



May 19, 2025

VIA ELECTRONIC SUBMISSION

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
Washington, DC 20460

Re: National Pollutant Discharge Elimination System (NPDES) 2026 Issuance of the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Docket No. EPA-HQ-OW-2024-0481.

Dear Administrator Zeldin:

On December 13, 2024, the United States Environmental Protection Agency (EPA) published a notice and request for comment on the NPDES 2026 Issuance of the Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity¹ This letter constitutes the Office of Advocacy's (Advocacy) public comments on the EPA's 2026 MSGP.

Advocacy is concerned that the EPA has not fully complied with the Regulatory Flexibility Act (RFA)² by not treating the 2026 MSGP as a rule and properly evaluating its impacts on small entities. The EPA should also not move forward with the 2026 MSGP's new requirements for per- and polyfluoroalkyl substances (PFAS) and 6PPD-quinone which impose unnecessary regulatory burdens on small entities. Advocacy strongly recommends the 2026 MSGP be withdrawn until these issues are addressed.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The

¹ 89 Fed. Reg. 101000 (Dec. 13, 2024).

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ Additionally, Section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶ If a rule is not expected to have a significant economic impact on a substantial number of small entities, agencies may certify it as such and submit a statement of the factual basis for such a determination that adequately supports its certification.⁷

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁸ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.⁹

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."¹⁰

B. The Proposed Rule

The proposed rule seeks comment on the 2026 MSGP. Once finalized, the 2026 MSGP will replace the 2021 MSGP.¹¹

The Clean Water Act prohibits discharging pollutants from a point source into waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. In 1987, Congress expanded the NPDES program to include industrial stormwater runoff, whether discharged directly into waters of the United States or through municipal storm sewer systems. This led to a significant increase in the number of industrial facilities that needed NPDES permits to continue operating.

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 609.

⁶ *Id.*

⁷ *Id.* § 605(b).

⁸ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

⁹ *Id.*

¹⁰ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

¹¹ The 2021 MSGP became effective on March 1, 2021, and expires on February 28, 2026, at midnight. *See* 89 Fed. Reg. 101002 (Dec. 13, 2024).

In response, the EPA established the MSGP in 1994. This new permit provided NPDES permit coverage for a wide range of industrial activities, grouped by industrial sector. The MSGP is reissued every five years, consistent with the Clean Water Act time limit for NPDES permits. The MSGP covers those areas where the EPA has NPDES permitting authority and serves as a model for the states to which the EPA has delegated permitting authority. The policy changes in each MSGP revision are often reflected in state programs.

To operate under the MSGP, a permittee submits a Notice of Intent (NOI). An NOI is a notice to the NPDES permitting authority, not an application. By signing and submitting the NOI, the permittee certifies that the discharge meets all the eligibility conditions specified in the MSGP and that the permittee intends to follow the terms and conditions of the permit. In general, coverage of the permit starts 30 days after the EPA notifies the permittee that it has received a complete NOI, unless the EPA takes affirmative action to deny or delay the permit.

II. Advocacy's Small Business Concerns.

The Office of Advocacy held a roundtable on January 30, 2025, to discuss the 2026 MSGP with small entities and their representatives. Small businesses from multiple sectors attended the roundtable and expressed concerns about the process by which the 2026 MSGP was developed and new regulatory requirements that EPA added in the permit.

Advocacy is concerned by the fact that the 2026 MSGP did not undergo interagency review under Executive Order 12866. Additionally, as Advocacy has stated in prior comments¹², the MSGP is a rule because of its nationwide scope, and it should be treated as such. The EPA should also evaluate whether the 2026 MSGP would have a significant impact on a substantial number of small entities as well as the possible need for a Small Business Advocacy Review (SBAR) panel. Finally, new reporting requirements in the 2026 MSGP place unnecessary regulatory burdens on small entities.

Each of these issues is explained further in the following subsections.

A. The 2026 MSGP Should have Undergone Interagency Review.

Advocacy strongly maintains that the 2026 MSGP should have undergone interagency review at the Office of Information and Regulatory Affairs (OIRA). Since the EPA began issuing the MSGP in 1995, all draft permits have been submitted to the OIRA and had the benefit of interagency review. However, when Advocacy contacted EPA prior to the issuance to the 2026 MSGP to inquire whether it would be submitted to the OIRA, the EPA did not respond until the draft permit was posted on the agency's website. The 2026 MSGP never went through interagency review.

¹² See U.S. Small Bus. Admin., Off. of Advocacy, Comment Letter on Proposed Rule for 2020 National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges Associated with Industrial Activity (June 1, 2020), <https://www.regulations.gov/comment/EPA-HQ-OW-2019-0372-0167>.

The interagency review process not only provides a valuable opportunity for fellow federal agencies to weigh in on regulatory matters, but it also allows the public the chance to meet with both OIRA and EPA personnel to discuss issues before actions are proposed in the Federal Register.

According to the OIRA's website, evidence-based meetings requested by the general public under Executive Order 12866, *Regulatory Planning and Review*,¹³ are "most useful" to the federal government when they allow the public to reflect on their "lived experiences with government policies."¹⁴ The OIRA further points out that these meetings can be used to "point out issues of importance, emphasize the value of alternative approaches and/or substitute language, and help decision-makers appreciate the strengths of other solutions than those proposed."¹⁵

By not submitting the 2026 MSGP to interagency review, the EPA denied itself the opportunity to gather beneficial information for the development of its proposed permit. Further, a coalition of groups representing small entities contacted Advocacy to ask when the 2026 MSGP would be sent to OIRA for interagency review. This coalition, which includes small entities from multiple industrial sectors, presented the EPA with questions about the data underlying the 2026 MSGP on multiple occasions dating back to 2022.¹⁶ The choice to bypass interagency review and forego the opportunity to gather input through EO 12866 meetings effectively denied the EPA a chance to address underlying data issues which should have been resolved prior to the publication of the 2026 MSGP.

Advocacy strongly recommends the EPA withdraw the 2026 MSGP and resubmit any future draft permits to the OIRA for interagency review.

B. The MSGP is a Rule and Should be Treated as Such.

The Office of Advocacy has consistently maintained that MSGPs are rules under the RFA.¹⁷ The EPA disagrees and states that a general permit is issued as an adjudication, not a rulemaking. In EPA's view, "the fact that an NPDES general permit may apply to a large number of different dischargers does not convert it from a permit into a rule."¹⁸

The Administrative Procedure Act (APA) defines a rule as "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy. . ."¹⁹ and defines a rulemaking as the agency's process for "formulating, amending, or repealing a rule."²⁰ Section 553 of the APA requires that general notice of proposed rulemaking be

¹³ 58 Fed. Reg. 51735 (Oct. 4, 1993).

¹⁴ See Off. of Info. & Regul. Aff., *How To Guide for E.O. 12866 Meetings*, <https://www.reginfo.gov/public/do/eo/eomHowTo> (last accessed Mar. 28, 2025).

¹⁵ *Id.*

¹⁶ See Small Bus. Low Risk Coal., Comments on Multi-Sector General Permit (MSGP) Request #2 (Jan. 7, 2025), <https://www.regulations.gov/comment/EPA-HQ-OW-2024-0481-0168>.

¹⁷ See U.S. Small Bus. Admin., Off. of Advocacy, *supra* note 13.

¹⁸ 63 Fed. Reg. 36490 at 36497 (July 6, 1998).

¹⁹ 5 U.S.C. §551(4).

²⁰ *Id.* §551(5).

published in the Federal Register. This notice must include a statement of the time, place and nature of rulemaking proceedings, reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved.

The EPA's 2026 MSGP fits squarely into the definition of a rule under the APA. First, the 2026 MSGP is an agency statement of general applicability and future effect. A statement of "general applicability," in contrast to a statement of "particular applicability," applies to all that meet the stated criteria. The 2026 MSGP covers stormwater discharges from industrial facilities in 30 sectors across the EPA's Regions 1 through 10. It is not limited to named parties nor parties that are already members of the class, so it is a policy of "general applicability." It is also of "future effect," since it will replace the existing MSGP upon its expiration at midnight on February 28, 2026²¹ and remain in effect for five years. The draft 2026 MSGP is designed to implement and prescribe law. Under Section 402(p) of the Clean Water Act, the EPA is required to develop a phased approach to regulate stormwater discharges under the NPDES. The EPA lists Section 402(p) as the statutory authority under which it proposes this MSGP.

The U.S. Court of Appeals for the D.C. Circuit has disagreed with the EPA's interpretation of a rule in similar circumstances. In *National Association of Home Builders v. Corps of Engineers*, the court held that nationwide permits (NWP) issued by the Army Corps of Engineers under Section 404 of the Clean Water Act "fit easily" into the APA's definition of a "rule."²² Like the EPA, the Army Corps of Engineers contended that NWPs should instead be classified as "adjudications" under the APA because they were formulations of an "order," which includes "licensing," and a permit is a form of a "license."²³ However, the court rejected the Army Corps' "elaborate statutory construction for the more straightforward one."²⁴

The NWPs which the D.C. Circuit held to be rules and the MSGP are similar in that each authorizes permittees to discharge under the Clean Water Act, while prohibiting those without a permit from doing so. Despite this, the EPA only recognizes that the "legal question remains a difficult one."²⁵

The Office of Advocacy strongly recommends the EPA withdraw the 2026 MSGP and reissue it as a proposed rule.

C. The EPA Must Analyze the Impacts of the Draft 2026 MSGP on Small Entities.

The RFA requires the EPA to consider the impacts of its rules on small entities. As part of that consideration, the EPA must identify the affected industries and the number of small entities in those industries. Recognizing the 2026 MSGP as a rule will allow the EPA "to strengthen the efficiency of any final MSGP by fully engaging with small entities and understanding how small

²¹ 89 Fed. Reg. 101002 (Dec. 13, 2024).

²² *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'r*, 417 F.3d 1272, 1284-85 (DC Cir. 2005).

²³ *Id.*

²⁴ *Id.*

²⁵ 74 Fed. Reg. at 8791 (Feb. 26, 2009).

entities participate in the MSGP regulatory program.”²⁶ Additionally, President Trump’s Executive Order 14219, *Ensuring Lawful Governance and Implementing the President’s “Department of Government Efficiency” Deregulatory Initiative*, specifically directs agencies to identify “regulations that impose undue burdens on small business and impede private enterprise and entrepreneurship.”²⁷

Upon recognizing the 2026 MSGP as a rule, the EPA has two options for moving forward. The first option is to initiate the processes for a SBREFA panel under Section 609(b), in preparation for an initial regulatory flexibility analysis (IRFA). After public comment on the IRFA, the EPA could move forward with development of a final regulatory flexibility analysis supporting promulgation of the 2026 MSGP.

The EPA’s second option is to issue as final only those elements of the 2026 MSGP that it can certify will not have a significant economic impact on a substantial number of small entities. However, according to the EPA’s cost impact analysis for the 2026 MSGP, the agency “does not currently collect data on number of employees or annual receipts of entities that may seek coverage under the MSGP. Therefore, it is not possible for EPA to estimate the proportion of these costs that will be incurred by smaller facilities.”²⁸ Without data on the number of affected entities, the EPA cannot properly certify that the rule would not have a significant economic impact on a substantial number of small entities and must prepare an IRFA.

It is possible for the EPA to obtain the data necessary to analyze the impacts of the 2026 MSGP on small entities. The permit already identifies affected sectors, and Appendix D summarizes the affected industries,²⁹ but there is no estimate of the number of affected small entities in the draft permit. If the EPA lacks administrative data on these industries, they should use data published by the U.S. Census Bureau as part of the Statistics of U.S. Businesses (SUSB) to identify the number of affected small entities and their sizes. As a starting point, the EPA can identify the number of small entities in each industry by using the size standard in SBA’s Table of Size Standards that correspond with the appropriate firm size class in the data.

As the permit has direct effects on small entities in select states, the EPA may narrow the analysis to affected entities in those states. SUSB has data on business size, states, and six-digit North American Industrial Classification System (NAICS) codes but does not publish a single table that breaks down firms by all these variables. State-level firm size data is available publicly at the sector level but not industry specific due to disclosure avoidance. However, the EPA could request from the Census Bureau, through a special tabulation, access to more granular data. If the EPA cannot access granular data with the number of small entities by state and detailed industry, the number of affected small entities could be estimated by reasonably assuming the national

²⁶ Astrika Wilhelm Adams, *What’s in a Name? A Rule Called a Permit is Still a Rule*, 35 TUL. ENV’T L. J. 27, 44 (2022), <https://journals.tulane.edu/elj/article/view/3760>.

²⁷ 90 Fed. Reg. 10583 (Feb. 25, 2025).

²⁸ U.S. ENV’T PROT. AGENCY, COST IMPACT ANALYSIS FOR THE PROPOSED 2026 MULTI-SECTOR GENERAL PERMIT (MSGP) 8 (Jan. 21, 2025) <https://www.regulations.gov/document/EPA-HQ-OW-2024-0481-0176>.

²⁹ U.S. ENV’T PROT. AGENCY, 2026 MSGP: PROPOSED APPENDIX D – FACILITIES AND ACTIVITIES COVERED, <https://www.epa.gov/system/files/documents/2024-12/proposed-2026-msgp-appendix-d-facilities-and-activities-covered.pdf> (last accessed Mar. 28, 2025).

distribution of firm sizes applies in the affected states. The EPA could also make assumptions on the percentage of entities in an affected industry with stormwater discharges using past permit data.

The Office of Advocacy strongly recommends the EPA withdraw the 2026 MSGP to analyze its impacts on small entities, in accordance with existing law and EOs.

D. New Requirements Proposed in the 2026 MSGP Will Impose Unnecessary Burdens on Small Entities

The EPA has specifically requested comment on requiring PFAS indicator monitoring as well as monitoring requirements for 6PPD-quinone.³⁰ With both chemicals, the EPA is still gathering information on what regulatory course of action the agency should take. On PFAS, the EPA's website has a section on "what we don't fully understand yet" and notes that "EPA's researchers and partners across the country are working hard to answer critical questions about PFAS."³¹ On 6PPD-quinone, the EPA closed the comment period on an Advanced Notice of Public Rulemaking on March 24, 2025,³² and has not issued any sort of final regulation.

Until the EPA determines its own regulatory strategy on PFAS and 6PPD-quinone, the agency should not place additional requirements on small entities. Requiring small entities to monitor for substances before specific regulations are in place will burden small entities without any understanding of how the information they gather will be used. Additionally, asking small entities to collect data for potential standards that have not yet been established based on science that is still in progress generates additional costs for small businesses without any corresponding benefits.

The Office of Advocacy recommends the EPA not include new monitoring requirements for PFAS or 6PPD-quinone in the 2026 MSGP.

III. Conclusion

Advocacy recommends the EPA withdraw the 2026 MSGP. EPA should further consider any future iteration of the 2026 MSGP to be a rule and properly analyze its impacts on small entities. Finally, new monitoring requirements for PFAS and 6PPD-quinone should not be added to future permits.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or by email at nick.goldstein@sba.gov.

³⁰ 89 Fed. Reg. 101002 (Dec. 13, 2024).

³¹ U.S. Env't Prot. Agency, *PFAS Explained*, <https://www.epa.gov/pfas/pfas-explained> (last updated Oct. 3, 2024).

³² 90 Fed. Reg. 5798 (Jan. 17, 2025).

Sincerely,

/s/

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/s/

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Copy to: Mr. Jeffrey B. Clark, Sr. Acting Administrator
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