Appeal No. APL-2014-00095

To be argued by:
STEVEN C. WU
30 minutes requested

Supreme Court, Westchester County, Index No. 16132/10

State of New York
Court of Appeals

In the Matter of the Application of

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules

-against-

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent-Respondent.

BRIEF FOR RESPONDENT

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Dated: December 18, 2014

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PRELIMINARY STATEMENT

The issue in this case is whether the New York State Department of Environmental Conservation (DEC) reasonably exercised its judgment and complied with state and federal law in adopting a General Permit that controls stormwater discharges from more than five hundred small municipal separate storm sewer systems (MS4s) in New York. Regulating stormwater discharges poses unique challenges. There are more than fifty thousand discharge points from MS4s. And unlike with other discharges regulated under federal and state law, the rain and snow that cause stormwater discharges cannot be stopped or controlled, and the pollution that this discharge carries is caused by many unregulated parties.

Because of the formidable challenges that regulating stormwater discharges presents, both federal and state law authorize permitting authorities such as DEC to employ a distinctive regulatory model that primarily relies on (a) general, rather than site-specific, permits that set broadly applicable standards for the small municipalities that own and operate

MS4s; and (b) best management practices and other measures that allow municipalites to control the introduction of pollutants *into* stormwater sewer systems, rather than effluent limitations that control the discharge of pollutants *out of* these systems.

New York's General Permit follows this model. The General Permit includes many specific prescriptions that small municipalities must follow. But because of the unique circumstances that each municipality faces and the valuable role that local governments play as partners in controlling stormwater pollution, the General Permit also allows municipalities to retain a certain amount of discretion in designing programs to implement the General Permit's mandatory "minimum control measures" and best management practices. And the public has a substantial opportunity to contribute to and comment on the General Permit's control measures and a municipality's plan to control stormwater.

Both DEC and the federal Environmental Protection Agency (EPA) have determined that this regulatory model controls stormwater discharges from small MS4s to the "maximum extent

practicable," the unique and flexible standard that both federal and state law uses to measure the efficacy of MS4 regulation. Eight environmental organizations (collectively referred to here by the name of the lead petitioner, Natural Resources Defense Council, Inc. or NRDC) disagree, contending that DEC must replace local discretion and judgment with top-down commands, and generalized permitting with individualized permit reviews and hearings. The Appellate Division, Second Department rejected these arguments and upheld DEC's permit. This Court should affirm.

QUESTIONS PRESENTED

1. Was DEC's determination to extend coverage to small municipalities through a General Permit for stormwater discharge reasonable?

2. Was DEC's determination regarding the extent of public participation provided under the General Permit reasonable?

3. Was DEC's determination regarding the amount and type of monitoring required under the General Permit reasonable?

4. Is DEC's approach for ensuring that municipalities comply with water quality standards reasonable?

The Appellate Division, Second Department, answered yes to all four questions.

STATEMENT OF THE CASE

A. Regulating Stormwater Runoff Poses Unique Challenges

When rain falls or snow melts, municipal separate storm sewer systems[1] (MS4s) convey the resulting stormwater away from the surface through a system of storm drains, gutters, ditches, and man-made channels. Because stormwater runoff in urban areas passes over roads, parking lots, rooftops, construction sites, and other surfaces, it can pick up chemicals, sediment,

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[1] MS4s are systems designed to carry only stormwater. Each municipality that operates or controls an MS4 in an urbanized area must obtain coverage for stormwater discharges under the General Permit. (A. 259, 261.) Final Rule, National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,723-24, 68,736 (Dec. 8, 1999); 40 C.F.R. §§ 122.26(b)(8), (16), 122.32.

trash, and other debris as it travels. This collected runoff is ultimately discharged into waterways such as rivers, lakes, and other bodies of water.[2]

This litigation involves MS4s owned and operated by small local municipalities—those with fewer than 100,000 residents.[3] Regulating stormwater discharges from small MS4s presents unique challenges. The federal Clean Water Act's central regulatory mechanism is its prohibition against the discharge of pollutants, absent a permit that places "limits on the type and quantity of pollutants that can be released."[4] But that discharge prohibition cannot be applied straightforwardly to MS4s. Unlike an industrial plant that can control, or even terminate, the discharge of wastewater flowing through its pipes, a municipality cannot control or stop the rain and snow that lead to stormwater

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[2] *See* 6 N.Y.C.R.R. § 750-1.2(a)(87).

[3] 40 C.F.R. § 122.26(b)(8), (16).

[4] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

discharges.[5] As NRDC acknowledges, municipal storm sewers "cannot cease to operate." Br. for Appellants ("App. Br.") at 18 n.34.

In addition, the sheer scale and complexity of MS4s make end-of-pipe effluent limitations difficult to apply. There are more than five hundred MS4s in New York State, with more than fifty thousand discharge points. (A. 164-165.) Stormwater that flows through an MS4 is intermittent and highly variable, peaking at unpredictable times with storms or heavy snowmelts.[6] And the boundaries of the MS4s do not map cleanly onto political boundaries—drainage from one stormwater system may be routed through different MS4s that are owned by different cities and towns; and different MS4s might discharge into each other,

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[5] *See* 64 Fed. Reg. at 68,753.

[6] *See* EPA, Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress at B-5–B-8 (March 1995) (EPA 833-K-94-002) (explaining that the length of time pollutants from storms remain in the water depends on the storm's duration, size of the watershed, flow rates, and pollution accumulation in the sediment), *available at* http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=20004CXQ.TXT

making any analysis of causation or compliance with numeric limitations on the discharge of pollutants exceedingly difficult.[7]

For all these reasons, as discussed further below, Congress, the State Legislature, and both EPA and DEC have determined that addressing pollutants at their source, rather than after they enter into MS4s, is a more effective means of regulating stormwater discharge. But this type of regulation raises its own problems. Pollution in stormwater is often caused by activities of third parties, *i.e.*, persons living in and passing through the community, who may not be directly regulated by environmental laws. (A. 774-775.) Moreover, these third-party activities are widely dispersed and difficult to monitor, and could occur outside

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[7] *See* Final Rule, National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges, 55 Fed. Reg. 47,990, 48,040-44 (Nov. 16, 1990); 64 Fed. Reg. at 68,753 ("EPA believes that . . . derivation of numeric water quality-based effluent limitations is significantly complicated . . . . [D]etermining compliance with any such numeric limitations may be confounded by practical limitations in sample collection."); National Research Council, *Urban Stormwater Management in the United States* 28, 100 (2009) (uncertainty and variability inherent in stormwater discharges "make it much more difficult to set precise numeric limits in advance for stormwater sources").

of public view. These activities produce a wide variety of contaminants and debris that are difficult to trace back to the source after they enter into an MS4.

For central permitting authorities such as DEC, the fact that the regulated entities are local governments poses additional difficulties. The municipalities and governmental entities that manage stormwater sewer systems are independent political actors with their own policy views and their own constituents. Moreover, local governments have diverse needs, governance structures, and financial resources, making uniform regulation or centralization of stormwater management impractical.[8] (A. 275.)

B. Federal and State Laws on Stormwater Discharges Grant Substantial Discretion to Permitting Authorities

Both federal and state law responded to the unique difficulties of controlling stormwater discharges by adopting a

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[8] 64 Fed. Reg. at 68,754 (noting the variation among different municipal entities in financing capability); N.Y. State Dep't of State, *Local Government Handbook* 141 (6th ed. 2009) (describing local variations in sewer management).

distinctive regulatory model for MS4s. As originally enacted, the Clean Water Act treated stormwater discharges no differently from other, more traditional discharges.[9] In 1987, Congress enacted the Water Quality Act,[10] which created a new subsection (p) in the Clean Water Act's permitting statute, 33 U.S.C. § 1342, specifically to address stormwater. In this new provision, Congress made a deliberate choice to regulate stormwater discharges from small municipalities under a separate scheme with two central features: (1) the use of best management practices rather than end-of-pipe effluent limitations to control discharges; and (2) the use of general permits rather than individual permits. New York's analogous statute largely duplicates federal law.[11]

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[9] *See NRDC v. Costle*, 568 F.2d 1369, 1381-82 (D.C. Cir. 1977) (holding that EPA lacked authority to exempt stormwater discharges).

[10] Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified in various sections of title 33 of the *United States Code*).

[11] *See* ECL § 17-0808(3)(c).

Best Management Practices. Traditional effluent limitations restrict the type and quantity of pollutants that a source can release. But these limitations are not ideal for regulation of stormwater discharges from municipalities because of the unique characteristics of these discharges. See *supra* at 4-7.

Instead, Congress and the State Legislature chose to focus on measures to control the introduction of pollution *into* the storm sewer system and to decrease water flow *through* the system.[12] Permits for MS4 stormwater discharges thus require not end-of-pipe technologies, but rather "management practices, control techniques and system, design and engineering methods" that protect MS4s from pollutants or excess water flows at the outset.[13] Examples of such management practices include a prohibition on dumping wastewater into MS4s, or a requirement that new

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[12] *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-1165 (9th Cir.) (recognizing that Congress "chose *not* to include a . . . provision [like effluent limitations under 33 U.S.C. § 1311] for municipal storm-sewer discharges") (emphasis added), *amended on denial of rehr'g*, 197 F.3d 1035 (9th Cir. 1999).

[13] 33 U.S.C. § 1342(p)(3)(B)(iii); ECL § 17-0808(3)(c).

construction use more permeable ground cover so that rainwater soaks into the ground instead of carrying pollutants into the MS4.

Congress also enacted a new standard to evaluate the efficacy of these management practices at controlling stormwater discharges. Rather than requiring municipal dischargers to comply with numerical effluent limitations, Congress instead required them to meet the more flexible "maximum extent practicable" standard. Any permit issued for discharges from municipal storm sewers thus "shall require controls to reduce the discharge of pollutants to the maximum extent practicable," using methods such as management practices "as [EPA] or the State determines appropriate for the control of such pollutants."[14]

General Permits. To address the enormous administrative burden of regulating hundreds of MS4s with thousands of discharge points, Congress and the State Legislature also expressly provided that a permitting authority may issue general permits, *i.e.*, permits issued on a "system- or jurisdiction-wide

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[14] 33 U.S.C. § 1342(p)(3)(B)(iii); ECL § 17-0808(3)(c).

basis," for discharges from municipal storm sewers.[15] General permits establish rules that apply to many smaller, similar discharges at once and extend coverage to those discharges when the municipality certifies an intention to comply with the terms of a general permit.[16] The general permit system allows a regulator to establish "adequate environmental safeguards . . . without the administrative and resource burdens involved in an individual permit issuance."[17]

The use of general permits was a considered and deliberate choice by Congress. Prior to the Water Quality Act amendments, EPA had exempted municipalities operating MS4s from regulation under the Clean Water Act, on the grounds that requiring permits

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[15] 33 U.S.C. § 1342(p)(3)(B)(i); *see also* ECL § 17-0808(3)(a); ECL § 70-0117(6) (authorizing general permits).

[16] *See, e.g.*, *Costle*, 568 F.2d at 1381 (citing examples of general permits that agencies had made use of during the years prior to the Water Quality Act of 1987); *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 968 (7th Cir. 2005) (explaining general permit process).

[17] National Pollutant Discharge Elimination System General Permits and Reporting Requirements for Stormwater Discharges Associated with Industrial Activity, 56 Fed. Reg. 40,948, 40,961 (Aug. 16, 1991).

for such municipalities would be infeasible.[18] NRDC challenged EPA's stormwater exemption, specifically arguing that a permit scheme would not be infeasible because EPA could use general permits.[19] The D.C. Circuit agreed with NRDC noting that "[a]reawide regulation is one well-established means of coping with administrative exigency."[20] The Water Quality Act, enacted in response to this decision, followed course by ensuring that general permits were available for regulating stormwater discharges.

Additional Studies. Congress did not prescribe specific management practices or dictate the operation of the general permitting scheme for stormwater discharges from small municipalities. In fact, the Water Quality Act did not require small municipalities to obtain a stormwater discharge permit at all. Instead, Congress directed EPA to conduct a study and to

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[18] *See* Proposed Rules, National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973).

[19] *See NRDC v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *aff'd*, 568 F.2d 1369 (D.C. Cir. 1977).

[20] *Costle*, 568 F.2d at 1381.

issue regulations (1) designating stormwater discharges that, based on its study, EPA believed should be regulated, and (2) establishing a comprehensive program to regulate such discharges.[21] This direction reflected Congress's recognition of the uncertainty over the best way to control stormwater discharges from small MS4s. EPA responded by conducting the required study[22] and promulgating the regulation that serves as the template for the General Permit at issue here, as well as for general permits for MS4s in other States.

C. EPA's Regulations Identify Minimum Control Measures for Small Municipalities to Control Stormwater Discharge to the Maximum Extent Practicable

In its regulations, EPA designed a program for controlling stormwater discharges based on six minimum control measures that are implemented through "best management practices," to be

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[21] 33 U.S.C. § 1342(p)(5)-(6). In contrast, Congress required industrial entities and large municipal storm sewer systems serving a population of 100,000 or more—neither at issue here—to obtain a permit to discharge stormwater runoff. *Id.* § 1342(p)(4).

[22] *See* 64 Fed. Reg. at 68,732.

developed and implemented by small municipalities.[23] EPA "determine[d] that pollutants from wet weather discharges are most appropriately controlled through management measures rather than end-of-pipe numeric effluent limitations" because of the unique challenges of regulating stormwater discharges.[24] And EPA thus provided that a municipality that implements EPA's required "minimum control measures" has complied with the standard of reducing pollutants to the "maximum extent practicable."[25]

EPA recommended, encouraged, and expected state permitting authorities to issue a general permit to cover designated small municipal storm sewers.[26] It anticipated that most municipalities would "obtain coverage" under a general permit by submitting to a state regulator a notice of intent (NOI)

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[23] 64 Fed. Reg. at 68,736, 68,753.

[24] 64 Fed. Reg. at 68,753.

[25] 40 C.F.R. § 122.34(a); 64 Fed. Reg. at 68,754.

[26] 40 C.F.R. § 123.35(h)(2)(i); 64 Fed. Reg. at 68,737, 68,762.

to discharge.[27] In the NOI, municipalities must identify and submit a list of best management practices that will be used, along with "measurable goals for the development and implementation of each [best management practice]."[28]

The NOI filing requirement ensures that "the regulated community is aware of the [permit] requirements and the permitting authority is aware of the potential for adverse impacts to water quality from identifiable locations."[29] The NOI does not create the permitting conditions, *i.e.*, the minimum control measures and required best management practices; those are stated in the general permit.[30] As a result, EPA's regulations did not provide for notice or opportunity to comment on the NOI; however, the regulations did direct municipalities to include the public in development of their plans to control stormwater.[31]

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[27] 64 Fed. Reg. at 68,762.

[28] 64 Fed. Reg. at 68,762.

[29] 64 Fed. Reg. at 68,739.

[30] 64 Fed. Reg. at 68,764.

[31] 64 Fed. Reg. at 68,755.

EPA also expressly rejected proposals to require permitting authorities to approve or disapprove in advance the best management practices and goals set out in a municipality's NOI.[32] Instead, EPA's program allows up to five years, with steady progress reported during that time, for a municipality to develop these practices and goals after the municipality obtains coverage under a general permit.[33] (DEC's General Permit reduces this time to three years (A. 269).) This approach allows EPA, the States, and municipalities to review and revise best management practices as they obtain data and feedback about existing controls.[34] The program also builds in flexibility so that municipalities can optimize their plans based on experience gained and local factors such as storm sewer size, municipal

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[32] 64 Fed. Reg. at 68,755; *see* 40 C.F.R. § 122.28(b)(2)(iv) (providing that coverage may be effective "upon receipt" of the NOI).

[33] 40 C.F.R. § 123.35(e).

[34] 64 Fed. Reg. at 68,753-54. EPA's permitting approach "provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges." 64 Fed. Reg. at 68,788 (quotation marks omitted).

finances and capabilities, climate, hydrology, and geology.[35] In EPA's judgment, this approach strikes an appropriate "balance between the competing goals of providing certainty as to what constitutes an adequate program and providing flexibility to the permittees."[36]

Following issuance of EPA's regulations, the Ninth Circuit entertained a facial challenge to the validity of the regulations and remanded two aspects of the rule regarding small municipalities: the level of review a permitting authority must conduct on an NOI, and the public-participation requirements.[37] The Ninth Circuit did not hold, however, that permits issued

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[35] 64 Fed. Reg. at 68,754.

[36] 64 Fed. Reg. at 68,764.

[37] *Envtl. Defense Center, Inc. v. EPA*, 344 F.3d 832, 853-56 (9th Cir. 2003) ("*EDC*"). NRDC suggests that the Ninth Circuit "vacated" EPA's regulations (Br. at 64) but the decision makes clear that it was "*remand[ing]*" the rule so that "EPA may take appropriate action to comply with the Clean Water Act." *EDC*, 344 F.3d at 879. Actually vacating the rule would have led to less regulation and was not something that the environmental organization petitioners in that case sought. *See* Reply Br. of Pet., *Envtl. Defense Ctr. v. EPA*, 344 F.3d 832 (9th Cir. 2001) (No. 00-70014), 2001 WL 35957448.

pursuant to EPA's regulations were invalid.

Following that remand, EPA has adhered to its regulations,[38] and EPA's regulations remain binding on DEC.[39] Contrary to NRDC's claim (Br. at 64 & n.19), EPA did not advise States that they should no longer rely on its regulations. EPA instead issued informal "interim guidance" indicating that permitting authorities should conduct an "appropriate review" of NOIs; however, EPA did "not believe official 'approval' of NOIs is necessary."[40] In its guidance, EPA has emphasized the "iterative" nature of the "maximum extent practicable" standard and has focused on compiling examples of state-by-state permitting

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[38] *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1082 (9th Cir. 2011), *rev'd sub. nom. Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013).

[39] *Cf. Matter of Shah v. DeBuono*, 257 A.D.2d 256, 260 (2d Dep't 1999) ("neither this Court nor the respondent agencies have the power to rewrite the [federal Medicaid] rules").

[40] James A. Hanlon, Director, Office of Wastewater Management, Memorandum to Wastewater Management Division Directors at 1, 3 (Apr. 16, 2004) ("Hanlon Memorandum").

approaches, rather than setting any new rules or regulations.[41]

D. New York's General Permit Follows the Approach Set Out in EPA's Regulations and Approved by Congress and the Legislature

In accordance with state and federal law and regulation, DEC issued a General Permit for stormwater discharges from small municipalities in 2003.[42] DEC revised and re-issued the General Permit in 2008 for a period of two years. On May 1, 2010,

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[41] *See* Andrew D. Sawyers and Benita Best-Wong, Memorandum to Water Division Directors (Nov. 26, 2014) ("2014 Guidance"); EPA, Municipal Separate Storm Sewer System Permits, Post-Construction Performance Standards & Water Quality-Based Requirements, A Compendium of Permitting Approaches (June 2014) (EPA 833-R-14-003).

[42] 40 C.F.R. § 122.28(b)(2); 6 N.Y.C.R.R. § 750-1.21(d)(1). EPA has reviewed DEC's General Permit (*see* A. 841) and provided only "comments" on the permit; it did not "object" to the oversight role laid out in the permit—which would have stopped the permit from being issued. *See* 40 C.F.R. § 123.44 (providing that EPA has a right to review and object to provisions in a general permit). EPA does not "approve" DEC's permits; not objecting is the most positive response option under the Memorandum of Agreement between EPA and DEC (A. 851-852) and the above regulation.

DEC issued the General Permit at issue in this case. The permit currently covers 559 MS4s.[43]

1. Municipalities must adopt best management practices for each of the minimum control measures in the General Permit

New York's General Permit closely tracks EPA's regulations. The General Permit regulates discharge of stormwater by requiring local governments to develop a Stormwater Management Program that implements forty-four mandatory best management practices grouped into six program components, or "minimum control measures."[44] (A. 281-301, 558-561). Many of the mandatory best management practices are highly specific

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[43] *See* DEC, SPDES Compliance and Enforcement Annual Report for SFY 2013/14, at 13, *available at* http://www.dec.ny.gov/chemical/62557.html (last visited Dec. 11, 2014). (*See also* A. 156.) The 2010 General Permit will expire at the end of April 2015. DEC has publicly noticed a draft renewal of the 2010 Permit. As proposed, the draft renewal permit is an interim permit, effective for only two years instead of the statutory maximum of five years. For a copy of the draft interim general permit and its accompanying fact sheet, see http://www.dec.ny.gov/chemical/41392.html.

[44] *See* 40 C.F.R. § 122.34(b) (enumerating six minimum control measures).

requirements that leave little or no flexibility in implementation to the municipality; others afford some flexibility but are no less clear, enforceable, and effective because of it. As required by EPA,[45] the mandatory minimum control measures are:

(1) *public education* about the impacts of stormwater and the steps that individuals may take to reduce stormwater pollution, such as not dumping chemicals in the street gutters (A. 281);

(2) *public participation* in the development, implementation, review, and revision of the municipality's Stormwater Management Program (A. 283);

(3) *a program for detecting and eliminating "illicit discharges,"* which are discharges composed of non-stormwater that nonetheless enter into MS4s (A. 287-288);[46]

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[45] 40 C.F.R. § 122.34(b).

[46] *See* Center for Watershed Protection, et al., Illicit Discharge Detection and Elimination: A Guidance Manual for

(*continued on next page*)

(4) *a program to control construction site stormwater runoff*, including inspections of construction sites (A. 291) and a requirement that builders implement a municipality-approved Stormwater Pollution Prevention Plan (SWPPP) for their projects that includes erosion and sediment controls (A. 290, 350);

(5) *post-construction stormwater management*, including review of all SWPPPs to ensure that post-construction practices control and treat runoff in compliance with the State's Stormwater Management Design Manual or provide equivalent controls (A. 160-161, 295, 551, 748-750); and

(6) *pollution prevention for municipal operations*, under which the municipality reduces its own contributions of pollutants to the stormwater sewer system. (A. 289-299.)

Program Development and Technical Assessment 91-117 (2004), http://www.epa.gov/npdes/pubs/idde_manualwithappendices.pdf (last visited Oct. 23, 2012).

2. Municipalities obtain coverage by submitting a notice of intent

Under the General Permit, a municipality obtains coverage by submitting an NOI. DEC then reviews the NOI to ensure that the municipality has selected the elements that are required for each control measure specified in the General Permit. (A. 261-262.) "Submitting an NOI is an affirmation that an initial [Stormwater Management Program] has been developed and will be implemented in accordance with the terms of the [General Permit]." (A. 255 (emphasis omitted).) The municipality confirms in the NOI that it agrees to develop the best management practices required by the General Permit, indicates practices that it has identified for implementation, and provides deadlines for each measure to ensure that the program is developed within the required timeframe. (*See* A. 558-561.) Newly covered municipalities must fully implement their plans within three years of obtaining initial coverage under the permit. (A. 269.)

Municipalities covered by the General Permit must file annual reports summarizing their activities during the previous year, providing an assessment of their programs, and

summarizing plans for the next year. (A. 273.) During the municipality's development of the Stormwater Management Program, the General Permit requires that the annual report shall include detailed information about the municipality's development and implementation of required controls, including interim developmental milestones. (A. 281-301, 567-602). When the General Permit is renewed, a municipality already covered by an earlier version of the General Permit is not required to file a new NOI; instead, the municipality may continue its coverage by filing an annual report that describes its ongoing progress in complying with the General Permit's requirements. (*See* A. 261.)

The General Permit's procedure for applying and continuing coverage to municipalities is similar to that followed in many other States.[47] These other States have similarly recognized that

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[47] *See e.g.*, EPA, General Permits for Stormwater Discharges, New Hampshire Draft General Permit ("EPA/NH Draft General Permit") at 7, 10 (2013), *available at* http://www.epa.gov/region1/npdes/stormwater/nh/2013/NHMS4-NewDraftPermit-2013.pdf; EPA, General Permits for Stormwater Discharges, Massachusetts Draft MA MS4 General Permit ("EPA/Mass. Draft General Permit") at 5, 7, *available at* http://www.epa.gov/region1/npdes/

(*continued on next page*)

this process provides municipalities with the necessary flexibility to select and implement specific best management practices while also ensuring that municipalities comply with the permit's control measures.

E. The Proceedings Below

Petitioners sued DEC in 2010, asserting that the General Permit violates state and federal law. (A. 56-63.) Supreme Court,

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stormwater/ma/2014DraftMASmallMS4GeneralPermit.pdf; Conn. Dep't of Energy & Envtl. Prot., General Permit for the Discharge of Stormwater ("Conn. General Permit") at 4, 8 (Jan. 9, 2009), *available at* http://www.ct.gov/deep/lib/deep/Permits_and_Licenses/Water_Discharge_General_Permits/MS4_gp.pdf; Mont. Dep't of Envtl. Quality, General Permit for Storm Water Discharge, Permit No. MTR 040000 at IV.A (Dec. 30, 2009), *available at* http://www.deq.mt.gov/wqinfo/mpdes/ default.mcpx; N.J. Dep't of Env'tl Prot., Tier A Municipal Stormwater General Permit ("N.J. General Permit") at 2, 7 (March 1, 2009), *available at* http://www.nj.gov/ dep/dwq/tier_a.htm; S.C. Dep't of Health & Envtl. Control, NPDES General Permit for Storm Water Discharges, Permit No.: SCR030000 at 4, 15 (Nov. 1, 2013), *available at* http://www.scdhec.gov/Environment/docs/ Final_SMS4_Permit.pdf; Vt. Agency of Natural Res., Dep't of Envtl. Conservation, General Permit 3-9014 (2012) for Stormwater Discharges ("Vt. General Permit") at 7-8 (Dec. 5, 2012), *available at* http://www.anr.state.vt.us/dec/waterq/stormwater/docs/ms4/sw_Final_MS4_permit_12_5_12_adminrevised.pdf.

Westchester County (Lefkowitz, J.) granted the petition in part and denied it in part. The court held that the General Permit adequately ensures compliance with applicable water quality standards, except to the extent that it does not specify a schedule of compliance for certain covered entities.[48] (A. 30-31). And it rejected NRDC's argument that the General Permit contained inadequate monitoring requirements. (A. 31-32.)

But Supreme Court held that DEC's review of the NOI under the General Permit is insufficient because DEC does not "ensure" that a municipality's control measures will "in fact" reduce discharges to the maximum extent practicable. (A. 22, 25.) The court also held that DEC must provide the public with an opportunity to request a public hearing on each NOI. (A. 33.)

On appeal, the Appellate Division, Second Department upheld DEC's permit in its entirety.[49] The court overturned

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[48] DEC did not challenge the compliance schedules ruling on appeal to the Appellate Division.

[49] The Second Department initially held that the permit did not fail to specify compliance schedules as required by 6 N.Y.C.R.R. 750-1.14. *Matter of NRDC v. DEC*, 111 A.D.3d 737, 747

(*continued on next page*)

Supreme Court's holding that DEC must conduct more review of each NOI, holding that the General Permit complies with EPA's regulations and adequately ensures that municipalities meet the "maximum extent practicable standard" by imposing enforceable terms on covered municipalities. *Matter of NRDC v. DEC*, 120 A.D.3d 1235, 1243 (2d Dep't 2014). (*See also* A. xvi.)

The Appellate Division also rejected NRDC's contention that the public should have an opportunity to request a hearing on a municipality's NOI, holding that the NOI is not a permit application subject to this public-hearing requirement. *Matter of NRDC v. DEC*, 120 A.D.3d at 1245. The court further held that the general permit properly ensures that small municipalities monitor their stormwater discharges. *Id.* at 1247. And it held that the general permit adequately ensures compliance with state

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(2d Dep't 2013). But because DEC had not appealed that portion of Supreme Court's order, the Second Department granted NRDC's motion to reargue and removed that holding from its decision. *Matter of NRDC v. DEC*, 120 A.D.3d 1235 (2d Dep't 2014). DEC intends to revise the General Permit to contain the appropriate schedules at the conclusion of this litigation. Therefore, as NRDC explains, the Court need not reach the merits of this issue. App. Br. at 43.

water quality standards because the Clean Water Act allows flexibility to adopt or impose best management practices instead of numeric discharges. *Id.* at 1246.

This Court granted leave to appeal. *NRDC v. DEC*, 23 N.Y.3d 901 (2014) (reproduced at A. vi-vii.)

ARGUMENT

DEC'S GENERAL PERMIT COMPLIES WITH FEDERAL AND STATE LAW

Under the General Permit, small municipalities may continue their stormwater discharges only if they comply with an extensive and detailed set of best management practices that collectively limit the pollution entering into MS4s. NRDC challenges several aspects of the General Permit as insufficiently protective. But NRDC's arguments ignore the considerable discretion that permitting authorities have to manage the complex and highly uncertain problem of stormwater discharges. And, by relying on statutory provisions that require individual permitting, NRDC's position reflects a fundamental misunderstanding of the

distinct regulatory scheme governing stormwater discharges from small municipalities.

At bottom, this litigation involves a disagreement between DEC and NRDC over the best way to achieve environmental goals in the face of the unique obstacles of regulating stormwater discharges. The General Permit represents DEC's current, reasonable resolution of this complex problem. Although private parties may disagree with DEC's policy, the agency's judgment lies at the core of its delegated discretion and should not be lightly disturbed. "[T]he court may not substitute its judgment for that of the agency responsible for making" a determination that is within its expertise, "but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious."[50] "[T]his Court treads gently in second-guessing the experience and expertise of state agencies charged with administering statutes

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[50] *Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363 (1987).

and regulations."[51] NRDC has identified no error sufficient to justify second-guessing DEC's expert judgment in this area.

A. DEC's General Permit Ensures that Municipalities Reduce Stormwater Pollution to the "Maximum Extent Practicable."

Both federal and state law give permitting authorities such as DEC considerable discretion in implementing pollution controls for stormwater discharges. Controls on non-stormwater discharges (such as waste pipes from factories) generally involve strict, numeric effluent limitations and mandatory technologies, imposed from the top down by either the State Legislature or the permitting agency. But Congress and the State Legislature adopted a different approach for stormwater discharges from MS4s. As the Supreme Court has explained, Congress granted permitting authorities "broad discretion . . . in the realm of stormwater runoff."[52] Pollutants from stormwater discharges need

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[51] *Matter of Davis v. Mills*, 98 N.Y.2d 120, 125 (2002).

[52] *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (upholding EPA's industrial stormwater rule regarding industrial logging activities).

only be reduced "to the maximum extent practicable"[53]—a standard that gives the permitting agency considerable latitude to determine what is "reasonably capable of being accomplished."[54] And to achieve that flexible standard, the permitting authority may require "management practices" and any other "techniques" and "methods" "as the [authority] determines appropriate for the control of such pollutants"[55]—an express delegation of discretion to the permitting authority.

This discretion reflects legislative judgment about how best to manage the extraordinarily complex problem of stormwater pollution, which is unstoppable, highly localized, and widely distributed. Indeed, rather than dictating in the Water Quality Act of 1987 the specific practices, techniques, or methods that a permitting authority should require small municipalities to adopt,

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[53] 33 U.S.C. § 1342(p)(3)(B)(iii); ECL § 17-0808(3)(c).

[54] *Black's Law Dictionary* 1291 (9th ed. 2009) (defining "practicable").

[55] ECL § 17-0808(3)(c); *see also* 33 U.S.C. § 1342(p)(3)(B)(iii) ("as . . . the State determines appropriate for the control of such pollutants").

Congress instead ordered EPA to "conduct a study" "in consultation with the States" to propose initial control measures.[56] And although EPA completed that study, and then established the six minimum control measures that the General Permit now requires, its analysis of this area remains ongoing.[57]

The General Permit represents DEC's current best judgment about the regulatory system that will control pollution from stormwater discharges to the maximum extent practicable. Small municipalities may obtain coverage under the General Permit by submitting an NOI that identifies the best management practices for each of the minimum control measures they have adopted or intend to adopt over a number of years, with expected completion dates and measurable goals for those practices. And DEC not only reviews the NOI at the outset but also monitors and enforces municipalities' continued compliance with the General Permit through annual reports, audits, investigations, and (if necessary)

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[56] 33 U.S.C. § 1342(p)(5).

[57] *See* 40 C.F.R. § 122.37. See also *supra* n. 40 (listing recent guidance and analysis EPA has issued).

enforcement actions. The General Permit closely tracks EPA's regulations, and thus represents the judgment of both agencies that this regulatory scheme adequately controls the pollution discharged through MS4s.

NRDC disagrees with DEC's (and EPA's) judgment. But none of its objections justify invalidating the General Permit.

1. The General Permit provides clear standards that control small municipalities' compliance.

NRDC asserts that the General Permit's prescribed pollution controls are "so hopelessly vague" that they provide no objective standards for how small municipalities should reduce pollution from stormwater runoff. App. Br. at 49. But the General Permit *requires* municipalities to implement the six minimum control measures, and forty-four best management practices, and only grants them some flexibility in implementation. And the General Permit's highly detailed directions on how to implement the control measures belie NRDC's "vagueness" argument.

In accordance with EPA's regulations, the General Permit requires municipalities to implement six minimum control

measures to meet the "maximum extent practicable" standard.[58] (*See* A. 281-301.) The General Permit expands on those minimum control measures by specifying forty-four mandatory measures. (A. 281-301, 558-561.) These measures thus represent the judgment of two agencies (EPA and DEC) that these controls are "appropriate" to "reduc[ing] the discharge of pollutants [from MS4s] to the maximum extent practicable"—a judgment that both federal and state law leave to the permitting authority, and that is accordingly entitled to deference.[59]

Contrary to NRDC's assertion of vagueness, the General Permit's minimum control measures and best management practices in fact contain highly specific directions to small municipalities. For example, among many other requirements, the

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[58] 40 C.F.R. § 122.34(a).

[59] 33 U.S.C. § 1342(p)(3)(B)(iii); ECL § 17-0808(3)(c); *see also NRDC v. EPA*, 966 F.2d 1292, 1308 (9th Cir. 1992) (upholding EPA's decision not to require any specific substantive standards or specific reductions in pollutants); *EDC*, 344 F.3d at 845 n.18 (upholding EPA's adoption of the minimum control measures as a "permissible interpretation" of EPA's authority under section 402(p)(6)).

General Permit requires municipalities to develop and enforce a program that requires "construction site operators to implement erosion and sediment control management practices" and requires them to control waste at construction sites that "may cause adverse impacts to water quality." (A. 290.) In addition, municipalities must inform and train public employees, businesses, and the general public about the hazards associated with improper disposal of waste, maintain records of such communications, and ensure that their staff use the training. (A. 288, 299.) For each of these measures, the municipality must identify the specific agencies or offices responsible for implementing the measure and ensure all coordination necessary to achieve these controls. (A. 281.) And in Section IX, the General Permit contains even more specific instructions on how certain identified municipalities must implement additional best management practices when they discharge into waters that do not meet state water-quality standards. (*See e.g.*, A. 322.)

Even the specific provisions that NRDC points to as too "vague" (Br. at 51) say far more than NRDC identifies in its brief.

For example, NRDC argues that the General Permit's direction that a municipality "develop" and "implement" a program "to detect and address non-stormwater discharges" (also known as "illicit discharges") into the storm sewer system is too vague because it only tells municipalities to include "procedures" for eliminating such discharges. App. Br. at 51 & n. 87. But the General Permit spells out those procedures in considerable detail. (A. 287-289.) It requires municipalities to develop and maintain maps showing the location of all outfalls (*i.e.*, discharge points out of MS4s), verify each of them in the field, and conduct an outfall inventory in accordance with a detailed guidance published on EPA's website (A. 287). The General Permit further dictates that each municipality's program "*must* include" procedures for identifying areas that are of the highest concern for the program and describe those areas of concern, available equipment, staff, and funding; procedures for identifying and locating illicit discharges; procedures for eliminating illicit discharges; and procedures for documenting the steps the municipality has taken to implement its plan. (A. 288 (emphasis added).) Moreover, the

General Permit instructs the municipality that it "must" prohibit and "must eliminate" (A. 259) non-stormwater discharges that "substantially contribut[e]" to pollutants in the system, must develop a program "to detect and eliminate" illicit discharges, and must "prohibit" illicit discharges (A. 287).

Ultimately, NRDC's objection is that the General Permit's already-detailed description of control measures is not as fulsome as NRDC would prefer. But in the context of a statutory scheme that vests discretion in DEC, see *supra* at 31-32, the level of detail required in rules governing regulated entities is a question that falls squarely within DEC's ambit.

2. DEC monitors and enforces ongoing compliance with the General Permit.

NRDC asserts that DEC "fail[s] to provide . . . necessary oversight" over small municipalities' compliance with the General Permit. App. Br. at 52. That is also incorrect. DEC oversees compliance through its initial review of NOIs, its mandate that small municipalities provide annual reports of their progress, and its enforcement actions when small municipalities fall short of

their obligations under the General Permit. In addition, through the New York State Association of Regional Councils (NYSARC), DEC has provided crucial support to municipalities preparing their NOIs or annual reports and in setting up their initial programs.[60]

Initial Review. A municipality's NOI is an enforceable commitment that the municipality will comply with all the terms of the General Permit. The NOI must be signed and certified as true, accurate, and complete under the "penalty of law"; false information can lead to significant penalties, including fines or imprisonment. (A. 565.) Contrary to NRDC's characterization here, the NOI form is far from a "bare-bones checklist." App. Br. at 53. Every item in the NOI form corresponds to and incorporates more detailed directions in the General Permit—thus, for

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[60] *See generally* DEC, ARRA/CWA Section 604(b) Project Profiles, http://www.dec.ny.gov/lands/68596.html (describing funding of regional planning commissions that assist with planning stormwater programs); NYSARC, Statewide Water Resources Management Program, Project Summaries at 6 (January 2007), *available at* http://www.cnyrpdb.org/NYSARCwater/?ThisPageID=57 (describing regional councils' roles in development of stormwater management plans).

example, a municipality's representation that it will "[d]evelop, implement and enforce a program to detect and eliminate illicit discharges to the MS4" (A. 559) incorporates the General Permit's extensive instructions for such programs described above (A. 287-289). Moreover, the NOI form not only requires municipalities to commit to certain control measures; it also requires municipalities to explain and define measurable goals and expected completion dates for each management practice that will be implemented. (A. 566.)

DEC reviews every NOI prior to accepting it. (A. 162, 261.) This review is no rubber stamp, and DEC has rejected multiple NOIs for failure to satisfy the requirements of the General Permit—particularly if they do not properly explain and describe the municipality's measurable goals. For example, DEC rejected an NOI for failure to select any specific activities or programs it would conduct beyond its commitment to the required elements to address municipal operations contributing to pollutants of

concern.[61] It also rejected an NOI for failure to identify activities that would be or had been implemented in the areas of public outreach, public involvement, and illicit discharge and detection.[62] And it rejected an NOI for failure to identify programs in education and outreach, public involvement, illicit discharge and detection, and municipal operations that it would implement or was planning to implement.[63] In short, NRDC is wrong in claiming that a municipality could fill in the form "with anything, rather than nothing" and it would be deemed sufficient (Br. at 53-54 n.89).

Annual Review. The NOI is a representation that the municipality will develop and implement a Stormwater Management Program in accordance with the General Permit—the plan must be implemented within three years of initial

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[61] *See* DEC Rejection Notice to City of Watertown (Apr. 30, 2014) (Add. 145).

[62] DEC Rejection Notice to Village of New Paltz (Apr. 30, 2014) (Add. 143).

[63] DEC Rejection Notice to Town of Goshen (Apr. 30, 2014) (Add. 141).

coverage, and the selected measures must be updated continuously as needed for the life of the General Permit. (A. 269.) To ensure that municipalities are continuing to make progress, the General Permit requires that covered municipalities submit annual reports detailing their progress toward implementing the measurable goals they identified in the NOI or in previous annual reports. (A. 271-274, 567-602.)

Like NOIs, annual reports are enforceable commitments to comply with the General Permit and are signed and certified as true under penalty of law. (A. 576.) Each annual report contains multiple details on the municipality's ongoing compliance with the General Permit's mandatory control measures. For example, in 2014, Monroe County reported on the specific number of construction site inspections it had conducted and the Town of Brighton reported the number of sewer repairs, reconstructions and cleanings it had conducted.[64] As another example, in 2012,

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[64] Stormwater Coalition of Monroe County, MS4 2013-2014 Joint Annual Report, at 249, 256 (pdf page) (May 30, 2014),
(*continued on next page*)

SUNY's University at Albany reported that it had located all of its outfalls, sampled them, found no indications of illicit discharge, and posted the locations and sample results on a web-based interactive map.[65]

DEC Enforcement. DEC also ensures compliance with the General Permit through its comprehensive enforcement program. DEC conducts audits (A. 165),[66] site inspections (A. 672), review of citizen complaints (A. 673), investigations, and other monitoring and analysis. (*See* A. 688-689.)

As examples of enforcement actions, DEC and EPA have brought formal enforcement actions against municipalities that violated the General Permit (or its predecessors) by failing to develop an adequate Stormwater Management Program and

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available at http://www2.monroecounty.gov/des-stormwater-coalition.

[65] Stormwater Coalition of Albany County, Joint Annual Report, at 271 (pdf page) (March 2012) http://www.townofbethlehem.org/ArchiveCenter/ViewFile/Item/56

[66] DEC's Stormwater Implementation Team, consisting of trained auditors using standardized procedures, audit up to ten percent of all small municipal storm sewers each year. (A. 165.)

schedule of compliance;[67] complete a map of outfalls;[68] enact laws prohibiting illicit discharges;[69] detect discharges that a municipality's detection program should have uncovered;[70] enact or implement laws governing construction site operators[71] or

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[67] *Matter of City of Glen Falls*, Order on Consent, Case No. R5-20120419-1096 (DEC Aug. 29, 2012) (assessing penalty of $28,900) (Add. 9).

[68] *Matter of City of Mount Vernon*, Order on Consent, Case No. R3-20090604-74 (DEC Dec. 21, 2009) (2008 general permit) (Add. 27).

[69] *Matter of Village of Nyack*, Order on Consent, Case No. R3-20110824-85 (DEC Jan. 3, 2012) (Village failed to enact local ordinance in violation of Part VII.A.3.f of General Permit) (Add. 95); *Matter of Village of New Square*, Order on Consent, Case No. R3-20100630-126 (DEC Oct. 20, 2011) (same) (Add. 79).

[70] *Matter of City of Rensselaer*, Administrative Compliance Order at 5, No. CWA-02-2011-3019 (EPA Feb. 2, 2011) ("Respondent failed to develop and implement a program to detect and address non-stormwater discharges . . . in violation of Part VII.A.3.g of the [General Permit]") (Add. 129); *Matter of Village of Mamaroneck*, Administrative Order, No. CWA-02-2011-3022 (EPA Mar. 11, 2011) (same) (Add. 119); *City of Mount Vernon*, *supra*, at 3 (failure to maintain "track-down" program).

[71] *Matter of City of Ithaca*, Consent Order, Case No. R7-20080208-9, at 2 (DEC Mar. 21, 2008) (City violated 2002 general permit because it failed to implement ordinance or regulatory control mechanism to require erosion and sediment controls at construction site) (Add. 20); *City of Mount Vernon*, *supra*, at 3 (2008 general permit); *Matter of Village of Spring Valley*, Order on Consent, Case No. R3-20110114-23, at 2 (DEC Aug. 11, 2011)

(*continued on next page*)

conduct site inspections;[72] and prevent pollution of stormwater runoff resulting from a municipality's own activities.[73]

NRDC complains that DEC's reliance on enforcement "turns the [permit] program on its head" (Br. at 54), but this argument simply ignores the fact that Congress and the Legislature consciously chose a different model—distinct from the classic individual permitting scheme—to regulate stormwater discharges from MS4s. The controls required by permits for other types of discharges are typically straightforward to implement and monitor: in the usual case, the permittee must install certain

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(local law failed to address post-construction runoff controls) (Add. 105).

[72] *Matter of Village of Kiryas Joel*, Order on Consent, Case Nos. R3-20080229-14 (DEC Dec. 9, 2010) (Village failed to conduct site inspections at active construction sites where DEC observed inadequate sediment and erosion controls) (Add. 59).

[73] *Matter of Town of Brookhaven*, Order on Consent, File No. R1-20140714-84 (DEC Jul. 9, 2014) (failure to correct municipal operations that contribute pollutants of concern to the MS4) (Add. 47); *Matter of City of Cohoes*, Order on Consent, File No. R4-2011-0926-109 (DEC Apr. 2, 2012) (City's own practices violated General Permit where, *inter alia*, it left used lead-acid vehicle batteries sitting on a pallet on the ground and DEC observed degreasers and hydraulic fluid discharged from storm drains into river) (Add. 1).

specified technologies and must comply with numeric effluent limitations that restrict how much of certain pollutants may be discharged at the end of a pipe. By contrast, the best management practices mandated by the General Permit are not technology-based controls at the end of the pipe; rather, they are policies or programs intended to influence how hundreds or thousands of individuals act over many years. In light of the distinct nature of the General Permit's regulatory focus, DEC reasonably determined that ongoing investigations and enforcement actions, combined with significant assistance from NYSARC, would help supplement the General Permit's detailed initial mandatory measures and DEC's NOI review and ensure that the long-term policies and programs required by the General Permit were being implemented.

3. DEC rationally includes municipalities in planning stormwater discharge controls.

NRDC complains that local municipalities have too much discretion to determine how to implement the best management practices prescribed by the General Permit. NRDC acknowledges

that allowing municipalities to develop their own best management practices is "laudable and can be an effective approach." App. Br. at 49. But it insists that DEC, not local municipalities, "must determine which pollution controls will be necessary and sufficient" to reduce stormwater pollution "to the maximum extent practicable." App. Br. at 48.

This top-down, command-and-control approach is neither good policy nor a requirement of federal or state law. Following the approach of EPA's MS4 regulation, the General Permit grants small municipalities discretion in the following way: through the General Permit, DEC requires municipalities to address six broad control measures and forty-four specific management practices, and it gives municipalities flexibility to decide how best to implement these practices. For example, a municipality can accomplish public education and outreach through television advertisements, websites, school programs, newspaper articles, or other means as appropriate to the locality (A. 578); and to prevent illicit discharges of non-stormwater into MS4s, each municipality can target particular types of business as appropriate to the

locality, including dry cleaners, carwashes, hospitals, and industrial facilities (A. 588).

The General Permit grants municipalities discretion to interpret, choose, and implement specific control measures for several reasons. First, small municipalities understand their own circumstances best, allowing them to tailor the control measures required by the General Permit to local conditions that may not be immediately apparent to DEC. Granting municipalities a role in selecting the tools and regulatory structure thus allows locality-specific plans to be "tailored to meet particular geographical, hydrological, and climatic conditions" as well as "the fundamentally different characteristics of many municipalities."[74] Local governments are likewise in the best position to understand how to most effectively influence, persuade, and compel their residents and local developers to adopt practices, techniques, and maintenance programs that lead to reduced stormwater runoff.[75]

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[74] 55 Fed. Reg. at 48,053.

[75] Dep't of State, *Local Government Handbook*, *supra*, at 156 (discussing the variety of mechanisms that a municipality has for

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And they are in a far better position to adopt local ordinances that fit with their existing building and zoning codes to form a coherent whole. By contrast, centralized planning by DEC would standardize these decisions in a way that would destroy the municipality's flexibility to adapt their practices to changing and local needs or to allocate resources to address any unique circumstances in a way that might be different from other municipalities.[76]

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water resources protection, including sanitary codes, land use laws, site plan review laws, and subdivision regulations).

[76] *See* Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 Va. Envtl. L.J. 189, 206 (2002) ("There is growing recognition that ecologically sound management must be local and/or regional in character, tailored to the ecosystem context."); Wallace E. Oates, *A Reconsideration of Environmental Federalism, in* Recent Advances in Environmental Economics 22 (John A. List & Aart de Zeeuw eds., 2002) ("[W]here environmental quality is basically a local public good, the case for the setting of environmental standards at an appropriately decentralized level of government is quite compelling."); Daniel A. Farber, *Eco-Pragmatism: Making Sensible Environmental Decisions in an Uncertain World* 179-83 (1999) (summarizing problems of overly centralized environmental regulation); Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 Colum. J. Envtl. L. 153, 154 (1988) (the system of centralized environmental regulation has "grown to the point where it amounts to nothing less than a

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Second, affording local governments discretion over their Stormwater Management Programs gives them the flexibility to adapt to changing needs and conditions. Stormwater runoff is intermittent and highly dependent on ever-changing local conditions. An unusually intense thunderstorm, a change in residents' routines (such as a change in disposal of lawn care waste), or an upgrade to municipal infrastructure (such as a new road) can alter both the degree and composition of stormwater runoff in ways that might require immediate action by local officials. The art and science of stormwater management is continually evolving, requiring local governments to "be responsive to these changes, developments or improvements in control technologies."[77] (*See* A. 160, 749.) NRDC's vision of a centralized, top-down approach to stormwater regulation would freeze local discretion and prevent innovative, adaptable, or immediate local responses to local problems.

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massive effort at Soviet-style central planning of the economy to achieve environmental goals.").

[77] 40 C.F.R. § 122.34(b)(5)(iii).

Third, the regulated entities in this case are governmental entities with their own structure of accountability and can be presumed to comply with their legal obligations.[78] NRDC's top-down approach is predicated on the opposite presumption: that local governments cannot be trusted. *See* App. Br. at 19, 49, 65. But unlike private nongovernmental entities such as power plants and chemical factories, local governments are themselves "partners in environmental and public health stewardship,"[79] and they are directly accountable to the citizens who will benefit from cleaner waters.[80] Giving local governments a say in how to

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[78] *Matter of Altamore v. Barrios-Paoli*, 90 N.Y.2d 378, 386 (1997) (applying "presumption of regularity and honest motivation which attaches to official acts" in case involving municipal employee).

[79] The U.S. Conference of Mayors, Written Testimony, David Berger, Before the Water Resources Subcommittee -- House Transportation and Infrastructure Committee, at 17-18 (July 25, 2012) (urging EPA to work with local governments as "partners in environmental and public health stewardship" when implementing its stormwater and wastewater management programs), *available at* http://www.cityhall.lima.oh.us/DocumentCenter/View/297.

[80] Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 Va. L. Rev. 959,

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manage programs and policies within their own jurisdiction is not "abdicat[ing] . . . responsibility," as NRDC claims. App. Br. at 49. Rather, it respects the coordinate authority of local governments and treats them as good-faith regulators, not resistant polluters.

Fourth, given the large number of municipalities that require permit coverage and the vast number of individual management practices that would require review across all the different municipalities, NRDC's demand that DEC prospectively review all of these controls (Br. at 46) and create an "individually tailored" permit (Br. at 5) would be an unmanageable administrative burden. DEC's review process would be clogged by applications reflecting each municipality's idiosyncratic circumstances. And local municipalities would be forced to divert resources from regulating pollution to filling out paperwork. That

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967 (June 2007) (noting the importance of a role for local governments in cooperative federalism); David J. Barron, *The Promise of Cooley's City: Traces Of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 490 (Jan. 1999) ("our towns and cities are . . . important political institutions that are directly responsible for shaping the contours of ordinary civic life in a free society (quotation marks omitted)).

result would defy one of Congress's main goals when addressing stormwater regulation. As Senator Daniel Patrick Moynihan explained, Congress enacted the Water Quality Act of 1987 "to devise a stormwater permit system that would improve water quality without being too costly or too cumbersome for EPA to administer" and that avoided diverting permitting efforts "from control of toxic contaminants in water to a paper shuffling exercise that would not result in environmental improvements in most cases."[81] DEC's experience likewise had demonstrated that individualized review would create "substantial administrative burdens without corresponding increases in environmental protection."[82] DEC thus reasonably chose to balance administrative burden and environmental regulation by setting the detailed control measures in the General Permit while

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[81] Floor Activity: Senate Agreement to Conference report on S. 1128, 132 Cong. Rec. 32,394 (Oct. 16, 1986).

[82] Memorandum by Janice K. Corr, DEC Deputy Commissioner and General Counsel (Feb. 26, 1987), *reprinted in* Bill Jacket for ch. 360 (1988), at 13-14.

allowing local governments to tailor those measures to their own unique circumstances.

NRDC relies on two federal cases to support its argument that federal and state law do not authorize local flexibility in regulating stormwater discharges (Br. at 60-64).But those cases are neither binding on this Court nor apposite to the issues presented here.

Waterkeeper Alliance, Inc. v. EPA (discussed at Br. at 61-62) is concerned with an entirely different permitting system for a different type of discharge. That case held that a permitting authority must review the "nutrient management plan" created for controlling animal waste runoff from concentrated animal feeding operations (large agricultural enterprises where animals like cows and pigs are kept and raised in confined situations, known as "CAFO") in order to ensure compliance with the Clean Water Act.[83] But discharge permits for CAFOs are subject to

[83] 399 F.3d 486, 498 (2d Cir. 2005).

effluent limitations and standards,[84] rather than the distinct "maximum extent practicable" standard that applies to discharges from MS4s.[85] Moreover, CAFOs are private industrial operations, not governmental entities, and can, unlike MS4 operators, choose to stop discharges. The legal and regulatory structure of CAFO permitting is thus vastly different from the legal and regulatory structure governing stormwater permitting.

The Ninth Circuit's decision in *EDC*,[86] is also inapposite. That decision reviewed EPA's MS4 regulation, but did not review an actual permit or determine that a general permit, much less this General Permit, fails to comply with governing law.

EDC was also wrongly decided. The court reasoned that EPA's regulations extending coverage to municipalities through submission of an NOI were invalid because they did not require a permitting authority to ensure that the measures "will *in fact*

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[84] 399 F.3d at 498.

[85] 33 U.S.C. § 1342(p)(3)(B)(iii).

[86] 344 F.3d 832.

reduce discharges."[87] But that judge-made rule usurps the agency's role in designing an appropriate program for stormwater management. EPA, in its discretion, reasonably and rationally determined that a program which requires a municipality to establish a stormwater management program within a specified framework and through a series of enforceable control measures not only complies with the requirement that a municipality reduce discharges to the maximum extent practicable, but also sufficiently requires controls that will reduce discharges to the statutory level.[88]

In sum, *Waterkeeper* and *EDC* do not stand for the proposition that further centralization is required in the General Permit. Moreover, such a requirement would not give proper

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[87] *EDC*, 344 F.3d at 855.

[88] *Anacostia Riverkeeper v. Maryland DEP*, Opinion & Order, Case No. 339466-V (Dec. 4, 2013) (NRDC ADD 24-26), cited by NRDC, is likewise wrongly decided. In any event, the *Anacostia* decision pertains to individual permits for a large municipality and two Maryland courts at the same level have now disagreed with it. *See Chesapeake Bay Found., Inc. v. Maryland DEP*, Order, Case No. 02-C-14-186144 (Dec. 2, 2014) (Add. 147).

deference to DEC's expert judgment and would run directly counter to the permitting scheme that Congress and the State Legislature authorized.

B. The General Permit Complies with Statutory and Regulatory Public Notice Requirements.

NRDC argues that the General Permit should be invalidated because it fails to provide more opportunities for public participation in the creation of each municipality's NOI and Stormwater Management Program. App. Br. at 60. The Appellate Division correctly rejected this argument.

As an initial matter, only the validity of the General Permit is at issue in this appeal. There is no dispute that interested parties had (and will have) opportunities to make comments and request a public hearing on the details of the General Permit itself. (A. 167-169.) And NRDC has not identified any source of law requiring the General Permit to provide for more public involvement in the creation of municipalities' NOIs and Stormwater Management Programs.

Even if NRDC were correct that each municipality's NOI and Stormwater Management Program should themselves be subject to more public-participation requirements, that complaint is not a challenge to the General Permit, but rather to the NOIs and Stormwater Management Programs themselves. To the extent that NRDC believes that state or federal law provides it with an opportunity to request a hearing on (for example) an individual NOI, the proper recourse would be to challenge that NOI. And the proper remedy for any purported failure would be, at the very most, invalidation of that individual NOI—not annulment of the entire General Permit.

In any event, the General Permit provides adequate opportunities for public participation in each municipality's development of its control measures. The General Permit requires municipalities to provide their NOIs and annual reports to the public for comment on DEC's Environmental Notice Bulletin[89] for

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[89] The bulletin is an official publication of notices, hearings, and other business before DEC. *See* ECL § 3-0306(4); DEC, Envtl.

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twenty-eight days prior to coverage. (A. 261.) The General Permit also requires municipalities, as one of the enforceable control measures, to provide the public with an opportunity to participate in, develop, review, and comment on municipalities' Stormwater Management Programs. (A. 284.) DEC further requires municipalities to make their NOIs and Stormwater Management Programs available for public inspection. (A. 267.) And the public is also given an opportunity to comment on DEC's guidance documents.[90] These provisions for public participation closely track the general permits issued in other States[91] and, in fact, are more generous than what some States provide.[92]

Notice Bulletin, http://www.dec.ny.gov/enb/enb.html (last visited Dec. 16, 2014).

[90] *See* ECL § 3-0301(2)(z); DEC, Draft Retrofit Program Plan Guidance Document for Pathogen Impaired Watershed MS4s on Long Island (Sept. 2012), *available at* http://www.dec.ny.gov/chemical/92910.html (last visited Dec. 10, 2014).

[91] *See* EPA/N.H. Draft General Permit, *supra*, at 8 (30 days' notice); EPA/Mass. Draft Permit, *supra*, at 5 (30 days' notice); Conn. General Permit, *supra*, at 6 (30 days' notice); Mo. Dep't of Natural Res., Missouri State Operating Permit, Fact Sheet pt. IV (June 13, 2008), *available at* http://www.dnr.mo.gov/env/wpp/

(*continued on next page*)

NRDC objects that the public participation provided for by the General Permit does not include the opportunity for a public hearing on the NOIs or Stormwater Management Programs.[93] But none of the statutes cited by NRDC for this public-hearing requirement apply to local municipalities' NOIs or Stormwater

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permits/issued/R040000.pdf (30 days' notice for issuance of coverage); Vt. General Permit, *supra*, at 5 (10 days' notice).

[92] *Compare* A. 261 *with* Ga. Dep't of Natural Res., Storm Water Discharges Associated with Small Municipal Separate Storm Sewer Systems at 8 (Dec. 6, 2012), *available at* http://epd.georgia.gov/sites/epd.georgia.gov/files/related_files/site_page/FINAL_GAEPD_NPDES_MS4_PhaseIISmall_GAG610000_Y2012Dec6.pdf (municipalities encouraged to make stormwater management plans available to the public); Illinois EPA, General NPDES Permit for Discharges ("Illinois General Permit") at 4, 10 (Feb. 20, 2009), *available at* http://www.epa.state.il.us/water/permits/storm-water/general-ms4-permit.pdf (NOI should be submitted electronically and available on the municipality's website; providing notice and comment for construction activity); N.J. General Permit, supra, pt. I—Narrative Requirements at 20 (municipality shall make records available to the public); S.C. General Permit, *supra*, at 38 (municipality must make records, including NOI available to the public if requested to do so in writing).

[93] Though NRDC complains that it must have an opportunity for a hearing "to contest whether the pollution control measures vaguely identified" in the NOI "meet applicable legal standards" (Br. at 60), to date, NRDC has never submitted any comment on any municipality's NOI to complain that the measures are too vague, that they will not meet the standards, or otherwise.

Management Programs. Neither the Clean Water Act nor EPA's regulations oblige DEC to require an opportunity for a hearing (or even public notice) for NOIs or Stormwater Management Programs. To the contrary, EPA has determined that permitting authorities are not required to provide the public with the opportunity for a hearing on NOIs, and that judgment has been upheld as "eminently reasonable."[94]

State law also does not require DEC to provide an opportunity to request a public hearing on an NOI or a Stormwater Management Program. The only state law that NRDC cites for this point governs public participation for individual permit applications.[95] Even for such permit applications, DEC has discretion to decide whether to provide an opportunity to request a public hearing.[96]

But the law cited by NRDC does not support their public-hearing argument for an even more fundamental reason: NOIs

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[94] *Tex. Indep. Producers*, 410 F.3d at 964.

[95] 6 N.Y.C.R.R. § 621.8(b).

[96] ECL § 17-0805(1)(b).

and Stormwater Management Programs are not individual permit applications. Instead, they merely affirm the municipality's intent to comply with the binding obligations of the General Permit. The entire point of a general permit is to obviate the need for individual permit applications, thereby ensuring that the scheme remains administrable.[97] Treating NOIs or Stormwater Management Programs as individual permit applications makes no sense because those documents do not set the terms of compliance and cannot alter the requirements of the General Permit. The public-participation requirements that apply to individual permit applications thus do not apply to NOIs or Stormwater Management Programs under a general permit.

For all these reasons, the cases that NRDC cites to support its argument for a public-hearing requirement are inapposite. In *EDC* (Br. at 62-64), the Ninth Circuit found that EPA had failed to provide adequate public participation because EPA did not even

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[97] A hearing requirement "would be inconsistent with Congress' intent to allow for the use of general permits." *See Tex. Indep. Producers*, 410 F.3d at 978.

make NOIs available to the public,[98]—a defect that the General Permit does not share. (In any event, the Seventh Circuit has since disagreed with the Ninth Circuit and upheld EPA's determination that NOIs need not be made available to the public for comment or hearings.[99]) In addition, *Matter of Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*,[100] addressed variances under 6 N.Y.C.R.R. 702.17 in an *individual* permit, which DEC conceded should be subject to public-participation requirements (A. 135), a situation very different from the NOIs in this case. Thus, no law supports NRDC's assertion that a public-hearing requirement applies to NOIs or Stormwater Management Programs.

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[98] 344 F.3d at 857.

[99] *Tex. Indep. Producers*, 410 F.3d at 978.

[100] No. 06-3601, 2008 WL 5592764 (Aug. 5, 2008, Sup. Ct. Ulster County) (discussed at Br. at 59-60).

C. DEC's General Permit Rationally Implements Federal and State Monitoring Requirements.

NRDC complains that the General Permit does not require local governments to monitor MS4 discharges to ensure compliance with the Permit's requirements. App. Br. at 67. But the General Permit provides for monitoring in multiple ways, both from DEC and municipalities. As the trial court correctly found, and the Appellate Division affirmed, the General Permit requires "myriad recording and reporting requirements, ambient monitoring of affected waterbodies, and computer modeling of pollutant loading." (A. 31-32 (internal citations omitted).) DEC has broad discretion to select appropriate monitoring requirements because federal and state laws only require DEC to select monitoring requirements that are "reasonably" required.[101] In addition, EPA has made clear that the term "monitoring" should

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[101] *See* 6 N.Y.C.R.R. § 750-1.13(a); 33 U.S.C. § 1318(a)(1). NRDC's presentation of federal and state regulations and law governing monitoring (Br. at 16) is misleading. These statutes and regulations only require permits to include any monitoring requirements that are required or applicable; none of these provisions *mandates* that monitoring be required.

be construed broadly and has left the choice of whether to specify monitoring or some other means of evaluation to the permitting authority.[102] The monitoring that DEC has chosen here falls well within its delegated discretion.

The General Permit imposes reasonable requirements that allow DEC to monitor and evaluate municipalities' compliance with the General Permit. These requirements go well beyond simple end-of-pipe sampling. Specifically, for those entities that discharge into impaired waters, DEC requires computer modeling of pollutant loading using DEC-accepted models. (A. 164-165, 264-267, 723.) Municipalities must also participate in or use ambient water-quality monitoring programs to "validate the accuracy of models and evaluate the effectiveness" of the additional best

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[102] *See* 64 Fed. Reg. at 68,769 ("EPA has intentionally written today's rule to provide flexibility to both MS4s and permitting authorities regarding appropriate evaluation and assessment. Permitting authorities can specify monitoring or other means of evaluation when writing permits."); 40 C.F.R. § 122.34(g)(3)(ii) (municipalities must report "[r]esults of information collected and analyzed, including monitoring data, *if any*, during the reporting period" (emphasis added)); *NRDC*, 966 F.2d at 1308 (deferring to EPA's choice to conduct only limited sampling).

management practices specific to the pollutants of concern that they are using. (A. 265.) And DEC itself not only conducts ambient monitoring of impaired waters to verify compliance with water quality standards (A. 735); it also compiles monitoring data from many other sources to create a comprehensive assessment of water quality. (A. 31-32 (citing A. 321); *see also* A. 164-165, 765-766.)

The General Permit also contains multiple requirements that municipalities monitor their compliance with the General Permit's minimum control measures. For example, the General Permit requires municipalities to "[c]onduct an outfall reconnaissance inventory" in order to map all of its storm sewer system's outfalls (*i.e.*, discharges into surface waters), to identify and verify all the outfall locations and to actively seek out, locate, track down, and eliminate any illicit discharges through monitoring, inspections, and other methods. (A. 287-288.) The General Permit requires municipalities to inspect construction sites to ensure that those sites are complying with best management practices and confirm construction sites are not

discharging pollutants into their MS4. (A. 296.) And municipalities must periodically assess the effectiveness of their program at meeting the "maximum extent practicable" standard and report their progress toward implementing best practices and achieving measureable goals.[103] (A. 304, 307, 310, 313, 316, 319.)

Thus, monitoring requirements that allow DEC and the municipalities to assess their compliance with the General Permit are far from "absen[t]," as NRDC asserts. App. Br. at 71. NRDC's argument here boils down to the contention that DEC should have mandated different monitoring that NRDC prefers—though it never explains exactly how the additional monitoring should be conducted. But DEC's discretion under state law to choose reasonable monitoring methods conclusively defeats NRDC's attempt to compel DEC to adopt different practices. As the lower courts correctly held, courts should not second-guess DEC's expert judgment on how to conduct monitoring in New York's vastly complex system of outfalls and water bodies. Rather, it is the

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[103] *See also* 40 C.F.R. § 122.34(g)(3)(i).

agency's role to "'weigh the desirability of any action or [to] choose among alternatives.'"[104] DEC's judgment on how to implement monitoring here is thus entitled to deference.

NRDC has cited no reason to overturn DEC's expert judgment. For example, NRDC argues that DEC cannot rely on computer modeling instead of end-of-pipe water sampling. App. Br. at 73-74. But NRDC cites no legal authority for this proposition. Nor would end-of-pipe sampling be feasible or more effective: stormwater passes through more than fifty thousand discharge points at highly variable rates—upstream, downstream, and midstream (*see* A. 165)—and it is exceedingly difficult to obtain an accurate assessment of the source or quantity of any particular pollutant that is discharged from many varying rain events through water samples. Using a validated computer model instead to predict discharge of pollutants is a well-accepted,

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[104] *Matter of Trump on the Ocean, LLC v. Cortes-Vazquez*, 76 A.D.3d 1080, 1083 (2d Dep't 2010) (quoting *Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 232 (2007)).

feasible, and preferred method of addressing this problem. (A. 164-165.)

To be sure, some other States (such as Connecticut) have required a small amount of sampling from its municipalities. But the practice of other States operating under dramatically different circumstances does not create a binding obligation on New York to use the same procedures. Connecticut, for example, has only a fifth of New York's number of small municipalities.[105] And Connecticut's approach has not been uniformly adopted by other, even smaller States: Maine, for instance, has simply stated in its general permit that it "may require monitoring," without creating any obligation for municipalities to do so.[106] DEC's monitoring

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[105] *See e.g.*, Conn. General Permit, *supra*, at 13 (requiring monitoring from six outfalls total for each of 113 MS4s); Dep't of Energy and Envtl. Protection, Connecticut General Permit Factsheet at 2 (2014), http://www.ct.gov/deep/lib/deep/public_notice_attachments/general_permits/2014july7ms4generalpermitfactsheet.pdf

[106] Maine, Dep't of Envtl. Prot., General Permit for Stormwater Discharges (July 1, 2013) at 25, *available at* http://www.maine.gov/dep/land/stormwater/ms4/2013_Municipal_MS4_GP.pdf.

requirements thus fall well with the heartland of choices adopted by other States.

There is also no merit to NRDC's argument that DEC must require municipalities themselves to conduct monitoring, rather than relying on monitoring and modeling conducted by DEC or third parties. App. Br. at 72-73. EPA has encouraged permitting authorities to conduct or collect monitoring to provide crucial support to small municipalities, many of which may lack the resources or technical wherewithal to engage in monitoring themselves.[107] Nothing requires DEC to force municipalities to duplicate its efforts.

D. The General Permit's Approach for Complying with Water Quality Standards Is Reasonable.

NRDC argues that the permit unlawfully fails to ensure compliance with state water quality standards by not including effluent limitations necessary to meet those standards. App. Br. at

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[107] *See* 64 Fed. Reg. at 68,748.

24-25. This argument ignores the General Permit's requirements and applicable law.

The Clean Water Act requires each State to establish water quality standards for individual intrastate water bodies. To establish water-quality standards, a State must designate a use for every waterway and establish criteria for "the amounts of pollutants that may be present in [those] water bodies without impairing" their uses.[108] The State must also identify those waters that do not meet the water quality criteria for their designated uses; these waters are deemed "impaired."

For impaired waters, a State is expected to calculate the total maximum daily load of pollutants (*i.e.*, the TMDL) that the water may receive from all sources while maintaining its water-quality standards, and set reductions for different source types so that dischargers into the impaired water may meet the TMDL.[109]

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[108] *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012).

[109] *See* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.2(e)-(i).

The TMDL process may, but is not required to, set individual source-by-source reductions for individual point sources or group reductions for sources covered by a general permit.[110] Like most States, New York has not developed TMDLs for all of its impaired waters, but has instead focused on completion of certain priority TMDLs in accordance with its agreement with EPA.[111]

State law requires permits (including stormwater discharge permits) to include conditions "necessary to insure compliance

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[110] *See* TMDLs to Stormwater Permits Handbook at 83-85 (Nov. 2008 draft) ("TMDLs Handbook"), *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/techsupp.cfm (last visited Dec. 15, 2014); EPA, Guidelines for Reviewing TMDLs at 3 ("TMDLs Guidelines"), *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2002_06_04_tmdl_guidance_final52002.pdf (last visited Dec. 12, 2014).

[111] *See* 64 Fed. Reg. at 68,752 ("In most States, water quality assessments have traditionally been conducted for principal mainstream rivers and their major tributaries, not all surface waters."); *NRDC v. Fox*, 93 F. Supp. 2d 531, 545 (S.D.N.Y. 2000) (noting the partnership efforts between EPA and DEC to establish TMDLs and carry out the Clean Water Act). As Supreme Court noted, NRDC has not claimed "that DEC has been lax in its ongoing efforts to establish TMDLs for each of the hundreds of waters which are in violation of water quality standards." (A. 29 n.14.)

with water quality standards."[112] That requirement is triggered when a municipality discharges into impaired waters. Here, the General Permit complies with this requirement by setting reasonable controls for municipalities that discharge into impaired waters.

1. The General Permit adequately ensures compliance with applicable water quality standards for impaired waters without a TMDL.

When a TMDL has not yet been determined, dischargers into an impaired water cannot know how much they will have to reduce their discharges to maintain water-quality standards. The General Permit nonetheless imposes three controls on municipal stormwater discharges that protect water quality as an interim measure pending the completion of TMDLs.

First, the General Permit requires municipalities that discharge into non-TMDL impaired waters to implement the

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[112] ECL § 17-0811(5); *see also* 6 N.Y.C.R.R. § 750-1.11(a)(5) ("permit shall ensure compliance . . . whenever applicable" with "any more stringent limitations . . necessary to meet water quality standards.").

minimum control measures (including required best management practices) described above. See *supra* at 23-24. DEC's experience and research show that this requirement will in fact "result in load *reduction*"—*i.e.*, a reduction in pollution. (A. 717.) For example, a review of studies conducted before and after regulation of stormwater discharges from large municipalities demonstrates that use of best management practices led to a substantial reduction in discharge of pollutants of concern.[113] These measures thus "reduce the discharge of [stormwater] pollutants to the maximum extent practicable"[114] and constitute a significant step to reducing any effect on the quality of impaired waters.

Under EPA's regulations, compliance with these minimum control measures is sufficient to satisfy water-quality

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[113] *Compare* EPA, Results of the Nationwide Urban Runoff Program (NURP), Final Report (Dec. 1983), *available at* http://www.epa.gov/npdes/pubs/sw_nurp_vol_1_finalreport.pdf *with* National Stormwater Quality Database, *available at* http://www.bmpdatabase.org/nsqd.html and http://rpitt.eng.ua.edu/Research/ms4/mainms4.shtml (compiling NURP data as well as 2005 data from large municipalities regulated under the Water Quality Act).

[114] ECL § 17-0808(3)(c).

standards.[115] Indeed, EPA "strongly recommends that . . . no additional requirements beyond the minimum control measures be imposed" until a TMDL has been implemented for an impaired water body.[116] The General Permit nonetheless imposes additional requirements beyond merely requiring compliance with minimum control measures.

Second, the General Permit requires a municipality to "ensure no net increase" in its discharge of certain identified pollutants of concern, measured from the date the municipality gains coverage under the General Permit. (A. 164, 264.) The General Permit's "no net increase" requirement requires municipalities to demonstrate, using DEC-accepted models, that any new construction, for example, will not eliminate the reductions in pollutants of concern that were obtained through application of

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[115] 64 Fed. Reg. at 68,770. EPA has stated that the federal provisions that NRDC cites (Br. at 25 n.45), such as 40 C.F.R. § 122.44(d), "will be met by the specific approach outlined in today's rule for the implementation of [best management practices]." 64 Fed. Reg. at 68,770

[116] 40 C.F.R. § 122.34(e)(1), (2).

the best management practices. (A. 264.) Thus, in order to comply with the "no net increase" provision, municipalities may need to focus on best management practices directed at the pollutants of concern, drawn from the required best management practices outlined in the General Permit or other additional appropriate best management practices. Although the "no net increase" standard sets a ceiling tied to the amount of a pollutant that the municipality discharged on the date it gained coverage under the General Permit it ensures that a municipality will obtain and maintain *reductions* in those pollutants, because that is combined with the best management practices that target the pollutants of concern.

Third, under the General Permit, for any discharges, whether to an impaired water body or not, when the discharge is "determined to directly or indirectly cause or have the reasonable potential to cause or contribute to the violation of an applicable water quality standard," the municipality "must take all necessary actions to ensure future discharges do not directly or indirectly cause or contribute to the violation." (A. 263.)

Taken together, these three measures help limit any impact on water quality by municipalities with MS4 discharges into impaired waters without a TMDL. Such municipalities must comply with the minimum control measures and required best management practices applicable to all MS4s; they must additionally ensure "no net increase" of certain pollutants of concern, including by adopting additional best management practices; and, if specific information establishes that any activity within the municipality is causing or contributing to the violation of a water-quality standard, that municipality must take action to remedy such violations. DEC's determination that the General Permit adequately respects the quality of impaired water bodies through these requirements is a reasonable one.[117]

NRDC complains that these measures do not go far enough, but as both lower courts determined, NRDC has not identified any error so grave as to require this Court to overturn DEC's expert

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[117] *See Defenders of Wildlife*, 191 F.3d at 1166 (upholding EPA's use of "best management practices . . . in first-round storm water permits . . . to provide for the attainment of water quality standards" (quotation marks omitted)).

judgment. First, NRDC claims that DEC must establish—for *every* relevant municipality discharging into an impaired water body without a TMDL—numerical reductions of pollutant discharges to preserve the quality of impaired waters. But specific municipalities may play only an insignificant role in the impairment of any particular water body, and prior to the TMDL analysis into how much any source or group of sources is contributing to a water-quality violation, DEC generally cannot create a waste load allocation for that source or group of sources, as NRDC demands. App. Br. at 30. Moreover, the law does not mandate particular effluent limitations to address water quality standards, and, as NRDC concedes (Br. at 12 & n.14), DEC has substantial discretion to set requirements that address state water quality standards through a variety of means.[118]

Second, NRDC seems to argue that the General Permit must require every municipality to prove, in advance, that it is *not* contributing to the violation of any water-quality standard. App.

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[118] *See Pud No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 713-21 (1994); 40 C.F.R. § 131.3(b).

Br. at 31. But the General Permit sensibly imposes a very similar requirement in an after-the-fact manner: as explained above, a municipality *is* required to eliminate contributions to water-quality violations if facts emerge to show that there is a harmful effect on impaired waters. DEC reasonably decided to apply this requirement only after the predicate fact of contribution has been demonstrated, rather than before, as NRDC seems to demand.

Ultimately, NRDC's complaint here is not with the General Permit, but with DEC's TMDL process, which NRDC contends is too slow. App. Br. at 31-33. But NRDC is not directly challenging DEC's rate of TMDL completion, and it has failed to develop the facts or relevant law applicable to that question.[119] The sole question in this appeal is the validity of the General Permit.

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[119] In a follow-on opinion to the case NRDC cites to support its argument that DEC has not promulgated enough TMDLs, (Br. at 33), the district court held that New York has "unquestionably . . . dedicated substantial resources to the [TMDL] problem and amply demonstrated its good-faith interest in collaborating with EPA to bring the State's TMDL program to completion." *Fox*, 93 F. Supp. 2d at 538-41, 562. NRDC did not appeal this finding. *See NRDC v. Muszynski*, 268 F.3d 91, 93 (2d Cir. 2001).

Whatever NRDC's grievance with the TMDL process, its complaints are inapposite to the only question at issue here.

2. The General Permit adequately ensures compliance with applicable water quality standards for impaired waters with a TMDL.

For municipalities that discharge into impaired waters where DEC has established a TMDL, NRDC asserts only that certain details are missing from the General Permit—specifically, TMDL baselines and individualized allocations. App. Br. at 27, 35-36. But a fair reading of the General Permit demonstrates that these details are not missing.

The General Permit requires municipalities to bring their stormwater discharges into alignment with the TMDL's waste load allocation by complying with percentage-based reductions in specified pollutants. (*See* A. 321-322, 328, 331-333, 337.) NRDC argues that each permit must clearly identify a baseline to judge compliance with the percentage reductions. App. Br. at 35. But the TMDLs already contain the baselines needed for this analysis. App. Br. at 35. NRDC has admitted that its claim is satisfied if

the General Permit incorporates the TMDL's baselines. App. Br. at 35-36. That is exactly what the General Permit does. The General Permit states that the calculated reductions are based on the TMDL and directs the municipalities to meet the TMDL's waste load allocation and to meet reductions "defined by the TMDL program." (*See* 264-265, 321.)[120]

Another detail that NRDC claims is missing is individualized allocations for municipalities for achieving the reductions required by the TMDL. App. Br. at 36. This individualized allocation is not required in the TMDL itself, though TMDL-writers will sometimes provide them.[121] When the individualized allocations are not provided in the TMDL, EPA has instead consistently recommended that MS4 permitting

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[120] *See also* A. 30 (holding that DEC's determination that the baseline would be incorporated from the applicable TMDL for each affected water body was not arbitrary or capricious); A. 164 (explaining that the reductions required by the TMDL are summarized in guidance documents); A. 733 ("The MS4 permit will rely on the base line defined by the TMDL as outlined in [DEC's] guidance.")

[121] *See* TMDLs Handbook, *supra*, at 4.4; TMDLs Guidelines, *supra*, at 3.

authorities develop and apply individualized waste load allocations only "when circumstances allow."[122]

In any event, DEC has already established individual allocations for some watersheds (*see e.g.*, A. 322, 728, 734) and has committed to providing more specific allocations where feasible and appropriate. (A. 728-729, 734.) But this process takes time. DEC needs years to complete setting individualized allocations because this process requires detailed analysis of causation among municipalities and between municipalities and other sources.

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[122] 2014 Guidance, *supra*, at 8; *See also id.* at 7-9 ("EPA is again recommending that, '*when information allows*,' [waste-load allocations] for NPDES-regulated stormwater discharges be expressed 'as different [waste-load allocations] for different identifiable categories'"). EPA's earlier guidance was similar. *See* James A. Hanlon & Denise Keehner, Memorandum to Water Management Division Directors 5 (Nov. 12, 2010) (waste-load allocations should be disaggregated . . . "*to the extent feasible*" (emphasis added)); Hanlon Memorandum, *supra*, at 4 ("EPA recommends expressing the wasteload allocation in the TMDL as either a single number for *all* NPDES-regulated storm water discharges, or *when information allows*, as different [waste load allocations] for different identifiable categories, *e.g.*, . . . municipal storm water discharges from City A as distinguished from City B." (emphasis added)).

In the interim, the General Permit makes clear that each municipality is responsible for reducing their contribution as instructed by the TMDL. Municipalities may meet this default obligation on their own, or they may form coalitions and achieve the reductions on a regional basis. (A. 265.) Furthermore, DEC has required all municipalities subject to a TMDL to implement *additional* best management practices aimed at the specific pollutants of concern under the TMDL[123] (A. 322-339), while DEC gathers information necessary for additional determinations of individualized allocations (A. 163-164).[124] This approach for waters covered by TMDLs mirrors the approach taken by many other States.[125] Taken together, these measures adequately provide individualized obligations to municipalities to ensure that they do not contribute to violations of water-quality standards.

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[123] The primary pollutants of concern related to stormwater in New York are "nitrogen, phosphorus, silt and sediment, pathogens, flow, and floatables." (*See* A. 346.)

[124] *See* 64 Fed. Reg. at 68,788.

[125] *See e.g.*, Conn. General Permit, *supra*, at 15 (requiring MS4s to meet TMDL allocations where they have been set); Illinois General Permit, *supra*, at 4-5.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Appellate Division.

Dated: New York, NY
December 18, 2014

Respectfully submitted,

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