

COURT OF APPEALS
STATE OF NEW YORK

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.

**AMENDED MOTION FOR LEAVE TO PARTICIPATE AS
AMICI CURIAE IN SUPPORT OF RESPONDENT-
RESPONDENT THE NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION**

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JANUARY 7, 2015

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Proposed Amended Brief of the City of New York *et al.* as *Amici Curiae* (separately bound)

COURT OF APPEALS
STATE OF NEW YORK

X

In the Matter of the Application of

NATURAL RESOURCES DEFENSE COUNCIL,
INC., et al.,
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For a Judgment Pursuant to Article 78
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THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
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X

**AMENDED
NOTICE OF
MOTION FOR
LEAVE TO
PARTICIPATE AS
AMICICURIAE IN
APPEAL**

Westchester County Clerk's
Index No. 16132/19

PLEASE TAKE NOTICE that pursuant to the attached motion and proposed amended *amici curiae* brief, dated January 7, 2015, the City of New York (“the City”); the State of New Hampshire; the State of Wyoming; Nassau County, New York; Onondaga County, New York; the New York Conference of Mayors (“NYCOM”); the New York State Association of Counties (“NYSAC”); the Water Environment Federation (“WEF”); the National Association of Clean Water Agencies (“NACWA”); the National Association of Flood and Stormwater Management Agencies (“NAFSMA”); the American Water Works Association (“AWWA”); the New York Section of the American Water Works Association (“NYSAWWA”); the New York State Association of Regional Councils

(“NYSARC”); and the New York Water Environment Association (“NYWEA”) move this Court located at 20 Eagle Street, Albany, New York, 12207, on January 12, 2015, or as soon thereafter as counsel may be heard, for an order, pursuant to Rule of Practice 500.23(a)(1) of this Court: (1) to appear in the above appeal as *amici curiae* in support of respondent-respondent the New York State Department of Environmental Conservation (“NYSDEC”), and (2) such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 7, 2015

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COURT OF APPEALS
STATE OF NEW YORK

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THE NEW YORK STATE DEPARTMENT OF
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Respondent-Respondent.

-----X

**AMENDED
AFFIRMATION IN
SUPPORT OF
MOTION**

Westchester County Clerk's
Index No. 16132/10

AMY MCCAMPHILL affirms the truth of the following under penalty of perjury:

1. I am an attorney in the office of Zachary W. Carter, Corporation Counsel of the City of New York, attorney for the City of New York ("the City").

2. I am familiar with the facts and circumstances herein set forth and submit this affidavit in support of the motion of the City to appear, together with the State of New Hampshire; the State of Wyoming; Nassau County, New York; Onondaga County, New York; the New York Conference of Mayors ("NYCOM"); the New York State Association of Counties ("NYSAC"); the Water Environment

Federation (“WEF”); the National Association of Clean Water Agencies (“NACWA”); the National Association of Flood and Stormwater Management Agencies (“NAFSMA”); the American Water Works Association (“AWWA”); the New York Section of the American Water Works Association (“NYSAWWA”); the New York State Association of Regional Councils (“NYSARC”); and the New York Water Environment Association (“NYWEA”); as *amici curiae* in the above-captioned matter for the limited purpose of supporting the New York State Department of Environmental Conservation (“NYSDEC”) as respondent-respondent in this proceeding.

3. The participation of the City of New York and the other undersigned parties as *amici curiae* would be of assistance to the Court, as required by in 22 N.Y.C.R.R. § 500.23(a)(4)(iii). The City has great interest in the issues presented on this appeal because, as set forth in greater detail in Appendix A to the annexed proposed *amici curiae* brief, the City is a regulated municipal separate storm sewer (“MS4”) operator under the New York State Department of Environmental Conservation’s (“NYSDEC”) State Pollutant Discharge Elimination System (“SPDES”) General Permit for Stormwater Discharges from MS4s, Permit No. GP-0-10-002, in Westchester and Putnam counties, where the City operates facilities in connection with its water supply. The City also has great interest in the operation of the MS4 general permit since the efforts of all the regulated MS4s in

its East of Hudson Watershed to manage municipal stormwater discharges are important to protecting and improving the quality of the City's drinking water. Finally, the City is interested in this litigation because the City is currently negotiating the terms of an individual MS4 permit, with requirements similar to those in the Statewide MS4 general permit, with NYSDEC.

4. More broadly speaking, all of the proposed *amici* are or represent states, local governments, public utilities, and water management agencies. *Amici* have direct roles in ensuring that the water in New York State and throughout the nation is clean and safe. As explained further in the attached Appendix A to the proposed attached *amici curiae* brief, the *amici* here represent a broad range of governmental perspectives on the regulation of MS4s from both within New York and outside of it. Thus, the *amici* include (1) MS4s or associations representing MS4s in New York that are regulated under NYSDEC's MS4 general permit; (2) municipalities and associations representing municipalities in New York that rely on NYSDEC's general permit to protect and improve the cleanliness of critically important local water bodies; (3) groups representing regulated MS4s from outside of New York that operate under regulatory programs similar to NYSDEC's MS4 general permit; and (4) other state governments tasked, as NYSDEC is, with regulating MS4s pursuant to the federal Clean Water Act ("CWA").

5. The diverse *amici* represented here all are united in the position that NYSDEC's MS4 general permit reflects NYSDEC's reasonable and appropriate implementation of the United States Environmental Protection Agency's program to regulate stormwater discharges from MS4s. *Amici* support NYSDEC's MS4 general permit's regulation of stormwater discharges by small municipalities as an effective strategy for reducing pollutant loading from municipal separate storm sewer systems to the maximum extent practicable.

6. Based on our extensive experience, the City and other *amici* seek to invite this Court's attention to law and arguments that may not be briefed by the parties but which we believe will be of assistance to the Court. In particular, *amici* request this Court affirm the Second Department's ruling that the MS4 general permit is not required to ensure strict compliance with section 301 of the Clean Water Act, 33 U.S.C. § 1311, for the reasons explained in the annexed proposed *amici curiae* brief. While Respondent NYSDEC argues that the MS4 general permit should be upheld because, *inter alia*, it ensures compliance with Clean Water Act section 301, *amici* assert that the Second Department was correct to hold that petitioners claim on this issue fails because such compliance is not required. Instead, the MS4 general permit must—and does—comply with section Section 402 of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), by requiring the reduction of discharge of pollutants to the maximum extent practicable.

7. A copy of the proposed *amici curiae* brief, including Appendix A which provides detailed descriptions of *amicis*' interests, is annexed hereto. If this motion is granted, the City of New York will serve and file the requisite number of copies of the brief within the time set by the Court.

WHEREFORE, the City respectfully requests that it and the other *amici* be permitted to appear as *amici curiae* in these proceedings and file the attached proposed brief.

Dated: New York, New York
January 7, 2015

Respectfully submitted,

FOR THE CITY OF NEW YORK

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THE NEW YORK STATE DEPARTMENT OF
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**AMENDED BRIEF FOR *AMICI CURIAE* THE CITY OF NEW YORK; THE STATE OF
NEW HAMPSHIRE; THE STATE OF WYOMING; NASSAU COUNTY, NEW YORK,
ONONDAGA COUNTY, NEW YORK; THE NEW YORK CONFERENCE OF
MAYORS; THE NEW YORK STATE ASSOCIATION OF COUNTIES; THE WATER
ENVIRONMENT FEDERATION; THE NATIONAL ASSOCIATION OF CLEAN
WATER AGENCIES; THE NATIONAL ASSOCIATION OF FLOOD AND
STORMWATER MANAGEMENT AGENCIES; THE AMERICAN WATER WORKS
ASSOCIATION; THE NEW YORK SECTION OF THE AMERICAN WATER WORKS
ASSOCIATION; THE NEW YORK STATE ASSOCIATION OF REGIONAL
COUNCILS; AND THE NEW YORK WATER ENVIRONMENT ASSOCIATION IN
SUPPORT OF RESPONDENT-RESPONDENT THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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JANUARY 7, 2015

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, *amici curiae* the New York Conference of Mayors, the New York State Association of Counties, the National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies, and the New York State Association of Regional Councils state that they have no parent corporations, subsidiaries, or affiliates.

Amicus curiae the American Water Works Association is the parent of *Amicus curiae* the New York Section of the American Water Works Association. The following sections of the American Water Works Association are additional affiliates of these two proposed *amici curiae*: Alabama-Mississippi Section, Alaska Section, Arizona Section, Atlantic Canada Section, British Columbia Section, California-Nevada Section, Chesapeake Section, Connecticut Section, Florida Section, Georgia Section, Hawaii Section, Illinois Section, Indiana Section, Intermountain Section, Iowa Section, Kansas Section, Kentucky-Tennessee Section, Mexico Section, Michigan Section, Minnesota Section, Missouri Section, Montana Section, Nebraska Section, New England Water Works Association, New Jersey Section, North Carolina Section, North Dakota Section, Ohio Section,

Ontario Water Works Association, Pacific Northwest Section, Pennsylvania Section, Puerto Rico Section, Quebec Section, Rocky Mountain Section, South Carolina Section, South Dakota Section, Southwest Section, Texas Section, Virginia Section, West Virginia Section, Western Canada Section, and Wisconsin Section.

Amicus curiae the Water Environment Federation has the following member associations, which include *amicus curiae* New York Water Environment Association as a North American Member Association: *North American Member Associations* – Alabama’s Water Environment Association, Alaska Water Wastewater Management Association, Arizona Water Association, Arkansas Water Environment Association, Atlantic Canada Water and Wastewater Association, British Columbia Water and Waste Association, California Water Environment Association, Central States Water Environment Association, Chesapeake Water Environment Association, Federal Water Quality Association, Florida Water Environment Association, Georgia Association of Water Professionals, Hawaii Water Environment Association, Illinois Water Environment Association, Indiana Water Environment Association, Iowa Water Environment Association, Kansas Water Environment Association, Kentucky/Tennessee Water Environment Association, Louisiana Water Environment Association, Michigan Water Environment Association, Mississippi Water Environment Association,

Missouri Water Environment Association, Montana Water Environment Association, Nebraska Water Environment Association, Nevada Water Environment Association, New England Water Environment Association, New Jersey Water Environment Association, North Carolina Water Environment Association, North Dakota Water Environment Association, Ohio Water Environment Association, Oklahoma Water Environment Association, Water Environment Association of Ontario, Pacific Northwest Clean Water Association, Pennsylvania Water Environment Association, Puerto Rico Water & Environment Association, Réseau Environnement, Rocky Mountain Water Environment Association, Water Environment Association of South Carolina, South Dakota Water Environment Association, Water Environment Association of Texas, Water Environment Association of Utah, Virginia Water Environment Association, Western Canada Water Environment Association, West Virginia Water Environment Association, Illinois Association of Water Pollution Control Operators, Kentucky Water and Wastewater Operators Association, Maritime Provinces Water and Wastewater Association, Missouri Water and Wastewater Conference, Texas Water Utilities Association, Wisconsin Wastewater Operators' Association; *Latin America Member Associations* – AIDIS Argentina, Associação Brasileira de Engenharia Sanitária E Ambiental, Chile - AIDIS, Asociación Colombiana de Ingeniería Sanitaria y Ambiental, Sociedad Mexicana de Aguas,

A.C. (SMAAC), Sociedad Mexicana de Aguas de Occidente, A.C. (SMAO), Sociedad Mexicana de Aguas de Oriente, A.C. (SMADO), Asociación Venezolana de Ingeniería Sanitaria y Ambiental; *Asia/Pacific Member Associations* – China-Water Industry Association, China Civil Engineering Society, Chinese Taiwan Environmental Engineering Association, Indian Environmental Association, Japan Sewage Works Association, Korean Water Pollution Control Association, Water New Zealand, Water Environment Association of the Philippines, Environmental Engineering Society of Singapore, Environmental Engineers Association of Thailand, Indonesian Society of Sanitary and Environmental Engineers; *Europe, Middle East, and Africa Member Associations* – Hungarian Professional Water Environment Association, Italian Water Pollution Control Association, Nederlandse Vereniging Voor Waterbeheer, Associação Portuguesa de Engenharia Sanitária e Ambiental, Asociación para la Defensa de la Calidad de las Aguas, Foreningen Vatten, Swedish Association for Water, Water Environment Association of Turkey, Chartered Institute of Water and Environmental Management, Bulgarian National Association on Water Quality, Vesiyhdistys R.Y., DWA German Association for Water, Wastewater and Waste, Norsk Vannforening, Verband Schweizerische Abwasserfachleute, Egyptian Society for Water Environment Affairs, Israeli Water Association (IsWA), Palestinian Water

Environment Association, Saudi Arabian WEA, and Water Institute of Southern Africa.

INTERESTS OF *AMICI CURIAE*

Amici curiae are or represent state and local governments, public utilities, and local water management agencies that have direct roles in ensuring that the water in New York State and throughout the Nation is clean and safe. *Amici* submit this brief in support of respondent New York State Department of Environmental Conservation (“NYSDEC”), seeking affirmance of the decision of the Appellate Division, Second Department, which upheld NYSDEC’s general permit for stormwater discharges from municipal separate storm sewer systems (“MS4s”).

As explained further in the attached Appendix A to this Brief, the *amici* here represent a broad range of governmental perspectives on the regulation of MS4s from both within New York and outside of it. The New York *amici* include MS4s or associations representing MS4s across the State that are regulated under NYSDEC’s MS4 general permit, as well as New York municipalities that rely on NYSDEC’s general permit to protect and improve the cleanliness of critically important waterbodies. The New York *amici*, representing localities across all corners of the State, include: the City of New York; Nassau County; Onondaga County; the New York Conference of Mayors; the New York State Association of Counties; the New York Section of the American Water Works Association; the New York State Association of Regional Councils; and the New

York Water Environment Association. Each of these *amici* present detailed statements of interest in Appendix A.

The *amici* here also include other state governments that are tasked, as NYSDEC is, with regulating MS4s pursuant to the federal Clean Water Act (“CWA”), as well as groups representing regulated MS4s from outside of New York that operate under regulatory programs similar to NYSDEC’s MS4 general permit. These national *amici* include the States of New Hampshire and Wyoming which, like New York State, implement regulatory programs for municipal separate storm sewer systems in urbanized areas through general permits. The national *amici* also include the Water Environment Federation; the American Water Works Association; the National Association of Clean Water Agencies; and the National Association of Flood and Stormwater Management Agencies. All of these *amici*, too, present detailed statements of interest in Appendix A.

The diverse *amici* represented here all are united in the position that NYSDEC’s MS4 general permit reflects NYSDEC’s reasonable and appropriate implementation of the United States Environmental Protection Agency’s program to regulate stormwater discharges from MS4s. The focus of the MS4 general permit, as prescribed by the CWA and the New York State Environmental Conservation Law (“ECL”), is the development and implementation of stormwater controls to the “maximum extent practicable.” *Amici* strongly urge this Court to

affirm the Second Department's decision which recognizes the need for regulatory flexibility, within a framework of minimum required stormwater controls, given the inherent complexity of controlling stormwater runoff in diverse environments.

Amici support NYSDEC's MS4 general permit as an effective strategy for reducing pollutant loading from MS4s to the maximum extent practicable. *Amici* owning or operating MS4s in New York, or representing regulated MS4s, can attest from experience that NYSDEC's MS4 program requires covered municipal entities to adopt rigorous measures to reduce the discharge of pollutants from MS4s, while still affording those entities needed flexibility to develop and implement site-specific stormwater management programs based on local assessments of land use, watershed conditions, water quality, and economic conditions. As noted, NYSDEC's MS4 general permit is similar to permitting approaches outside of New York State, including those administered by *amici* States of New Hampshire and Wyoming.

NYSDEC's MS4 general permit appropriately reflects the reality that stormwater discharges from MS4s are fundamentally different from other point sources regulated under the CWA and the ECL in that the municipal owner or operator of the discharge has a limited ability to control the quantity and quality of the discharge. Unlike other regulated discharges, rainfall is naturally occurring, cannot be stopped, and can be controlled only to a limited degree. In contrast to an

MS4, wastewater treatment plants have fairly predictable influents, and are designed and built to provide mechanical and biological treatment to remove contaminants. Controls for MS4s are also unlike stormwater management from industrial or construction sites, where activities are wholly within the control of the sites' owner or operator. Instead, an MS4 receives stormwater runoff from vast developed areas that often consist of mostly private property—that is, property not directly controlled by the MS4 itself. This structure inherently limits the ability of the municipal owner or operator to manage a large portion of the stormwater entering the MS4.

Moreover, regulated MS4s are in populated, urbanized areas¹ which, in most instances, have already been developed with large areas that are impervious to absorption of stormwater directly into the ground, and without stormwater controls. For the most part, storm sewers were originally constructed to prevent or alleviate flooding, not to provide treatment of the water passing through them. In many cases, there may not be adequate available space to incorporate water quality treatment infrastructure for stormwater in densely developed areas. The control measures described below, which regulated MS4s are successfully employing to control stormwater pollution, include both physical

¹ See 40 C.F.R. § 122.32(a)(1).

stormwater management practices and also policy and public education changes to reduce pollutants in stormwater runoff.

Regulated MS4s need the flexibility, provided within the framework of required controls under New York State's MS4 general permit, to apply the "maximum extent practicable" standard to develop stormwater management plans tailored to local or regional circumstances. Such stormwater management plans are intended to serve as a "blueprint" for MS4 activities and will change dynamically over time as stormwater infrastructure is created and modified, and as the science underlying stormwater pollution control evolves. *Amici* provide additional detail concerning the development, implementation, enforcement, and impacts of stormwater management programs in Appendix A to this Brief.

BACKGROUND: OVERVIEW OF MS4 PERMIT REQUIREMENTS

The MS4 general permit establishes a rigorous framework through which regulated MS4s must reduce pollutants in stormwater discharges to the maximum extent practicable. Specifically, the MS4 general permit establishes six "Minimum Control Measures" that all regulated MS4s must implement, which can be tailored to address specific concerns and site limitations by each regulated MS4.

Regulated MS4s must conduct an annual evaluation of their programs to ensure that they are reducing the discharge of pollutants to the maximum extent

practicable.² MS4s' annual reports must be presented to the public, which must be given an opportunity to ask questions and comment on the report.³ MS4s are required to include a summary of comments received and intended responses in the final annual report submitted to NYSDEC, and describe any changes made to the stormwater management plan in response to the comments.⁴

The six Minimum Control Measures required by the MS4 general permit are:

1. Public Education and Outreach:⁵ The MS4 general permit requires the regulated MS4 to develop and implement a program to identify and disseminate information about individual or group behaviors which can contribute to stormwater pollution. A Public Education and Outreach program identifies target audiences, waterbodies of concern, and pollutants of concern, and describes steps that individuals or groups can take to reduce pollutants in stormwater runoff.⁶

While contributions from individual residents, businesses, and other groups to

² MS4 Permit V(A); A271.

³ MS4 Permit VII(A)(2)(d)(i)-(iii); A284-85.

⁴ MS4 Permit VII(A)(2)(d)(iv); A285.

⁵ See MS4 Permit VII(A)(1); Administrative Record A281-83 (subsequent references to the Administrative Record include only the page numbers, *e.g.*, A281). The MS4 general permit includes Minimum Control Measure provisions for addressing "traditional land use controls MS4s" such as cities, towns, and villages, *see* MS4 Permit VII(A), A281-301, and analogous provisions for "traditional non-land use control MS4s" and "non-traditional MS4s" such as schools, transportation agencies, fire districts, and federal and State facilities, *see* MS4 Permit VIII(A), A302-20. As these provisions are largely identical, *amici* focus on, and only cite to, Part VII of the MS4 general permit, addressing "traditional land use controls MS4s."

⁶ MS4 Permit VII(A)(1)(a)-(b); A281-82.

impairment are typically small, when aggregated across the entire population served by an MS4, these contributions may have a significant impact on local waters. Providing education and outreach to reduce pollutants to the “maximum extent practicable” requires an iterative program to identify target audiences and further tailor messaging and marketing to change behaviors and practices that can contribute to stormwater pollution.

2. Public Participation and Involvement:⁷ Regulated MS4s must also implement a program to solicit and facilitate direct input from local stakeholders in developing the MS4s’ stormwater management plans. This Minimum Control Measure is the natural extension of Public Education and Outreach: in connection with educating its target audiences on the impacts of their actions, the MS4 must engage stakeholders in its plans to control stormwater pollution to the maximum extent practicable. Specifically, the MS4 must identify and publish a local point of contact concerning all stormwater and MS4 permit-related issues⁸ and an annual report of activities for that permit year,⁹ and make publicly available the MS4’s stormwater management plan.¹⁰ The stormwater management plan describes, in

⁷ MS4 Permit VII(A)(2); A283-86.

⁸ MS4 Permit VII(A)(2)(c); A284.

⁹ MS4 Permit VII(A)(2)(d); A284-85.

¹⁰ MS4 Permit VII(A)(2)(d)(v); A285.

detail, the MS4's plans for implementing all the required controls to the maximum extent practicable.¹¹

3. Illicit Discharge Detection and Elimination:¹² Regulated MS4s must also develop a program to detect and eliminate non-stormwater discharges to the MS4. Among other things, this program requires the MS4 to:

- map all MS4 outfalls within the MS4's jurisdiction;¹³
- adopt and enforce a local law prohibiting the discharge of, or activities which result in, non-stormwater discharges to the MS4;¹⁴
- field verify all outfalls identified in the regulated MS4's outfall inventory;¹⁵ and
- educate the public and target audiences of the impacts and hazards of illicit discharges to the MS4.¹⁶

As non-stormwater and other illicit discharges can be a major source of water quality impairment, identifying and eliminating such discharges to the maximum extent practicable can have a significant impact on the water quality of the receiving waterbodies.

4. Construction Runoff Control:¹⁷ Regulated MS4s must also develop and implement a program to control stormwater runoff from construction activities.

¹¹ MS4 Permit IV(A); A267.

¹² MS4 Permit VII(A)(3); A287-89.

¹³ MS4 Permit VII(A)(3)(b); A287.

¹⁴ MS4 Permit VII(A)(3)(f)-(g); A287-88.

¹⁵ MS4 Permit VII(A)(3)(c); A287.

¹⁶ MS4 Permit VII(A)(3)(h); A288.

¹⁷ MS4 Permit VII(A)(4); A289-93.

The MS4 must adopt, administer, and enforce a local law which, at a minimum, provides the equivalent standard of protection as the NYSDEC State Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activities (either GP-02-01, GP-0-08-001, or GP 0-10-001).¹⁸ This Construction Activities general permit embodies NYSDEC's implementation of Clean Water Act requirements for large construction projects; regulated MS4s must take an active role in ensuring appropriate stormwater controls for such projects. At a minimum, the regulated MS4 must regulate all construction projects disturbing one acre or more of soil.¹⁹ The MS4 is responsible for ensuring that all construction projects that meet or exceed the land disturbance threshold prepare a stormwater pollution prevention plan, which, at a minimum, details the control of erosion and off-site sediment transport.²⁰ Under certain conditions, as noted immediately below, the stormwater pollution prevention plan must also contain post-construction stormwater controls to address stormwater runoff once the project is completed. The MS4 is required to maintain an inventory of active sites within its jurisdiction, inspect active sites, and enforce where a stormwater pollution prevention plan is being violated.²¹

¹⁸ MS4 Permit VII(A)(4)(a)(i); A290.

¹⁹ MS4 Permit VII(A)(4)(a)(ii); A290.

²⁰ MS4 Permit VII(A)(4)(a)(iii); A290.

²¹ MS4 Permit VII(A)(4)(a)(viii), (ix), (xii); A291-92.

5. Post-Construction Runoff Control:²² The MS4 must develop, implement, and enforce a program addressing post-construction stormwater runoff from certain new and redevelopment projects (*see* description of Minimum Control Measure 4, Construction Runoff Control, above).²³ This program must include a combination of management practices designed and implemented in accordance with the New York State Stormwater Management Design Manual.²⁴ The MS4 must establish and maintain an inventory of post-construction stormwater management practices within the MS4's jurisdiction.²⁵ MS4s are also required to oversee the effective long-term operation and maintenance of these management practices, including through inspection to ensure that the practices are performing properly.²⁶

6. Good Housekeeping and Pollution Prevention:²⁷ Regulated MS4s must also implement a program to reduce stormwater pollution from municipal operations and facilities, including, but not limited to:

- Street and bridge maintenance;
- Winter road maintenance;
- Storm sewer system maintenance;

²² MS4 Permit VII(A)(5); A293-98.

²³ MS4 Permit VII(A)(5)(a); A293.

²⁴ MS4 Permit VII(A)(5)(iv); A293.

²⁵ MS4 Permit VII(A)(5)(a)(vi); A295.

²⁶ MS4 Permit VII(A)(5)(a)(vii); A296

²⁷ MS4 Permit VII(A)(6); A298-301.

- Vehicle and fleet maintenance;
- Park and open space maintenance;
- Solid waste management; and
- Hydrologic habitat modification.²⁸

This Minimum Control Measure requires MS4s to look comprehensively at the interconnected operations of the entire municipality—a task well beyond the operations of the agency that typically handles water pollution controls. For example, in New York City, fifteen City agencies are coordinating in the Citywide effort to develop a Good Housekeeping and Pollution Prevention Program. The maximum extent practicable standard is essential to balance the demands of this program with the core functions of these agencies, which include, among others, the Fire and Police Departments, the Department of Education, and the Department of Corrections.

ARGUMENT

THE SECOND DEPARTMENT CORRECTLY RECOGNIZED THAT THE “MAXIMUM EXTENT PRACTICABLE” STANDARD GOVERNS CLEAN WATER ACT COMPLIANCE FOR MS4s

The Second Department’s unanimous ruling should be affirmed. In upholding NYSDEC’s MS4 general permit, the Second Department correctly recognized that the federal CWA and the New York State ECL establish a clear legal standard for MS4s, calling for permits that “require controls to reduce the

²⁸ MS4 Permit VII(A)(6)(a)(i); A289.

discharge of pollutants to the maximum extent practicable” (“MEP”).²⁹ This ruling is well supported by the plain language of the statutes, CWA legislative and regulatory history, and prior case law. The MEP standard, which compels significant improvements to water quality, is eminently appropriate for MS4s, because of their unique features as regulated point sources. The MEP standard allows regulated MS4s to develop appropriate stormwater controls based on site-specific conditions, providing the opportunity and obligation to identify appropriate controls iteratively as municipal stormwater management infrastructure is developed and altered, and as the science underlying stormwater pollution control evolves.

Petitioners wrongly assert that NYSDEC’s MS4 general permit is inadequate because it fails to ensure compliance with water quality standard requirements under section 301 of the CWA. NYSDEC’s brief shows that the general permit at issue here does in fact require that regulated MS4s comply with section 301.³⁰ But *amici* stress here that, as the Second Department’s ruling recognizes, petitioners’ argument fails on the more fundamental ground that the

²⁹ *Natural Res. Def. Council, Inc. v. N.Y. State Dep’t of Env’tl. Conservation*, 120 A.D.3d 1235, 1246 (2d Dep’t 2014); *see* 33 U.S.C. § 1342(p)(3)(B)(iii); N.Y. ECL § 17-0808(3)(c)

³⁰ An entirely separate issue, and one not before the Court, is what discretion permitting authorities have to include limitations based on strict compliance with water quality standards in MS4 permits. Regardless of this question, neither the CWA nor the ECL requires water quality standard compliance for MS4 permits, and thus petitioners’ allegation that the MS4 general permit unlawfully fails to ensure such compliance fails as a matter of law.

CWA does not require that MS4s comply with effluent limitations based on water quality standards in accordance with section 301. While the CWA requires that other types of permits ensure attainment with such standards, the Act specifically exempts MS4 permits from such a requirement, relying instead on the MEP standard as the measure of CWA compliance.³¹

Thus, in upholding the MS4 general permit, and rejecting petitioners' contention that the permit is unlawful because it does not ensure compliance with State water quality standards, the Second Department correctly noted that Congress "specifically provided that permits for *municipal dischargers* with respect to municipal separate storm sewers 'shall require controls to reduce the discharge of pollutants to the maximum extent practicable,' without reference to any numerical limitation established under the Clean Water Act in connection with any particular effluent."³² Thus, "Congress, rather than imposing specific effluent limitations,"

³¹ Although the issue is not before the Court on this appeal given the Second Department's modification of its decision on reargument, *amici* also note that, for similar reasons to those discussed in the text of this Brief, compliance schedules are also not required for MS4s regulated under the MS4 general permit. Such schedules "specify a schedule of compliance leading to compliance with CWA and regulations," and "may, when appropriate," be included in CWA permits. 40 C.F.R. § 122.47(a); *see also* N.Y. ECL § 17-0813 ("permits issued pursuant hereto *may* contain compliance schedules" (emphasis added)). Compliance schedules are appropriate when they can help regulated entities meet "applicable effluent limitations." N.Y. ECL § 17-0813(1). But for MS4s, CWA compliance is based on the MEP standard, rather than on effluent limitations based on water quality standards pursuant to section 301. Thus, compliance schedules are simply not relevant to MS4s, where the applicable standard is MEP rather than attainment of water quality standards.

³² *Natural Res. Def. Council, Inc.*, 120 A.D.3d at 1246 (quoting 33 U.S.C. § 1342(p)(3)(B)(iii)) (emphasis in original).

for MS4s, “vested the EPA and the States with discretion in imposing pollution controls,” and did not require such controls to “incorporate effluent limitations.”³³ The Second Department rightly recognized that in the realm of MS4s, the correct legal standard, in accordance with the plain language of the CWA, is the MEP standard, and the MS4 general permit appropriately requires compliance with this standard.

Because the Second Department correctly ruled that MEP is the appropriate standard for MS4s, its decision should be affirmed.

A. The distinctive “Maximum Extent Practicable” standard for regulation of MS4s is demanding, while still affording needed local flexibility in municipal stormwater management.

Municipal stormwater is regulated differently from other point sources under the CWA because it inherently *is* different. Unlike other regulated discharges, rainfall is naturally occurring, cannot be stopped, and can be controlled only to a limited degree. Moreover, the underlying sources of pollutants to MS4s are largely impervious surfaces on private property from which stormwater runs off—that is, sources not directly controlled by the municipality itself. To the extent that municipal land is the source of stormwater runoff, often these roads, parking lots, and buildings cannot be easily modified or altered to incorporate stormwater management controls without disrupting municipal operations or

³³ *Id.*

expending exorbitant amounts of money. And due to the complexity of stormwater discharge—which may contain a wide variety of chemical and biological substances and debris, and enter public water through thousands of point sources—tracing back the original source of pollutants can be extremely difficult or impossible.

For some stormwater controls, determining the “maximum extent practicable” is straightforward. For instance, while the resources required to develop, administer, and enforce a regulatory program for construction and post-construction stormwater controls are significant, as noted above, the parameters of such a program, based on a longstanding State and federal program to regulate construction stormwater, are well established. In contrast, determining appropriate best management practices for pollution prevention and good housekeeping at municipal facilities requires a far more complex application of the MEP standard, taking into account local site conditions, water quality concerns, and economic feasibility.

The experience of the *amici* here illustrates these points. For example, approximately 72% of New York City’s 305 square miles in land area is covered with impervious surfaces, such as rooftops, streets, and sidewalks, which prevent stormwater generated from rain and melting snow from being absorbed

into the ground.³⁴ New York City manages the hundreds of billions of gallons of stormwater that enter its sewer system each year, and has invested \$10 billion in infrastructure over the past decade to improve water quality in the New York Harbor.

The scale of the City's stormwater system underscores the importance of practicability in developing a stormwater management program. In 2013, the New York City Department of Environmental Protection performed 61,690 inspections of stormwater catch basins, and cleaned 36,593 catch basins.³⁵ The New York City Department of Sanitation street cleaners sweep over 9,000 miles of City streets weekly, sweeping up an average of 122 tons of street litter a day.³⁶ Even as the City begins to develop a stormwater management program under its forthcoming permit,³⁷ the City is already engaged in robust stormwater controls.

³⁴ The City is currently operating its MS4 pursuant to requirements incorporated into the permits for its fourteen wastewater treatment plants. The City is negotiating the terms of an individual MS4 permit, with requirements similar to those in the Statewide MS4 general permit, with NYSDEC. See Draft State Pollutant Discharge Elimination System ("SPDES") Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems owned or operated by the City of New York (Feb. 5, 2014), available at http://www.dec.ny.gov/docs/water_pdf/ms4nycdraft.pdf. The forthcoming permit will require significant enhancements to the City's stormwater management program to protect and improve water quality in the MS4's receiving waters.

³⁵ New York City Department of Environmental Protection, Best Management Practices: Annual Report for the Period January 1, 2013 – December 31, 2013 (April 2014), available at http://www.nyc.gov/html/dep/html/harborwater/spdes_bmp_report_2010.shtml, at p. 26. This report covers catch basins in both the separately sewered areas and the portions of the City served by combined sewers.

³⁶ Unpublished data from the City's 2014 Fiscal Year, available upon request.

³⁷ See *supra* n. 34.

The City is prepared to increase these controls as necessary in connection with its stormwater management program, but the breadth of such controls must be gauged against the statutory standard of practicability.

More broadly, the experience of *amici* across the State demonstrates that NYSDEC's MS4 program encourages a proactive, locally led approach to addressing stormwater management in urbanized areas. NYSDEC has both identified required actions under each of the six Minimum Control Measures that every MS4 must include in its stormwater management plan and preserved critical discretion for MS4s in choosing the specific management practices implemented to meet these requirements. This flexibility has been essential to effectively addressing the unique geophysical and anthropocentric conditions within each regulated MS4. Such flexibility is critically important not only from a water quality improvement perspective, but from an economic perspective as well. MS4s that are afforded the flexibility to target their implementation dollars where they will be most effective generate greater positive results than those that are held to a more prescriptive management scheme. In the absence of such flexibility, adaptive management is much more difficult, and bad decisions become long-term budget drains and obstacles to efficient allocation of resources.

Moreover, local conditions evolve over time, and the MS4 must re-evaluate and update its stormwater management plan to address current conditions.

For instance, under an adaptive management approach, water quality monitoring of selected representative discharge locations may be useful in assessing whether any of the Minimum Control Measures in an MS4's stormwater management plan should be adjusted or revised to more effectively address sources of impairment.

Amici have further observed that the MEP standard also prompts regional collaboration, when useful and practicable. Stormwater coalitions have formed across New York State, enabling communities with dissimilar development patterns, technical resources, staff capacities, and land use regulations to consult and to reach consensus on a number of land use and development decisions, and to develop complementary responses to shared problems. Working together at the watershed level, MS4s are jointly achieving stormwater management objectives, including a reduction in stormwater runoff volumes and the discharge of storm water pollutants of concern. Working in coordination has allowed MS4s to become more efficient, cutting costs by eliminating duplicative efforts and sharing services.

The experience of *amici* confirms that the MEP standard is demanding, yet retains needed flexibility for local governments, and thus is appropriately tailored to the regulation of MS4s.

B. The text and history of the Clean Water Act show that Congress specifically chose the “Maximum Extent Practicable” standard to address the distinctive challenges posed by municipal stormwater.

The centrality of the MEP standard to the regulation of MS4s is clear from the plain language and history of the CWA. The same sources directly refute petitioners’ contention that the CWA mandates the incorporation of water quality based effluent limitations under section 301 of the Act in MS4 permits.

Section 402 (p)(3)(B) of the CWA specifically provides that “[p]ermits for discharges from municipal storm sewers *shall require controls to reduce the discharge of pollutants to the maximum extent practicable*, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”³⁸ The plain text of section 402(p)(3)(B)(iii) thus both explicitly adopts the MEP standard and vests permitting authorities with discretion in implementing that standard.

The MEP standard embodied in the text of section 402(p)(3)(B)(iii) contrasts sharply with the standard that applies to industrial stormwater discharges.

³⁸ 33 U.S.C. § 1342(p)(3)(B)(iii)(emphasis added). In New York State, the CWA’s National Pollutant Discharge Elimination System (“NPDES”) permitting program is administered by the State, as the State Pollutant Discharge Elimination System (“SPDES”) permitting program. New York State law is identical to the federal CWA with respect to the standard for MS4s. N.Y. ECL § 17-0808(3)(c); *see also id.* § 17-0811(1) (requiring that “effluent limitation” be included in SPDES permits “where applicable”); *cf. Tualatin Riverkeepers v. Or. Dep’t of Env’tl. Quality*, 230 P.3d 559, 566 (Or. Ct. App. 2010) (noting Oregon state law “does not itself make state water quality standards applicable to storm water dischargers. Instead, it simply requires compliance with ‘applicable’ federal and state water quality standards”).

The CWA requires industrial stormwater discharges to “meet all applicable provisions of [section 402] and section 301.”³⁹ Section 301, “Effluent Limitations,” prohibits the discharge of pollutants absent compliance with effluent limitations as necessary to achieve water quality standards.⁴⁰ Thus, permits for industrial stormwater discharges must include limitations developed in accordance with section 301 of the Act, to ensure attainment of water quality standards. In contrast, for MS4s, the MEP standard, rather than restrictions developed to ensure attainment of applicable water quality standards, is the governing statutory requirement.

The history of the Clean Water Act and its implementation underscores that the adoption of the MEP standard for regulation of municipal stormwater was a deliberate choice by Congress, made in light of the distinctive challenges posed by such regulation. When the CWA was enacted in 1972, section 301(b)(1)(C) was designed to require whatever effluent controls were necessary to attain water quality standards “without regard to the limits of practicability.”⁴¹ But this requirement proved particularly difficult to implement in the regulation of stormwater pollution in general and the regulation of MS4s in particular.

³⁹ *Id.* § 1342(p)(3)(A).

⁴⁰ *Id.* §§ 1311(a), (b)(1).

⁴¹ S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, at 3710 (1971); *see* 33 U.S.C. § 1311(b)(1)(C) (requiring “any more stringent limitations, including those necessary to meet water quality standards, . . . established pursuant to any State law or regulations, . . . or required to implement any applicable water quality standard established pursuant to this Act”).

The United States Environmental Protection Agency (“EPA”) struggled for well over a decade to regulate stormwater under the CWA as initially enacted. EPA originally exempted most stormwater discharges that were not contaminated by industrial or commercial activity from CWA permitting requirements,⁴² but this exemption was subsequently struck down in *Natural Resources Defense Council v. Costle*.⁴³ EPA had argued that “certain characteristics of runoff pollution,”⁴⁴ made promulgation of effluent limitations difficult:

The major characteristic of the pollution problem which is generated by runoff . . . is that the owner of the discharge point . . . has no control over the quantity of the flow or the nature and amounts of the pollutants picked up by the runoff. The amount of flow obviously is unpredictable because it results from the duration and intensity of the rainfall event, the topography, the type of ground cover and the saturation point of the land due to any previous rainfall. Similar factors affect the types of pollutants which will be picked up by that runoff, including the type of farming practices employed, the rate and type of pesticide and fertilizer application, and the conservation practices employed⁴⁵

The D.C. Circuit nevertheless held that EPA did not have the discretion to exempt stormwater discharges, and expressed optimism that EPA could feasibly regulate such discharges “[w]ith time, experience, and technological development.”⁴⁶

⁴² 38 Fed. Reg. 18000, 18003 (July 5, 1973).

⁴³ 568 F.2d 1369 (D.C. Cir. 1977).

⁴⁴ *Id.* at 1377.

⁴⁵ *Id.* at 1377-78 (quoting Federal Appellants’ Memorandum on “Impossibility,” at 7-8).

⁴⁶ *Id.* at 1379.

In 1979, EPA issued revised CWA permitting regulations, including revised regulations for stormwater discharges;⁴⁷ EPA's new regulations were immediately challenged.⁴⁸ The following year, EPA issued regulations consolidating permitting under several federal laws, including the CWA; these regulations also included revisions to EPA's 1979 CWA stormwater regulations.⁴⁹ Challenges to EPA's 1980 regulations were consolidated into the pre-existing litigation.⁵⁰ Following a settlement, EPA proposed new regulations in 1982, which limited the scope of CWA permitting of stormwater systems and also reduced many permit application requirements for such systems.⁵¹ These regulations, in EPA's words, "attempted to balance the environmental concerns associated with

⁴⁷ 44 Fed. Reg. 32854 (June 7, 1979).

⁴⁸ See *Natural Res. Def. Council, Inc. v. U. S. Env'tl. Prot. Agency*, 673 F.2d 392, 396 (D.C. Cir. 1980). The D.C. Circuit specifically noted how contentious EPA's regulations were:

EPA anticipated that petitioners seeking review of these regulations . . . would "race to the courthouse," To deal with the anticipated problem, the agency published racing regulations and a "trigger" time: the regulations were to become ripe for judicial review at 1:00 p. m., Eastern Daylight Time (EDT), seven days after their appearance in the Federal Register. Thus, on June 14, 1979, various petitioners did indeed race to the courthouse, and petitions were eventually filed in the Third, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits.

Id.

⁴⁹ *Id.* at 395-36 (discussing regulatory history, noting that EPA's 1980 regulations "extensively revise[d] and supersede[d]" its 1979 NPDES regulations).

⁵⁰ *Id.*

⁵¹ See 47 Fed. Reg. 52073 (Nov. 18, 1982) (noting EPA's belief that "[i]n many cases, . . . extensive testing and reporting . . . would not be necessary in order to issue adequate permits" for stormwater discharges).

storm water discharges, the practical limitations of the NPDES permit as a tool for regulating storm runoff, and the realities of limited government resources.”⁵²

Nevertheless, despite “[i]ts protracted gestation and thoughtful preparation,” EPA’s proposed stormwater regulations “generated more comment and controversy than almost any other section” of EPA’s proposed 1982 CWA permitting regulations.⁵³ EPA concluded that “the best approach to deal with storm water related pollution problems, and the approach most consistent with the CWA, clearly falls between the extreme positions of not regulating any storm water discharges through the permit process,” or using “permits to control all storm water which may potentially contain any pollutants,” and accordingly tried to strike a balance in the final regulations.⁵⁴ Nevertheless, these regulations were again challenged in court, and further revised by EPA.⁵⁵

This regulatory struggle was eventually resolved in 1987 by Congress’s enactment of amendments to the CWA. These 1987 CWA amendments specifically adopted the distinctive “maximum extent practicable” language that today supplies the governing standard for municipal stormwater regulation. Specifically, Congress amended the CWA to establish the MS4-

⁵² 49 Fed. Reg. 37998 (Sept. 26, 1984).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.*; 50 Fed. Reg. 9362 (Mar. 7, 1985); 50 Fed. Reg. 32548 (Aug. 12, 1985).

specific MEP compliance standard requiring that permits for MS4s “shall include controls to reduce the discharge of pollutants to the maximum extent practicable.”⁵⁶ For MS4s, the MEP standard modifies the CWA’s section 301(b)(1)(C) requirement to ensure compliance with water quality standards—which remains directly applicable, without explicit reference to practicability, to industrial stormwater, industrial wastewater, and municipal wastewater discharge.⁵⁷

Congress’s intent that MEP provide the governing legal standard for MS4s, and afford municipalities some vitally needed leeway in controlling stormwater pollution, is clear in the legislative history. For example, during a Senate debate on January 14, 1987, Senator Durenberger described the amendments as “afford[ing] municipal and nonindustrial dischargers some relief from the 1972 permit application requirements.”⁵⁸ Specifically, “[a] permit for a municipal separate storm sewer . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable.”⁵⁹ And “[s]uch controls include management practices, control techniques and systems, design and engineering

⁵⁶ 33 U.S.C. § 1342(p)(3)(B)(iii).

⁵⁷ *Id.* § 1311(b)(1)(C).

⁵⁸ 133 Cong. Rec. 1260, 1280 (1987).

⁵⁹ *Id.*

methods, and other such provisions.”⁶⁰ Similarly, Senator Burdick, the primary Senate sponsor of the 1987 amendments, noted that the proposed legislation “provides an improved and less burdensome process for control of discharges of stormwater, particularly for municipalities.”⁶¹

During the House debate on January 9, 1987, Representative Roe, introduced as “the prime architect of this legislation,”⁶² explained that the proposed bill “establishes a mechanism to address the major problems associated with discharges from storm sewers through a permitting procedure and the development and implementation of management practices, control technologies, and design and engineering methods.”⁶³ Roe reiterated that MS4 permits “must require controls to reduce the discharge of pollutants to the maximum extent practicable.”⁶⁴

Following the 1987 amendments, EPA has expressly recognized that the MEP standard is the governing CWA standard for MS4s and distinguished MEP from the standards that apply to other permits issued under the Act. Thus, EPA has noted that “[t]he CWA requires, *with the exception of MS4s*, that NPDES permits contain technology-based effluent limits and water quality-based effluent limits (WQBELs) when the technology-based limits alone do not adequately

⁶⁰ *Id.*

⁶¹ 133 Cong. Rec. 1260, 1260 (1987).

⁶² 133 Cong. Rec. 976, 1005 (1987).

⁶³ 133 Cong. Rec. 976, 1006 (1987).

⁶⁴ *Id.*

protect water quality.”⁶⁵ In sharp contrast, “[t]he CWA standard for MS4s is that the permit must require controls to reduce the discharge of pollutants to the MEP [maximum extent practicable] to protect water quality.”⁶⁶ Petitioners here are mistaken in trying to compel NYSDEC to impose requirements beyond MEP in the regulation of municipal stormwater, when Congress specifically rejected the application of any such standards to municipal stormwater regulation.

C. A substantial body of legal precedent supports the Second Department’s ruling.

Courts have consistently recognized that the MEP standard, rather than strict compliance with effluent limitations developed under section 301 of the CWA, is controlling with respect to MS4s. For example, the Ninth Circuit, reviewing the legislative history of the CWA, correctly explained: “Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.”⁶⁷ In rejecting the petitioners’ challenge to EPA’s stormwater

⁶⁵ EPA, *TMDLs to Stormwater Permits Handbook*, at 10 (Nov. 2008), available at http://www.epa.gov/owow/tmdl/pdf/tmdl-sw_permits11172008.pdf (emphasis added).

⁶⁶ *Id.*

⁶⁷ *Natural Res. Def. Council v. U. S. Envtl. Prot. Agency*, 966 F.2d 1292, 1308 (9th Cir. 1992).

regulation, the Ninth Circuit concluded in 1992 that “Congress could have written a statute requiring stricter standards, and it did not.”⁶⁸

Similarly, in *Defenders of Wildlife v. Browner*, the Ninth Circuit reiterated that “Congress’ choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311 [CWA section 301], but not to include the same requirement for municipal discharges, must be given effect.”⁶⁹ Petitioners had argued that the CWA was ambiguous regarding whether municipalities must strictly comply with section 301, but the court found no ambiguity in the statutory language. Pointing to the clear difference in standards for MS4s and industrial stormwater discharges in section 402, and how section 402 “*replaces*” the requirements of section 301 for MS4s, the court concluded: “the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with [section 301].”⁷⁰ The court also noted that “[c]ontextual clues” support the plain meaning of section 402: because the CWA “contains other provisions that undeniably exempt certain discharges from the permit requirement altogether,” and thus from section 301, “Congress’ choice to exempt municipal storm-sewer discharges from strict compliance with [section

⁶⁸ *Id.* The Ninth Circuit also noted, with respect to the petitioners’ challenge to EPA’s sampling regime, that the court “must defer to EPA on matters such as this, where EPA has supplied a reasoned explanation of its choices.” 966 F.2d at 1308.

⁶⁹ 191 F.3d 1159, 1165 (9th Cir. 1999).

⁷⁰ *Id.* (emphasis in original).

301] is not so unusual that we should hesitate to give effect to the statutory text, as written.”⁷¹

State and federal courts across the country are in accord on this issue. For example, in *Mississippi River Revival, Inc. v. City of St. Paul*, the United States District Court for the District of Minnesota recognized that “unlike industrial storm water discharges, the CWA does not require water quality-based standards for municipal storm water discharges.”⁷² Instead, Congress required MS4s to meet the MEP standard, which “does not incorporate the water-quality based requirements” of section 301.⁷³ “While [the] CWA requires permits to contain conditions that ensure that water quality standards are met, the CWA specifically exempts municipal stormwater regulated MS4s from that requirement.”⁷⁴ The court thus rejected plaintiff’s allegations that defendant city was violating water quality standards, finding that compliance with such standards was not required under the MS4 permit at issue.⁷⁵

State courts in Oregon and Maryland also agree that the MEP standard is the controlling CWA standard for MS4. In *Tualatin Riverkeepers v. Oregon*

⁷¹ *Id.* at 1166.

⁷² 2002 U.S. Dist. LEXIS 25384, at *15 (D. Minn. Dec. 2, 2002).

⁷³ *Id.* at *16.

⁷⁴ *Id.* at *19.

⁷⁵ See also *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 437-38 (Minn. Ct. App. 2003) (citing *Miss. River Revival* with approval).

Dep't of Environmental Quality,⁷⁶ the Oregon Court of Appeals observed that while “[f]ederal law generally requires that discharges pursuant to NPDES permits must strictly comply with state water quality standards dischargers of municipal storm water are not subject to that requirement” and instead are subject to the MEP standard. The court rejected petitioners’ assertion that the MS4 permits at issue unlawfully failed to ensure compliance with water quality standards, holding that the regulating agency had discretion under both federal and State law to instead require best management practices to reduce the discharge of pollutants to the maximum extent practicable.⁷⁷ Similarly, in *Chesapeake Bay Foundation v. Maryland Department of the Environment*, a Maryland intermediate court recently held that “the Clean Water Act does not require strict compliance with water quality standards for municipal storm water sewer system permit.”⁷⁸ The court further held that Maryland law, which requires compliance with “all applicable state and federal water quality standards and effluent limitations” for CWA permitting, also does not require MS4 permits to ensure strict compliance with water quality standards.⁷⁹ Another Maryland intermediate court likewise upheld an MS4 permit that does not require strict compliance with CWA Section

⁷⁶ 235 Ore. App. 132, 141 n.10 (Or. Ct. App. 2010).

⁷⁷ *Id.* at 138-43.

⁷⁸ No. 02-C-14-186144 (Md. Cir. Ct., Anne Arundel Cnty. Dec. 2, 2014), at 18-19 (attached to this brief in Appendix B).

⁷⁹ *Id.* at 19.

301, noting that “Section 402 . . . provides, . . . permit requirements for municipal [stormwater] discharge shall require controls to reduce the discharge of pollutants to the maximum extent practicable This section of the [CWA] does not require meeting water quality standards.”⁸⁰

Thus, persuasive legal precedent clearly supports the Second Department’s correct determination that the governing legal standard for MS4 permits is MEP, not section 301 attainment of water quality standards.

In sum, the plain language of the CWA and the ECL, the statutory and regulatory history, persuasive legal precedent, and the essential characteristics of MS4s themselves all support the Second Department’s ruling that MEP, rather than section 301, is the governing standard for MS4s. For this reason, the Second

⁸⁰ *Blue Water Baltimore v. Md. Dep’t of the Env’t*, No. 03-C-14-000761 (Md. Cir. Ct., Baltimore Cnty.), October 3, 2014 Transcript of Proceedings, at 5:8-5:21 (attached to this brief in Appendix C); *see also* Order (October 7, 2014) (attached to this brief in Appendix D).

Amici are aware of only one contrary reported decision, *Anacostia Riverkeeper v. Md. Dept. of the Env’t*, No. 339466-V (Md. Cir. Ct., Montgomery Cnty. Dec. 4, 2013) (attached to this brief in Appendix E). There, the Judge noted during oral argument that he did not understand the permit at issue. *See* November 20, 2013 Transcript Excerpt at 48-49 (attached to this brief in Appendix F). Accordingly, he remanded the matter back to the state agency. The Judge specifically stated that he was “neither going to affirm it or reverse” the agency’s determinations, and asked “petitioner’s counsel” to draft “an appropriate order consistent with [his] oral opinion.” *Id.* at 51. Although the proposed order then submitted by the petitioners contained specific legal determinations—including the determination that MS4 permits must comply with section 301 requirements—that were not consistent with the Judge’s decision, the Judge nevertheless signed the order. That matter is currently before the Court of Special Appeals, *Md. Dept. of the Env’t v. Anacostia Riverkeeper*, No. 2199 (Sept. Term 2013). In light of these facts, this opinion has no persuasive value.

Department's holding that the MEP standard in the MS4 general permit is appropriate and consistent with applicable federal and State law must be affirmed.

CONCLUSION

The Second Department's Decision and Order should be affirmed.

Respectfully submitted,

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APPENDIX A: STATEMENTS OF INTEREST FROM *AMICI*

A. The City of New York

Amicus the City of New York (the “City”) is a political subdivision of the State of New York that both operates its own regulated stormwater sewer system,¹ and depends on the MS4 general permit to ensure the cleanliness of water in the City’s watershed. Indeed, the efforts of all the regulated MS4s in the East of Hudson Watershed to manage municipal stormwater discharges are critical to protecting and improving the quality of the City’s drinking water. Moreover, as a municipal entity operating water supply facilities in the East of Hudson Watershed and other areas subject to the MS4 general permit, the City’s Department of Environmental Protection is a regulated MS4 in Westchester and Putnam Counties, and has sought and obtained coverage under the MS4 general permit.

The City is committed to continued compliance with its obligations under the Statewide MS4 general permit for its upstate operations. Additionally, under an individual MS4 permit that NYSDEC is currently working with the City to develop for its in-City separate storm sewer system, the City will continue to make improvements to stormwater management within the City. Both in its own operations and as a beneficiary of the East of Hudson watershed communities’ efforts to reduce stormwater pollution, the City recognizes that investments in

¹ See *supra* Brief n. 34.

stormwater management need to be practical, taking feasibility and cost into consideration.

B. The States of New Hampshire and Wyoming

Like New York State, the States of New Hampshire and Wyoming are required under the Clean Water Act to administer and enforce regulatory programs for municipal separate storm sewer systems in urbanized areas. And like New York State, *amici* States implement these programs through general permits. That model recognizes the need for regulatory flexibility given the inherent complexity of controlling urban stormwater runoff in diverse environments. The States have an interest in preserving that flexibility within a framework of minimum required stormwater management controls, as embodied by the maximum extent practicable standard.

C. Nassau County, New York

Amicus Nassau County, New York (“Nassau”) is a political subdivision of the State of New York. Nassau occupies an area of 285.4 square miles (182,680 acres) located between New York City on the west, Suffolk County on the east, the Atlantic Ocean on the south, and the Long Island Sound on the north. The population of Nassau County based upon the 2001 census was 1,334,648. Two cities, three towns and sixty-two villages are located within the boundaries of Nassau County.

Stormwater within the county is discharged to the surface waters of the United States and to the groundwater. Nearly half of the land area in Nassau drains to surrounding surface waters. The current inventory of stormwater facilities within Nassau includes: 3,720 stormwater outfalls to the waters of the United States, 1,000 stormwater recharge basins, and approximately 57 miles of open stream corridors maintained by Nassau.

In addition to Nassau, various levels of government play a role in the management of stormwater within Nassau County's geographic area. Accordingly, the stormwater program in Nassau County is the result of inter-municipal cooperation. Nassau has developed a stormwater management plan that includes best management practices that will be implemented by Nassau and a coalition of local municipalities in order to achieve the regulatory standard of reducing pollutants in Nassau's stormwater to the maximum extent practicable.

Measurable goals and an implementation schedule have been developed for each of the BMPs in Nassau's stormwater management plan. The best management practices, measurable goals, implementation schedule, and initial stormwater management plan were developed by the Nassau County Department of Public Works with input from task groups. The task groups consisted of a combination of municipal officials, watershed protection committee members, and consulting engineers. The best management practices, measurable goals, and

implementation schedule were selected based on their ability to meet specific permit requirements and to reduce pollutants in Nassau's stormwater runoff to the maximum extent practicable. They were also selected based upon a general assessment of the best management practices' effectiveness, applicability to Nassau, and associated costs. Effectiveness of the selected best management practices, and success in achieving the selected measurable goals will be reviewed annually and the plan will be modified, if necessary.

D. Onondaga County, New York

Amicus Onondaga County is a municipal corporation and a one of twenty-five MS4 permit holders within the County. The County played a key role in pushing for the establishment of the Central New York Stormwater Coalition, of which the County is a member. The Coalition was established, and is run by the Central New York Regional Planning and Development Board, in order to foster the exchange of information, to identify and promote the discussion of issues of mutual concern facing MS4 communities, and to foster cooperation among participating MS4 communities in addressing issues that are of mutual concern.

The County provides to interested MS4s within the County the following services through the Onondaga County Department of Water Environment Protection:

- Establish a centralized "Hotline" for citizens to report suspected illicit discharges, at no cost to other municipalities;

- Perform routine inspections of stormwater outfalls at no cost to other municipalities (just under 1,800 outfalls, of which approximately half are County outfalls);
- Assist in tracking down sources of potential illicit discharges to stormwater systems, at a fee of \$55.00 per hour; and
- Share laboratory services at actual cost to the County.

In addition, the County has developed an award-winning green infrastructure program known as “Save the Rain,” through which the County provides financial assistance to municipalities to plan and implement green infrastructure projects to manage stormwater. The County has also planned and implemented an extensive green infrastructure program that now captures an estimated two hundred fifty million (250,000,000) gallons of stormwater annually. A key objective of the Save the Rain program is avoidance, to the maximum extent practicable of construction of costly end of pipe collection and stormwater treatment infrastructure.

Moreover, the County conducts an extensive ambient water quality monitoring program pursuant to which the County assesses the impact upon water quality of its long-term capital program to upgrade wastewater collection and treatment through a combination of gray and green infrastructure projects.

Over the past decade, the nature and complexity of the measures required by municipal stormwater permits has increased dramatically, along with the threat of citizen suits seeking to impose liability for noncompliance with those requirements. As an MS4 holder, the County is acutely aware of the

enormous complexity and potential financial impacts that would ensue from the need to comply with numeric end of pipe limitations and by implication rigid and costly infrastructure requirements that would be needed to assure compliance if the current MS4 permit is altered as urged by NRDC.

E. The New York Conference of Mayors

Amicus the New York Conference of Mayors (“NYCOM”) is a not-for-profit, voluntary membership association consisting of 583 of New York State’s 611 cities and villages, thereby representing the overwhelming majority of such municipalities. NYCOM’s mission is to improve the administration of municipal affairs in New York State through training for municipal officials, and to provide its members with legislative advocacy at both the state and federal levels on issues of concern to local government. This case is of significant concern to the many NYCOM members that are required under State and federal law to seek coverage for the MS4 discharges.

F. The New York State Association of Counties

Amicus the New York State Association of Counties (“NYSAC”) is a not for-profit corporation incorporated pursuant to the laws of the state of New York. NYSAC is the only statewide municipal association representing the interests of county government, including elected county executives, county supervisors, legislators, representatives, commissioners, administrators, and other

county officials from all 62 counties of the state of New York, including the City of New York. NYSAC's activities involve providing support and guidance to county officials in furtherance of their essential governmental functions, and all of its activities, including the filing of this amicus brief, accrue to the benefit of all county governments in the State of New York. This case is significant to the many New York counties that are required under State and federal law to seek coverage for MS4 discharges.

G. The Water Environment Federation

Amicus the Water Environment Federation ("WEF") is a not-for-profit technical and educational organization under Section 501(c)(3) of the Internal Revenue Code whose mission is to preserve and enhance the global water environment. Founded in 1928, WEF has more than 33,000 individual members and 75 affiliated Member Associations representing water quality professionals worldwide, including in the United States and in the State of New York. Over 7,000 of those members consider stormwater management, including MS4 issues, a key professional focus. Over 1,800 WEF members reside in New York State. WEF members, Member Associations, and staff proudly work to achieve its mission to help its members meet the requirements of the Clean Water Act, including those related to MS4s, and provide bold leadership, champion

innovation, connect water professionals, and leverage knowledge to support clean and safe water worldwide.

WEF is a leading organization in the dissemination of stormwater management and MS4 compliance information, technology, management, and policy best practices via books, journals, magazines, conferences, and professional committees. WEF, as an organization with stormwater practitioners and MS4 managers as members across the country in various climates and conditions, including in the State of New York, has an interest in preserving the flexibility inherent in the MS4 (general and individual) permitting approach. Considering that the management and treatment of stormwater runoff is tied directly to rainfall distributions and volumes, soil conditions, nature and amount of impervious cover, and other site- and locally-based conditions, it is imperative that MS4s are provided the flexibility in addressing the impacts of stormwater runoff in a manner that is most appropriate and effective for local conditions. Clarification on the applicability of the “maximum extent practicable” standard is also of importance for WEF, as this standard impacts all MS4s both directly and significantly.

In conclusion, WEF members, many of which are employed by MS4s, support affirmance of the lower court decision which recognized the need for MS4 controls to be practicable.

H. The National Association of Clean Water Agencies

Amicus the National Association of Clean Water Agencies (“NACWA”) represents the interests of nearly 300 of the nation’s publicly owned wastewater and stormwater management agencies. NACWA has 8 public utility members in New York State, including the New York City Department of Environmental Protection. NACWA members serve the majority of the sewered population in the United States, collectively managing and treating more than 18 billion gallons of wastewater and stormwater each day. NACWA members operate their utilities under the stringent requirements of the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) permit program, including state-issued permits developed under federally delegated Clean Water Act programs. NACWA has participated in litigation across the country before both federal and state courts regarding the appropriate regulatory requirements in NPDES permits for municipal wastewater and stormwater discharges. NACWA has an interest in this case to provide the court with a national perspective on the importance of the MEP standard for municipal stormwater discharges, and ensure to ensure the MEP standard is consistently and faithfully applied.

I. The National Association of Flood and Stormwater Management Agencies

Amicus the National Association of Flood and Stormwater Management Agencies (“NAFSMA”) is a national not-for-profit association of

municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control and floodplain management, stormwater management, water conservation, and other water-related districts, bureaus, departments, and other instruments of local, regional, and state government. NAFSMA's member agencies serve a combined population of millions of people nationwide and are responsible for the protection of lives, property, and the environment from the impacts of storm and flood waters. NAFSMA has an interest in this litigation because its members are directly involved in the administration of stormwater agencies and utilities and the implementation of stormwater management programs mandated by Section 402(p) of the Clean Water Act and by the state and federal regulations implementing that provision. Over the past decade, the nature and complexity of the measures required by municipal stormwater permits has increased dramatically, along with the threat of citizen suits seeking to impose liability for noncompliance with those requirements.

J. The American Water Works Association

Amicus the American Water Works Association ("AWWA") is an international nonprofit scientific and educational society dedicated to the improvement of drinking water quality and supply. AWWA's 50,000-plus members represent the full spectrum of the water community, including utility

managers, plant operators, environmental advocates, state and federal regulators, scientists, academicians, and others who hold a genuine interest in water supply and public health. AWWA's membership includes approximately 4,800 local or regional drinking water utilities, which collectively provide safe drinking water to more than 80 percent of the American people. AWWA has an interest in this litigation because its members are directly engaged in stormwater management and regulation.

K. The New York Section of the American Water Works Association

Amicus the New York Section American Water Works Association ("NYSAWWA"), established in 1914, is a nonprofit organization dedicated to providing sustainable safe water through the advancement of management, education, science, and technology. NYSAWWA provides solutions to improve public health, protect the environment, and enhance our quality of life. With approximately 1,800 individual and utility members, NYSAWWA represents both public and private water utilities and is a leading resource on water issues in New York State. NYSAWWA has an interest in this litigation due to its potential impact upon the already stressed administrative, operational, and financial resources of water utilities throughout New York State. MS4s present unique challenges and features as regulated point sources and the establishment of specific effluent discharge limits would impose immense challenges and economic

hardship upon municipalities, water utilities, and other entities forced to monitor and comply with specific limits. NYSAWWA supports the MEP standard, which allows regulated MS4s to develop and implement site-specific controls and measures which can be modified periodically as conditions and stormwater infrastructure change over time.

L. The New York State Association of Regional Councils

Amicus the New York State Association of Regional Councils (“NYSARC”) is composed of nine locally created Regional Councils representing 45 of the 62 counties throughout New York State. Regional Councils are public organizations created to foster coordination among neighboring counties and to provide a regional approach for addressing multi-jurisdictional concerns. NYSARC provides a range of services to its member counties including water resource management, land use planning, economic development, and energy use planning and development.

NYSARC has been active in water resources management for over 40 years, with the goal of promoting high quality water resources throughout New York State. In its water resources program, NYSARC serves as a key liaison between NYSDEC and the local governments it serves, providing valuable staff services that supplement NYSDEC’s efforts to establish, administer, and deliver

statewide water quality programs at the local level, including the MS4 general permit.

Since 2002, NYSARC has served as a liaison between NYSDEC and the regulated MS4 communities to ensure effective two-way communication and to promote clear understanding of, and appropriate compliance responses to, new and evolving stormwater requirements. NYSARC provides MS4s with regionally coordinated, direct, local assistance necessary for planning and implementing the six minimum control measures required in the MS4 general permit, including:

- Providing information and guidance on Clean Water Act requirements, compliance strategies, and permit renewals;
- Providing planning assistance in support of developing and implementing stormwater management plans that advance statewide water quality priorities including identification of priority pollutants of concern, developing measurable goals, and selecting appropriate best management practices and operating procedures;
- Facilitating incorporation of stormwater management concepts into land use regulations and comprehensive planning documents;
- Providing local law gap analysis assistance needed to meet initial construction, post-construction, and Illicit Discharge Detection and Elimination local law requirements, and preparing local law updates as needed to comply with evolving regulatory requirements and standards;
- Facilitating and coordinating intermunicipal cooperation and consistent stormwater program implementation among neighboring MS4s;
- Facilitating sustainable funding mechanisms for long-term stormwater management program implementation;
- Conducting and coordinating training workshops on issues related to erosion and sediment control practices and site inspection procedures

in the areas of construction, post-construction, and appropriate pollution prevention practices;

- Providing permit-specific mapping and priority stormwater management area identification and data collection assistance including outfall mapping, sewershed delineation, and promotion of consistent mapping standards;
- Providing guidance for conducting annual program effectiveness evaluations, documenting program compliance activities and procedures, and annual reporting procedures;
- Conducting one-on-one follow up with MS4s as needed to strengthen and improve stormwater management plans and overall regulatory compliance in response to MS4 stormwater program audits conducted by NYSDEC Regional Offices; and
- Conducting training, education, and outreach programs for elected officials and municipal staffs, the general public, developers and contractors, and soliciting feedback from user groups and stakeholders on municipal stormwater management efforts.
- Providing modeling and data analysis assistance to assess and address pollutant loading to impaired water bodies through the development of watershed improvement strategies.

M. The New York Water Environment Association

Amicus the New York Water Environment Association (“NYWEA”)

was founded in 1929 by professionals in the field of water quality as a nonprofit educational organization, and has over 2,500 members statewide who historically have helped lead the way for state and national clean water programs. NYWEA promotes sustainable clean water quality management through science, education and training, and has a mission to educate and assist those involved in water environment industry in New York State. NYWEA administers the New York State wastewater operator certification program, and its members include technical

and policy experts willing to offer objective scientific based information and facts regarding environmental legislation. The members of the organization are responsible for MS4s and CSO (combined sewer overflow) programs and offer expertise to government officials about implication of environmental laws on local municipalities. NYWEA frequently includes stormwater management and MS4 permitting as key topic(s) in its technical conferences and in its quarterly magazine *Clear Waters*. Through specialized committees and task forces, (consisting of public and private industry experts in the field) NYWEA members routinely engage with municipal leaders to address stormwater management issues common to MS4s, including training, treatment and compliance.