DATE: February 22, 2023
TO: FDEP Biscayne Bay Commission, c/o Noah Valenstein, Chair
FROM: Everglades Law Center and Miami Waterkeeper

Subject: Comments for record pursuant to the FDEP Biscayne Bay Commission's February 15, 2023, public meeting.

This letter memorializes comments by the undersigned organizations for public record. Our comments pertain to the Commission's February 15, 2023, meeting where the Florida Department of Environmental Protection (FDEP) presented its Municipal Separate Storm Sewer System (MS4) permitting program.

The undersigned are pleased to support the Florida Department of Environmental Protection (FDEP)'s efforts to update the MS4 program via issuing a new MS4 permit template. We believe the template is a welcome improvement over the existing permit mechanism. As we showed in our audit of the MS4 Permittees' compliance in Miami-Dade County, both the permit and the Permittees' compliance with it left room for improvement. Our report card and analysis show that more needs to be done to achieve cleaner water.

Everglades Law Center and Miami Waterkeeper have evaluated the draft template MS4 permit. Our draft comments are attached, and the final comments will be forwarded to FDEP by Friday, February 24th, per the National Pollutant Discharge Elimination System (NPDES) Stormwater Program instructions to us. Among our comments, we would like to highlight the following:

- The current MS4 monitoring regime needs to be reassessed. We believe it is not robust or precise enough to discern all pollution hotspots. More targeted monitoring per municipality needs to be done so as to identify problem areas and correct them.
- In our MS4 audit, we found that only 43% of Permittees have a complete map of the stormwater system. We are therefore pleased to see that the new MS4 template requires minor outfall mapping in addition to major outfall mapping, as previously required. We want to reiterate that digitized maps of the stormwater

systems are critical, and that municipality's access to FDEP's digitized map and associated shapefiles will be especially helpful.

- When we met with certain municipalities, we found a stark resource differential between modest-sized locales and large cities. We found that the low-scoring co-permittees tended to have limited budgets and personnel versus larger and better-resourced cities that can afford consultants and budgets to meet the terms and conditions of the permit – and report effectively on their progress. Therefore, it seems more coordination between the FDEP, County, and cities – particularly those with limited staff - may help to share resources and knowledge more equitably. We hope to see under-resourced areas comply "before the fact" if given resources to accomplish robust permit compliance.
- Our organizations wish to reiterate our support for the updated and improved template. Moreover, we support its enforcement; we look forward to assisting the FDEP in taking meaningful actions that ensure consistent compliance to preserve our watershed and way of life.

We thank FDEP's NPDES permitting section and the Biscayne Bay Watershed Commission for engaging with us. Our organizations are pleased to have a meaningful working relationship where we move towards improving the environment and the health of Biscayne Bay for the community.

Sincerely,

Ansley Samson
General Counsel
Everglades Law Center, Inc.

Dr. Rachel Silverstein
Executive Director and Waterkeeper
Miami Waterkeeper

Attachment:

Everglades Law Center, Inc. And Miami Waterkeeper Proposed Draft Comments to FDEP on Phase I MS4 Permit Template, dated February 22, 2023.

Everglades Law Center and Miami Waterkeeper Proposed *Draft* Comments to Florida Department of Environmental Protection regarding Phase I Municipal Separate Storm Sewer System Permit Template (as of February 22, 2023 – subject to change)

Part I. Discharges Under This Permit

B. Permittee Responsibility

PROPOSED COMMENT/ADDITION: Our experience reviewing MS4 permit annual report in Miami-Dade County and our discussions with co-permittees has led us to believe that MS4 co-permittees should be encouraged to develop cooperative arrangements broadly so that better-resourced municipalities are able to support less resourced ones.

Specific text: Add the words, AND OTHER under I.B.2.b.: Implementation of permit-area AND OTHER programs in Part III

II. Stormwater Pollution Prevention and Management Programs

A. Stormwater Management Programs

PROPOSED COMMENT: Written SOPs are not enough. Written SOPs need to be compiled, with all aspects of the Stormwater Management Program (SWMP) consolidated into a *written* Stormwater Management Program that could be a specific part of the "Stormwater Management Master Plan" that many permittees already develop (and referenced elsewhere in the Phase I MS4 Template). The process of having a single written document will on its own raise awareness of the complete SWMP and the ways different aspects of SWMPs complement or interfere with one another.

Specific text: In Section II.A, add the word WRITTEN: [The/Each] permittee shall implement a WRITTEN SWMP that includes use of legal authority, written procedures, operation and maintenance of their MS4, pollution prevention measures, treatment or removal techniques, stormwater monitoring, and other appropriate means to reduce the discharge of pollutants from the MS4 to surface waters of the State to the MEP.

B. Legal Authority

PROPOSED COMMENT: We recognize that the permit template addresses a wide range of MS4s. Specific permits should reflect work that has been completed in prior permit terms with each permittee.

E. Area-specific Plans

PROPOSED COMMENT: The template should provide for "area-specific plans" beyond those developed and/or required because of a completed TMDL or BMAP. The template should specifically allow for area-specific plans developed as part of RAPs/Alternative Restoration Plans. And it should also allow for plans or agreements among co-permittees developed before a RAP or TMDL is finalized that specify joint

responsibilities for permit implementation of expanded stormwater discharge characterization/monitoring; inspections and maintenance; illicit discharge elimination; and development and construction permit reviews.

III. Schedules for Implementation and Compliance

A. Stormwater Management Program

1. MS4 Operations

PROPOSED COMMENT: We previously suggested adding a requirement for Floatables Management, Monitoring and Reporting Stormwater Strategy in prior comments. The FDEP response was that the concept would be added to the Permit Resource Manual. We believe that the development of a strategy to prevent the capture of plastics larger than 5mm should be a required element of the SWMP.

a. Major Outfall Mapping

PROPOSED COMMENT: We previously suggested that permittees be required to submit digitized data in earlier comments, and the FDEP response was that FDEP did not have the authority to require this and had developed its own digitized map.

We appreciate the work that FDEP has done creating a statewide GIS map of stormwater assets. However, this map needs to be used by permittees to be most effective. Will permittees be able to access the map to track system maintenance? To log illicit discharge reports or monitoring data? The ability to combine data from multiple SWMP activities in a GIS system is what will facilitate progress toward meeting water quality standards.

b. Minor Outfall Mapping

We strongly support the addition of minor outfall mapping in the permit template but have the same comment as for major outfall mapping.

c. MS4 inspection and maintenance

PROPOSED COMMENT/ADDITION 1: In response to previous suggestions that septic discharge be explicitly included as an illicit discharge, FDEP variously responded that it was covered as an illicit discharge generally and was regulated by the FDOH. Septic discharges are explicitly mentioned in other states' MS4 permits, and it is appropriate to be explicit in the template that leaking/failing septic tanks can discharge to an MS4, and that those discharges are illicit discharges and must be "effectively prohibited."

Specific text (add the CAPITALIZED TEXT in the bulleted list under Section III.A.1.c): Evaluations of segments or specific components of the MS4 for increased inspection frequencies if they have a history of illicit discharges, illicit connections, or illegal dumping, INCLUDING THE POTENTIAL FOR LEAKAGE OF UNTREATED OR INCOMPLETELY TREATED WASTE FROM SEPTIC SYSTEMS;

PROPOSED COMMENT 2: We appreciate that minor outfalls are added to the template, but they should be inspected no less frequently than annually, like major outfalls.

d. Catch basins, inlets, and grate management

PROPOSED COMMENT/ADDITION: We previously suggested a more detailed inspection and maintenance schedule for catch basins and associated infrastructure. FDEP's response was that these suggestions would be added to the Permit Resource Manual. While we appreciate the change to require a more individualized assessment of catch basins and associated structures in determining appropriate maintenance schedules, the template should specify a higher minimum floor of inspections, no less than ANNUALLY and ensure that catch basins, inlets, or grates that are more than 25% full are cleaned out.

Part III.A.2 Roadways and Public Use Areas

a. Street Sweeping

PROPOSED COMMENT: We understand that this permit applies broadly to municipalities with widely varying levels of development. In MS4s in Miami-Dade County, based on current co-permittee activities, we believe the permit should specify a minimum frequency for street sweeping that is no less than monthly.

b. Litter Control Programs

PROPOSED COMMENT: We understand that this permit applies broadly to municipalities with widely varying levels of development. In MS4s in Miami-Dade County, based on current co-permittee activities, we believe the permit should specify a minimum frequency for litter collection that is no less than weekly.

Part III.A.3. Stormwater Management

PROPOSED COMMENT/ADDITION: We suggest adding another lettered paragraph to this subsection based on a requirement from the Washington State Phase I MS4 Permit to incentivize continuing reductions in stormwater pollution in areas discharging to impaired waters, where stormwater discharges likely contribute to impairments.

Specific text (add the entire paragraph d):

d. Stormwater Pollution Improvement
As part of its SWMP, each Permittee shall implement a Stormwater Pollution Continuing Improvement Program to prevent or reduce impacts caused by discharges from the MS4, where stormwater discharges are likely contributing to water quality impairments. Impacts that shall be addressed include disturbances to watershed hydrology and stormwater pollutant discharges. The program shall consider impacts caused by stormwater discharges from areas of existing development; including runoff from highways, streets, and roads owned or operated by the Permittee; and areas of new development, where impacts are anticipated as development occurs.

The program shall address impacts that are not adequately controlled by the other required actions of the SWMP.

i. The program shall consider the following projects:

(a) New flow control facilities,
(b) New treatment (or treatment and flow control) facilities,
(c) New LID BMPs,
(d) Retrofit of existing treatment and/or flow control facilities,
(e) Property acquisition for water quality and/or flow control benefits, and
(f) Maintenance with capital construction costs.

ii. Permittees should consider other projects to address impacts, such as:

(a) Restoration of riparian buffers,
(b) Restoration of forest cover,
(c) Floodplain reconnection,
(d) Permanent removal of impervious surfaces, and
(e) Other actions to address stormwater runoff into or from the MS4 not otherwise required in Section III.A.3.

iii. The Stormwater Pollution Continuing Improvement Program may also include a program designed to implement small-scale projects that are not planned in advance.

REPORTING

- Each Permittee's SWMP Plan shall describe the Stormwater Pollution Continuing Improvement Program.
- With each Annual Report, each Permittee shall provide a list of planned projects scheduled for implementation during the Permit term for the purpose of meeting the requirements of Part III.A.3.d.
- No later than the year 4 Annual Report, each Permittee shall achieve 300 Program Points, calculated per Appendix XX [detailing points per type of projects].

a. Comprehensive Planning and Development

PROPOSED COMMENT/ADDITION: Based on our review of different Miami-Dade County Permittees' Stormwater Management Master Plans, there seemed to be confusion about whether these are required, when they are required, and what they are required to discuss.

Specific text (add references noted in the capitalized text): Maintain a list of stormwater capital improvement projects proposed by the Stormwater Management Master Plan [REFERENCE THE LAWS AND REGULATIONS THAT REQUIRE THIS DOCUMENT], basin master planning studies, or other flood control projects being considered by the permittee.

b. Land Use Development Regulations and Stormwater Ordinances Review

PROPOSED COMMENT/ADDITION 1: For the MS4 permit to minimize pollution to the MEP with the goal of meeting water quality standards, regulations must at least account for water quality impairments.

Specific text (add capitalized text): Ensure stormwater attenuation and treatment requirements in local land-use planning and development codes and regulations TAKE INTO ACCOUNT WATER QUALITY STANDARDS AND ANY APPROPRIATE TMDL, BMP, AND RAP/ALTERNATIVE RESTORATION PLAN REQUIREMENTS, AND are at least as stringent as the requirements set forth in the Environmental Resource Permit (ERP) rules of the applicable Water Management District…

PROPOSED COMMENT/ADDITION 2: The MEP standard has been interpreted across the United States to require the implementation of LID/GSI.

Specific text (add capitalized text): The review shall also include the identification of existing language that may be prohibitive of low impact development (LID), green stormwater infrastructure (GSI), or adherence to the principles of the UF/IFAS Florida Friendly Landscaping (FFL) program; and identify changes that would promote or incentivize LID, GSI, and FFL principles. THE INTENT SHALL BE TO MAKE LID, GSI AND FFL PRINCIPLES THE PREFERRED AND COMMONLY-USED APPROACH TO SITE DEVELOPMENT. THE LOCAL DEVELOPMENT-RELATED CODES, RULES, STANDARDS, OR OTHER ENFORCEABLE DOCUMENTS SHALL BE DESIGNED TO MINIMIZE IMPERVIOUS SURFACES, NATIVE VEGETATION LOSS, AND STORMWATER RUNOFF IN ALL TYPES OF DEVELOPMENT SITUATIONS, WHERE FEASIBLE.

c. Post-construction Stormwater Management

PROPOSED COMMENT: This newly added discussion of post-construction stormwater management is critical; we strongly support it.

Part III.A.4. Pesticide, Herbicides, and Fertilizer

PROPOSED COMMENT: We understand this template covers a wide range of permittees. Specific MS4 permits such as Miami-Dade County should reflect the specific status of ordinance development/implementation in their jurisdiction.

Part III.A.5. Illicit Discharges

b. Illicit Discharge Detection and Elimination (IDDE)

PROPOSED COMMENT/ADDITION (add capitalized text): Implement a program(s) to detect and eliminate illicit discharges/connections to the MS4 through proactive inspections and investigations of reported illicit discharges/connections INCLUDING THE INFLOW AND INFILTRATION OF TREATED OR PARTIALLY TREATED WASTE FROM OSTDS/SEPTIC SYSTEMS BOTH BY WAY OF ABOVE-GROUND FLOW AND SUBSURFACE FLOW (E.G. INTO BROKEN PIPES OR SUBMERGED EXFILTRATION TRENCHES).

d. Prevention of Sanitary Sewer Contamination

PROPOSED COMMENT/ADDITION: We note that subsection d. does not cover septic systems because it refers to a rule that excludes them. We recognize this permit template covers a broad range of potential permittees and OSTDS/septic systems are not in use in all areas of the state/MS4s. However, where they are, they can be a significant contributor to illicit discharges to the MS4 and should be expressly identified as such to ensure permittees take the needed steps to address these illicit discharges. EPA has identified septic systems as illicit discharges to be addressed in MS4 permits (i.e., they are appropriately included in MS4 permits as well as in any DOH regulations). The issue is not simply about bacterial contamination, but also nutrient pollution. We thus propose the addition of a new subsection in the template to be included in permits for MS4s that include a significant number of septic systems and waters impaired by nutrients and/or bacterial pollution.

Specific text addition (entire new paragraph e, as laid out below):

e. Effective Prohibition of Infiltration and Inflow from OSTDS/Septic Systems
Establish a monitoring and inspections protocol to assess and determine whether, when, and where septic systems (Onsite Treatment and Disposal Systems, OTSDSs) are making illicit discharges into the system, including, as necessary, a septic tracer study.

The program shall consist of:

- Activities to identify areas with concentrations of OSTDS/septic systems failing or at risk of failing and discharging into the MS4;
- Activities to monitor the impact of failing septic tanks on water quality in the MS4;
- Dedicated personnel and resources to implement the program; and
- A written SOP that describes the aforementioned items.

REPORTING
In the Year 1 Annual Report provide:

- A sampling protocol designed to evaluate the effects of failing septic systems on MS4 water quality.

In the Year 3 Annual Report provide:

- The number of failing and at-risk-of failing septic tanks within the MS4 jurisdiction.
- The number of failing and at-risk-of failing septic tanks in close enough proximity to components of the MS4, including exfiltration trenches and outfalls, to have the potential to impact water quality in the MS4 and receiving waters.
- Monitoring and sampling data in identified priority areas designed to evaluate the effects of failing septic systems on MS4 water quality.

8. Public Education

PROPOSED COMMENT: We understand that this template covers a wide range of municipalities, not all of which contain OSTDSs/septic systems. However, permits for MS4s that contain septic systems should address public education about the impacts of septic pollution on water quality and appropriate maintenance of septic systems. The impacts are not only bacterial pollution but also nutrient pollution.

Part IV. Numeric Effluent Limitations

PROPOSED COMMENT/ADDITION: Other states have developed innovative approaches in their MS4 permits to reduce violations of water quality standards and reduced stormwater pollution to the MEP. We suggest an approach from the Washington State MS4 permit. The proposed addition below represents a balanced approach as it says the permit doesn't authorize violations of water quality standards, but that a permittee remains in compliance as long as a process for ensuring long-term compliance is complied with.

Specific addition (all text below):

A. Violations of Water Quality Standards Not Authorized

This Permit does not authorize a discharge which would be a violation of Florida's Surface Water Quality Standards (Chapter 62-302 FAC). The required response to such discharges is described below.

B. How to Remain in Compliance with This Permit if a Discharge Causes or Contributes to a Water Quality Stanard Violation

A Permittee remains in compliance with this permit despite any prohibited discharges when the Permittee undertakes the following response toward long-term water quality improvement:

1. A Permittee shall notify the Department in writing within 30 days of becoming aware, based on credible site-specific information that a discharge from the MS4 owned or operated by the Permittee is causing or contributing to a known or likely violation of water quality standards in a receiving water. Written notification provided under this subsection shall, at a minimum, identify the source of the site-specific information, describe the nature and extent of the known or likely violation in the receiving water, and explain the reasons why the MS4 discharge is believed to be causing or contributing to the problem. For ongoing or continuing violations, a single written notification to the Department will fulfill this requirement.

2. In the event that the Department determines, based on a notification provided or through any other means, that a discharge from a MS4 owned or operated by the Permittee is causing or contributing to a violation of water quality standards in a receiving water, the Department will notify the Permittee in writing that an adaptive management response as described, below, is required unless and until:

a. The Department also determines that the violation of water quality standards is already being addressed by a Total Maximum Daily Load (TMDL), Basin Management Action Plan (BMAP), Reasonable Assurance Plan (RAP), or other enforceable water quality cleanup plan; or

b. The Department concludes the MS4 contribution to the violation will be eliminated through implementation of other permit requirements.

3. Adaptive Management Response

a. Within 60 days of receiving a notification under Part IV.B.2. of this Permit, or by an alternative date established by the Department, the Permittee shall review its SWMP and submit a report to the Department. The report shall include:

i. A description of the operational and/or structural BMPs that are currently being implemented to prevent or reduce any pollutants that are

causing or contributing to the violation of water quality standards, including a qualitative assessment of the effectiveness of each BMP.

ii. A description of potential additional operational and/or structural BMPs that will or may be implemented on a site-specific basis to prevent or further reduce any pollutants that are causing or contributing to the violation of water quality standards.

iii. A description of the potential monitoring or other assessment and evaluation efforts that will or may be implemented to monitor, assess, or evaluate the effectiveness of the additional BMPs.

iv. A schedule for implementing the additional BMPs including, as appropriate: funding, training, purchasing, construction, monitoring, and other assessment and evaluation components of implementation.

b. The Department will, in writing, acknowledge receipt of the report within a reasonable time and notify the Permittee when it expects to complete its review of the report. The Department will either approve the additional BMPs and implementation schedule or require the Permittee to modify the report as needed to meet MEP on a site-specific basis. If modifications are required, the Department will specify a reasonable time frame in which the Permittee shall submit and the Department will review the revised report.

c. The Permittee shall implement the additional BMPs, pursuant to the schedule approved by the Department, beginning immediately upon receipt of written notification of approval.

d. The Permittee shall include with each subsequent Annual Report a summary of the status of implementation, and the results of any monitoring, assessment or evaluation efforts conducted during the reporting period.

e. This adaptive management process is not intended to create a shield for the Permittee from any liability it may face under 42 U.S.C. 9601 et seq.

Part V. Total Maximum Daily Loads

A. TMDL Prioritization

1. Prioritization Plan

PROPOSED COMMENT: We understand this permit template applies to a broad range of permittees. We note that individual MS4 permits should be tailored to specifically reflect the status of TMDL prioritization and implementation to ensure continuing progress.

2. Alternative Restoration Plans

PROPOSED COMMENT: We appreciate the statement that "The permittee may prioritize a Category 5 impaired WBID(s) in lieu of a TMDL waterbody, provided the waterbody is not identified on the DEP TMDL workplan or the TMDL draft list for development, and the permittee prioritizes the WBID(s) for the development of an Alternative Restoration Plan as described in the Department's Guidance on

Developing Water Quality Restoration Plans as Alternatives to Total Maximum Daily Loads – Assessment Category 4b and 4e Plans (October 2021, or current version)."

B. Prioritized Non-Bacterial TMDLs

PROPOSED COMMENT/ADDITION: Prioritized Alternative Restoration Plan/RAP waterbodies should have the same requirements for the development of heightened monitoring for source identification.

Specific text (add capitalized text):

B. Prioritized Non-bacteria TMDLs
This section applies to prioritized TMDL waterbodies OR IMPAIRED WATERS PRIORITIZED PURSUANT TO PARAGRAPH A.2 with a pollutant of concern other than bacteria.

The permittee shall address the WLA for the associated TMDL waterbody OR IMPAIRED WATERS PRIORITIZED PURSUANT TO PARAGRAPH A.2 through implementation of activities to evaluate and reduce the contribution of the pollutant of concern discharged from the MS4.

The permittee shall develop an MS4 Pollutant Loading Evaluation Plan and a TMDL Implementation Plan OR ALTERNATIVE RESTORATION/RAP IMPLEMENTATION PLAN as described below.

1. MS4 Pollutant Loading Evaluation Plan
Implement a plan to conduct, facilitate, or coordinate monitoring and/or modeling of the prioritized TMDL waterbody OR IMPAIRED WATERS PRIORITIZED PURSUANT TO PARAGRAPH A.2 in order to evaluate the contribution of the pollutant(s) of concern by the MS4, and load reductions achieved in relation to the WLA….

A written plan consisting of Storm Event Outfall Monitoring, Pollutant Load Reduction Modeling, or Targeted Water Quality Monitoring as described below, shall be submitted to the Department within six months of TMDL Prioritization Plan approval. Data collected from the plans shall be used along with other relevant data, such as load reduction data from BMPs that have been implemented in the MS4 drainage basins that discharge to the TMDL waterbody OR IMPAIRED WATERS PRIORITIZED PURSUANT TO PARAGRAPH A.2, to evaluate progress over time toward addressing the MS4 WLA in the TMDL waterbody OR IMPAIRED WATERS PRIORITIZED PURSUANT TO PARAGRAPH A.2.

….
b. Pollutant Load Reduction Modeling

Conduct Pollutant Load Reduction Modeling to obtain estimates of annual pollutant loadings from stormwater runoff as influenced by land-use, stormwater management

practices, and other determinants within MS4 drainage areas that discharge to a TMDL waterbody OR IMPAIRED WATERS PRIORITIZED PURSUANT TO PARAGRAPH A.2. The model shall, at a minimum, include the following inputs:

C. Prioritized Bacterial TMDLs

PROPOSED COMMENT: We understand this permit template applies to a broad range of permittees. However, we note that individual MS4 permits should be tailored to specifically reflect the status of TMDL prioritization and implementation to ensure continuing progress. Miami Dade County co-permittees have been engaged in this process for bacteriological control plans, and the renewed permit should assure continuing progress.

Part VI. Evaluation of the SWMP

A. Assessment Program

3. SWMP Evaluation

PROPOSED COMMENT: Although this permit language is strong, we note that past annual reporting in Miami-Dade County co-permittees has not demonstrated sufficient (or sometimes any) analysis by all co-permittees. Enforcement of permit provisions is critical to ensure progress in reducing stormwater pollution and meeting water quality standards.