permit requirement as part of a Phase 1 permit. The Phase 1 NPDES permit requirements are identified in 40CFR122.26 for Medium and Large MS4s. The Phase 2 NPDES permit requirements are listed in 40CFR122.34 for Small MS4s. Paragraph (a) of 40CFR122.34 clearly states, "***Your storm water management program must include the [6] minimum control measures described in paragraph (b) of this section unless you apply for a permit under 122.26(d).***" Therefore, the City objects to the inclusion of any Phase 2 requirements that are not included in 40CFR122.26.

14. **Comment** – TDEC continues to document their confusion over the differences between Phase 1 and Phase 2 requirements by including the fabricated statement in Section 1.5 on page R-5 of 15 in the draft to read, "***The six minimum measures, as written by the EPA in the Phase 1 final rule (December, 1999, 40 CFR122.3), serve as the basis for NPDES permit conditions. These will form the backbone of the proposed permit requirements, as follows:***" The City objects to TDEC issuing a permit with this fabricated language that seems to be created only to justify including this Phase 2 PIP requirement within

a Phase 1 permit. TDEC's statement is wrong on all accounts as described comment 2 above and repeated here for emphasis:

- The six minimum measures were not "***written by the EPA in the Phase 1 final rule***". The six minimum measures were actually part of the final rule for "small" phase 2 MS4s and can be referenced at 40 CFR 122.34(b). In fact, paragraph (a) precedes the small MS4's six minimum measures requirements with a clear warning that reads, "***Your stormwater management program must include the minimum control measures described in paragraph (b) of this section unless you apply for a permit under 122.26(d).***"
- The Phase 1 rule was not finalized in "1999". In fact, the Phase 1 communities in Tennessee were in the fourth year of their first permit and preparing their Reapplications that year in anticipation of being issued their second 5-year permit, which is still in effect in Memphis and Knoxville today.
- The Phase 1 requirements are not listed at "40 CFR122.3", which is entitled "Exclusions". This section is the opposite of requirements for NPDES since it describes those operations that do not require NPDES permits at all.
- Since none of these statements are true, they cannot possibly "***serve as the basis***" and "***backbone***" for Phase 1 NPDES permit conditions or justify using Phase 2 minimum measures in the Phase 1 MS4's individual permit. These requirements and tasks that are intended to target new programs for small MS4s with low populations and limited urban areas. This PIP program is not a Phase 1 program requirement and simply adds to program cost without proven benefit.

Page 29, section 3.4.1, Annual Review and Update of Stormwater Management Program

15. **Comment -** The City objects to the draft permit language that requires the MS4 to assess the effectiveness of each activity/control measure and each major component of the SWMP since TDEC failed to include a table of the SWMP components or activities/control measures to be implemented. This version of the draft permit is written as a narrative permit with hidden, suggested, construed, veiled and implied requirements woven throughout the narrative language. Even the Annual Report form in the appendix alludes to new tasks and requirements that are not part of the SWMP. These SWMP tasks were submitted in the original applications in 1993 and updated in the subsequent reapplications. TDEC included the SWMP activities and implementation schedule in the first two rounds of Phase 1 permits which made the requirements crystal clear. This version of the permit provides fertile ground for enforcement actions from TDEC/EPA and 3rd party lawsuits since the actual requirements for compliance are not definitive. TDEC should include a complete table of all SWMP activities and requirements with a compliance schedule as included in Part IV of the original and current Phase 1 individual permits. The Part IV Schedules for Implementation and Compliance leave no questions about what is required for compliance. TDEC should work with the MS4 to update their reapplication if necessary before this permit is issued.

Page 34, Section 5.1.1, Penalties for Violations of Permit Conditions

16. **Comment –** The City objects to the inclusion of wastewater/industry permit language since it does not apply. Specifically, this section states, *"...the discharge of treated wastewater..."*, and *"...conduct its wastewater treatment..."* when this permit is being issued for Stormwater discharges from an MS4. This language is not necessary and out of place in a stormwater permit.

Appendix A - Annual Report

17. **Comment** - The City objects to the standard Annual Report form since it is not consistent with the requirements of the draft permit. New tasks and requirements are included throughout the annual report and are not included in the body of the permit. TDEC should revise the form to create a match for the requirements in the actual permit so it is a report rather than a continuation of new programs and tasks.

Thank you for the opportunity to comment on this draft Phase 1 Individual NPDES permit. Please contact me at (865) 215-3251 for any questions or clarification. I look forward to working with you on the City of Knoxville's Permit soon.

Sincerely,

David W. Hagerman, P.E.
Stormwater Management