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December 18, 2014

No.: 14-80184
Short Title: Environmental Defense Center, et al v. USEPA

Dear Petitioners/Counsel

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. Always indicate this docket number when corresponding with this office about your case.

If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for in forma pauperis status, you must file a motion for permission to proceed in forma pauperis with this court.

Pursuant to FRAP Rule 21(b), no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

PETITION FOR A WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners Environmental Defense Center and Natural Resources Defense Council, Inc., submit that they have no parent corporations and no publicly issued stock shares or securities. No publicly held corporation holds stock in any of the petitioners.

December 18, 2014

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INTRODUCTION

In 2003, this Court vacated in part and remanded an Environmental Protection Agency (EPA) rule concerning stormwater pollution, finding that the rule's regulation of urban stormwater violated the Clean Water Act and that the agency had arbitrarily failed to decide whether to regulate stormwater from forest roads. *Envtl. Def. Ctr., Inc. v. U.S. EPA* (*EDC*), 344 F.3d 832, 858, 863 (9th Cir. 2003). Even then, a lawful stormwater regulation was past due, as Congress had required EPA to complete its stormwater rulemaking by 1993. Yet, more than eleven years after this Court found the rule unlawful and remanded it to the agency, EPA has yet to comply with the Court's remand order. Petitioners Environmental Defense Center (EDC) and Natural Resources Defense Council (NRDC), who brought and won that earlier litigation, now petition this Court to compel EPA to comply with the Court's 2003 remand order, and to do so by a date certain.

Polluted rainwater runoff, or "stormwater," is a major environmental and human health problem. Two types of stormwater are relevant in this case: urban stormwater and forest road stormwater. In urban areas, rain washes pollution from streets, roofs, parking lots, and other contaminated surfaces into rivers, streams, lakes, and coastal waters. This urban stormwater is one of the leading sources of water contamination in the country and causes

countless illnesses in swimmers each year. In our nation's forests, stormwater from the dirt and gravel roads used for logging and other forest activities washes sediment into water bodies, where it harms fish and contaminates sources of drinking water for millions of Americans.

In *EDC*, the Court agreed with Petitioners that the stormwater rule at issue, known as the "Phase II Rule," failed to adequately address these two types of stormwater. First, the Court held that the Phase II Rule created an impermissible self-regulatory system for small municipal stormwater systems and failed to provide for public participation in the permitting process for those stormwater systems, as required by the Clean Water Act. *Id.* at 854-58. Second, the Court held that EPA failed to explain why the Phase II Rule did not address stormwater from forest roads at all, despite evidence in the record that such roads are a major source of water pollution. *Id.* at 860-61, 863. The Court vacated and remanded the urban stormwater portions of the rule. *Id.* at 858. The Court also remanded the forest road issue, directing EPA to decide, in an appropriate administrative proceeding, whether to regulate forest roads under its Phase II authority. *Id.* at 863.

EPA has repeatedly acknowledged that it must comply with the Court's 2003 order. However, more than a decade later, the agency has yet to do so. The invalid regulations for small municipal stormwater systems remain

printed—unchanged—in the U.S. Code of Federal Regulations. Many state permitting agencies continue to rely on them. And EPA has yet to decide whether it will regulate forest road pollution under its Phase II authority. EPA's failure to address the Court's remand order is especially troubling because Congress required EPA to complete these rules by 1993.

Federal courts have authority to issue writs of mandamus directing agencies to comply with prior orders, and this Court should now exercise that authority. EPA's continued disregard of the 2003 order undermines the integrity of the courts and robs Petitioners of their victory. The Court should grant the Petition for a Writ of Mandamus and order EPA to comply with the 2003 order by a date certain.

JURISDICTION

Petitioners bring this case pursuant to Federal Rule of Appellate Procedure 21, which allows parties to petition the Courts of Appeals for a writ of mandamus. Under the All Writs Act, 28 U.S.C. § 1651(a), this Court has jurisdiction to issue a writ of mandamus to "effectuate and prevent the frustration of orders it has previously issued." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977) (discussing 28 U.S.C. § 1651(a)); *Ramon-Sepulveda v. INS*, 824 F.2d 749, 751 (9th Cir. 1987) ("We have the authority and the duty to

preserve the effectiveness of our earlier judgment."). The Court therefore has jurisdiction to enforce its 2003 *EDC* judgment.

Petitioners have standing to bring this action on two independently sufficient bases. First, Petitioners were prevailing parties in *EDC*, and thus have standing to enforce the Court's 2003 order. *See Salazar v. Buono*, 559 U.S. 700, 712 (2010) ("A party that obtains a judgment in its favor acquires a 'judicially cognizable' interest in ensuring compliance with that judgment."); *see also* Declaration of Lawrence Levine (Levine Decl.) ¶¶ 6-13; Declaration of Owen Bailey (Bailey Decl.) ¶¶ 5-15. Second, Petitioners' members have concrete interests harmed by stormwater pollution that would be addressed by EPA's compliance with this Court's 2003 order. *See* Declarations of E. Kush, B. Meade, A. Van Alyn Booraem, K. Shimata, B. Stevens, M. Schweitzer, B. Kimball, S. Cooper, S. Ferry, and T. Dudley.

BACKGROUND

I. Stormwater is a significant source of water pollution

Stormwater "is one of the most significant sources of water pollution in the nation, at times comparable to, if not greater than, contamination from industrial and sewage sources." *EDC*, 344 F.3d at 840 (internal quotation marks omitted). In urban areas, small municipal separate storm sewer systems (MS4s) collect stormwater from developed areas and discharge it to

nearby streams, rivers, lakes, and coastal waters. *Id.* at 840-41. As the stormwater flows across the pavement and soil and into the MS4, it picks up contaminants, including suspended metals, algae-promoting nutrients, used motor oil, raw sewage, pesticides, and trash. *Id.* at 840. EPA, upon issuing the Phase II Rule, explained that urban stormwater is a major cause of water pollution nationwide and is the single largest source of pollution in ocean waters. National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,726 (Dec. 8, 1999). EPA also noted that urban stormwater can cause illnesses in swimmers and leads to hundreds of beach advisories and closings each year. *Id.* at 68,727 (finding that the rate of illness in people who swim near storm drains is 57 percent higher than the rate in people who swim more than 400 yards away).

Stormwater is also a problem in our nation's forests, which are covered in a vast web of roads. These roads—many of them dirt or gravel—are used for logging, recreational, fire protection, or other purposes. Notice of Intent To Revise Stormwater Regulations To Specify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges, 77 Fed. Reg. 30,473, 30,475 (May 23, 2012). EPA has

concluded that these roads are the "major source of erosion from forested lands, contributing up to 90 percent of the total sediment production from forestry operations." *EDC*, 344 F.3d at 861 (internal quotation marks omitted). This sediment pollution can damage aquatic habitats by smothering benthic organisms, increasing turbidity, reducing light penetration, and reducing dissolved oxygen. 64 Fed. Reg. at 68,730. Forest road stormwater can also directly harm humans by contaminating drinking water supplies: 80 percent of the nation's freshwater sources originate in forest lands, and approximately 60 million people rely on National Forest lands as the primary source of their drinking water. 77 Fed. Reg. at 30,476.

II. EPA adopted the Phase II Rule six years after the deadline set by Congress

Congress amended the Clean Water Act in 1987 to better address the problem of stormwater pollution, directing EPA to regulate stormwater in phases. First, Congress required EPA to regulate stormwater discharges from industrial activities and "large" MS4s (those serving populations of more than 250,000) by 1989, and to regulate stormwater discharges from "medium" MS4s (those serving populations between 100,000 and 250,000) by 1991. 33 U.S.C. § 1342(p)(4). EPA promulgated the regulations addressing these sources, the "Phase I Rule," in 1990. *EDC*, 344 F.3d at 842.

Second, Congress required EPA to identify and regulate all other sources of problematic stormwater pollution by October 1, 1993. *See* 33 U.S.C. § 1342(p)(5)-(6). EPA eventually responded to this command by promulgating the "Phase II Rule" in 1999, six years after the statutory deadline. 64 Fed. Reg. at 68,722. The Phase II Rule required operators of "small" MS4s (those serving fewer than 100,000 people) in urbanized areas to obtain National Pollutant Discharge Elimination System (NPDES) permits. 40 C.F.R. §§ 122.26(a)(9)(ii), 122.26(b)(16), 122.32(a), 122.34(a); *EDC*, 344 F.3d at 840. The Phase II Rule did not regulate—or even mention—discharges from forest roads. *EDC*, 344 F.3d at 861-62.

III. The Ninth Circuit vacated and remanded portions of the Phase II Rule in 2003

Shortly after EPA adopted the Phase II Rule, Petitioners challenged the regulations in this Court. Industry and municipal groups also challenged the regulations on a variety of grounds. *EDC*, 344 F.3d at 843. The Ninth Circuit consolidated the actions, and found that it had original jurisdiction over the final Phase II Rule under 33 U.S.C. § 1369(b)(1). *Id.* In 2003, the Court rejected the industry and municipal groups' challenges, but ruled for Petitioners on issues relating to small MS4s and forest roads. *Id.* at 840, 879.

On the small MS4 issue, this Court held that the Phase II Rule created an "impermissible self-regulatory system" because it allowed permittees to decide, without any oversight from the permitting agency, which pollution control measures to include in their permits. *Id.* at 854-56. The Clean Water Act requires EPA to reduce municipal stormwater pollution to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). As one way of meeting that mandate, the Phase II Rule authorizes EPA or a state permitting agency[1] to regulate a large number of small MS4s under one "general permit." *EDC*, 344 F.3d at 853 (citing 40 C.F.R. § 122.33(b)). Typically, a general permit explains what a class of dischargers (e.g., small MS4s, construction sites, etc.) must do to control water pollution. To obtain coverage under the general permit, a discharger must file a simple "notice of intent" (NOI) to comply with the general permit's terms before discharging. Because the NOI is merely the formal acceptance of the general permit's terms, permitting authorities need not review the NOI before the permittee can start discharging. *Id.*

Unlike this traditional general permitting approach, the Phase II Rule allows each polluter to develop its own individualized pollution control

[1] The Clean Water Act allows the states to administer NPDES permitting programs. EPA serves as the permitting authority in states that choose not to administer the Act. *EDC*, 344 F.3d at 841 (citing 33 U.S.C. § 1342(a)-(b)).

system in its NOI. *Id.* at 853-54. But nothing in the rule requires permitting authorities to review the individualized NOIs to "ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable." *Id.* at 855. Accordingly, this Court ruled that the Phase II Rule violates the Clean Water Act. *Id.* at 856.

This Court also found that the Phase II Rule's NOI procedures failed to meet the Clean Water Act's public availability and participation requirements. *Id.* at 856-58. The Act requires permitting authorities to provide public notice and an opportunity for a hearing on permits. *Id.* at 856 (citing 33 U.S.C. § 1342(j), (a)(1)). The Court reasoned that because Phase II NOIs include substantive, individualized pollution control plans, they are "functionally equivalent" to individual permit applications. *Id.* at 857. Accordingly, the Court held that the Phase II Rule violates the Act by failing to require notice and a hearing on each NOI. *Id.* Because of these deficiencies, the Court vacated these portions of the Phase II Rule and remanded the rule to EPA. *Id.* at 858.

The Court also ruled for Petitioners on the forest roads issue. EPA had argued that Petitioners were barred from challenging that aspect of the rule on procedural grounds, but made no substantive defense of its failure to regulate forest roads. *Id.* at 862 (stating that EPA responded to comments "without disputing that the [forest road sedimentation] problem is serious").

The Court rejected EPA's procedural defenses and held that Petitioners' contention that the Clean Water Act requires EPA to regulate forest roads "necessitates a response from EPA on the merits." *Id.* The Court remanded the issue to EPA "so that it may consider in an appropriate proceeding Petitioners' contention that [the Act] requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review." *Id.* at 863.

EPA sought en banc and Supreme Court review of this Court's decision. Both were denied. *Id.* at 839-40; *Texas Cities Coal. on Stormwater v. EPA*, 541 U.S. 1085 (2004); Levine Decl. ¶ 4, Ex. A at 1.

IV. EPA has not complied with the Court's 2003 order

More than eleven years after this Court's ruling in *EDC*, EPA has yet to comply with the 2003 order. Meanwhile, state permitting agencies have continued to rely on the invalidated small MS4 regulations. Although EPA, in 2004, issued a non-binding guidance memorandum that advises small MS4 permitting agencies to comply with *EDC* until EPA takes "affirmative action" to address the Court's remand order, Levine Decl. ¶ 4, Ex. A at 2-3, many permitting agencies have not followed that guidance.

For example, New York's 2010 general permit for small MS4s allows precisely the self-regulatory system that EPA's vacated rule allowed and that this Court's 2003 order held to violate the Clean Water Act. *Id.* ¶ 7, Ex. C at 29, 33, 35, 43, 46, 50 (allowing permittees to "[s]elect and implement appropriate" pollution controls), and 8 (stating that permit coverage may be obtained simply by submitting a "complete and accurate" NOI). It also fails to provide for adequate public participation on NOIs. *Id.* ¶ 7, Ex. C at 8. Because of these deficiencies and others, in 2010, Petitioner NRDC and other organizations challenged the New York small MS4 general permit in state court. That litigation is currently pending before New York's highest court.[2] Notably, in that litigation, the State of New York has argued that *EDC* is not controlling because "EPA has not issued revised regulations . . . . Therefore, EPA's current regulations remain binding, and remain the framework for which stormwater permitting occurs throughout the nation . . . ." *Id.* ¶ 8, Ex. D

[2] NRDC and the other petitioners prevailed in the trial court in 2012, but the intermediate appellate court reversed. *NRDC v. N.Y. State Dep't of Envtl. Conservation*, 940 N.Y.S.2d 437, 443, 449, 453-54 (N.Y. Sup. Ct. 2012), *aff'd in part and rev'd in part*, 994 N.Y.S.2d 125, 136 (N.Y. App. Div. 2014). The state supreme court recently granted NRDC's request for review, *NRDC v. N.Y. State Dep't of Envtl. Conservation*, 10 N.E.3d 189 (N.Y. 2014) (unpublished disposition), and the parties are currently briefing the appeal. Levine Decl. ¶ 8.

at 15-17; *see also id.* ¶ 8, Ex. D at 17 (arguing that EPA's 2004 guidance memorandum is not binding on the states).

Other state permitting agencies have similarly followed, or proposed to follow, the invalidated regulations. *See, e.g.*, Levine Decl. ¶¶ 10-11, Ex. E at section III(e) (California), Ex. F at 18, 30-31 (New Jersey). In fact, EPA found it necessary in its recent "MS4 Permit Improvement Guide" to remind permit writers to refer to the 2004 guidance memorandum regarding the *EDC* remand. *Id.* ¶ 5, Ex. B at 10. However, until EPA amends its regulations, states will likely continue to issue permits that contain the fatal flaws identified in the Court's 2003 order.

In late 2009, EPA began a process to update its entire urban stormwater program, including the Phase II Rule. *See, e.g.*, Stakeholder Input; Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68,617 (Dec. 28, 2009). At that time, EPA planned to issue a proposed rule by September 2011, but it has pushed back that date repeatedly, and now states only that a proposed rule may be issued on a date "To Be Determined." Levine Decl. ¶ 14, Ex. G. EPA has stated that it is "deferring action on [the] rulemaking" to instead pursue non-regulatory actions that "provide incentives" to "encourage" communities to implement stronger stormwater programs. *Id.* ¶ 16, Ex. I.

EPA has similarly failed to comply with this Court's 2003 order to decide whether to regulate forest roads under its Phase II authority, even though the agency has acknowledged a duty to do so. In 2012, EPA cited the 2003 order during a rulemaking to revise the Phase I regulations to exempt logging roads[3] from the NPDES permit requirement.[4] EPA stated that, in response to *EDC*, it "continues to review available information on the water-quality impacts of stormwater discharges from forest roads," and that it "believes that stormwater discharges from forest roads, including logging roads, should be evaluated under [its Phase II authority]," which "may be well-suited to address the complexity of forest road ownership, management, and use." 77 Fed. Reg. at 72,972, 72,973.

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[3] Logging roads are a subset of forest roads. *See* Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72,970, 72,973 (Dec. 7, 2012).

[4] EPA made these revisions in response to litigation over the Phase I program. *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011), *rev'd and remanded on other grounds sub nom., Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013). After the Ninth Circuit held that stormwater discharges from logging roads required NPDES permits, *id.* at 1066-67, EPA revised its regulations—in just over six months—to specifically exclude logging roads from the Phase I Rule's permit requirement. 77 Fed. Reg. at 72,970, 72,972 (showing that EPA issued the notice of intent, proposed rule, and final rule on May 23, September 4, and December 7, 2012, respectively). The Supreme Court reversed, holding that EPA had properly construed the earlier version of the regulation to exempt logging roads from regulation under the Phase I Rule. *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013).

Around that time, EPA began a process to propose "flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads." Levine Decl. ¶ 15, Ex. H. But as with the nascent urban stormwater rulemaking, EPA's estimate for the release of an advanced notice of proposed rulemaking on forest roads slipped from 2013 to 2014, and then to a date "To Be Determined." *Id.* ¶ 15, Ex. H. EPA has yet to decide, in an appropriate proceeding that allows for judicial review, whether to regulate forest roads, as this Court required in 2003.

ARGUMENT

The Court should issue a writ of mandamus because EPA's eleven-year delay in complying with the 2003 order is unreasonable

Under the All Writs Act, a federal court may issue a writ of mandamus to "effectuate and prevent the frustration of orders it has previously issued." *N.Y. Tel. Co.*, 434 U.S. at 172; *see also Ramon-Sepulveda*, 824 F.2d at 751 ("We have the authority and the duty to preserve the effectiveness of our earlier judgment."). The Court should use its authority under the All Writs Act to compel EPA to comply with the 2003 order.

Courts evaluate an agency's failure to comply with a prior court order as a claim for unreasonable delay under the Administrative Procedure Act (APA), 5 U.S.C. § 706(1), which requires a court to compel agency action unlawfully

withheld or unreasonably delayed. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008); *cf. Cal. Power Exch. Corp. v. FERC*, 245 F.3d 1110, 1124-25 (9th Cir. 2001). To determine whether agency action has been unreasonably delayed, courts apply the factors announced in *Telecommunications Research & Action Center v. FCC* (*TRAC*):

> (1) the time agencies take to make decisions must be governed by a 'rule of reason'[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.'

Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (quoting *TRAC*, 750 F.2d 70, 80 (D.C. Cir. 1984)); *see also Cal. Power Exch. Corp.*, 245 F.3d at 1124-25 (applying the TRAC factors, rather than the traditional three-part mandamus test, to an unreasonable delay case).

When applying the *TRAC* factors in similar circumstances, courts have held that an agency's failure to comply with a prior court order is dispositive. For example, in *In re People's Mojahedin Organization of Iran*, the D.C. Circuit remanded the U.S. Secretary of State's decision to reject an organization's

petition to be removed from a terrorist watch list. *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 833 (D.C. Cir. 2012). The Secretary failed to take final action on the organization's petition, and two years later, the court granted a writ directing the Secretary to comply with the first order within four months. *Id.* The court considered the *TRAC* factors, but it ultimately found the agency's disregard of the remand order to be dispositive: "Decisive to us, however, is the fact that the Secretary has failed to heed our remand." *Id.* at 837.

In a similar case, the D.C. Circuit remanded a Federal Communications Commission rule in 2002, holding that the agency had failed to explain its authority for issuing the rule. *In re Core Commc'ns, Inc.*, 531 F.3d at 850. After six years of agency inaction, the petitioner sued again, and the court issued a writ of mandamus directing the agency to comply with the remand order within six months. *Id.* at 850, 861-62. The court discussed some of the *TRAC* factors, but it emphasized that the case was "different" from a typical unreasonable delay case because the agency had failed to comply with a court order. *Id.* at 856 ("In this case, we are faced with the agency's failure—for six years—to respond to our own remand.").

The Court's authority to issue a writ of mandamus in these circumstances is clear. EPA has failed to heed this Court's 2003 order for more

than a decade, despite knowing that it must do so. On this basis alone, the Court should grant the petition.

Each of the six *TRAC* factors also favors Petitioners. First, EPA has disregarded the Court's 2003 order for more than eleven years; that length of delay is unreasonable on its face. "[A] reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal quotation marks omitted). Courts have found much shorter delays for similarly complex or important agency actions to be unreasonable. *In re People's Mojahedin Org. of Iran*, 680 F.3d at 833 (finding a two-year delay unreasonable); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157-58 (D.C. Cir. 1983) (finding a three-year delay unreasonable); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 324-25, 341-42 (D.C. Cir. 1980) (finding a four-year delay unreasonable); *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (finding a five-year delay unreasonable); *In re Core Commc'ns, Inc.*, 531 F.3d at 857 (finding a six-year delay unreasonable); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (calling six years an "extraordinarily long time"); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 414, 419 (finding a six-year delay "nothing less than egregious"). At some point, the courts "must lean forward from the

bench to let an agency know, in no uncertain terms, that enough is enough." *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

Second, Congress provided a deadline for the underlying rulemaking, and that deadline has long since passed. Indeed, it had long since passed even at the time that EPA promulgated the rule that, in 2003, this Court struck down. *See* 33 U.S.C. § 1342(p)(6) (setting a 1993 deadline for the Phase II Rule). EPA's continuing failure to comply with the 2003 order means that, more than twenty years after the statutory deadline, the agency still has not promulgated a lawful Phase II Rule.

Third, this delay is unreasonable because human health is at stake. As EPA itself acknowledges, municipal stormwater is one of the leading sources of water pollution nationally and contributes to illnesses in swimmers and hundreds of beach swimming advisories every year. 64 Fed. Reg. at 68,727. Forest road stormwater pollutes important sources of drinking water supplies for millions of Americans. 77 Fed. Reg. at 30,476.

Fourth, this rule is a high priority because it is subject to a statutory deadline. Congress undoubtedly knew about the other demands on EPA when it established the 1993 deadline. *See, e.g.*, *In re People's Mojahedin Org. of Iran*, 680 F.3d at 837. EPA may claim that it has other priorities, but "[h]owever many priorities the agency may have, and however modest its personnel and

budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction in the face of the congressional command to act." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 554 (D.C. Cir. 1999). And, here, this Court has already ordered EPA to take action.

Fifth, Petitioners have been prejudiced by EPA's failure to comply with the 2003 order. EPA's delay in responding to the Court's mandate, and failure to revise the rule to comply with the law, has insulated this issue from further judicial review. *See In re People's Mojahedin Org. of Iran*, 680 F.3d at 837 (stating that the petitioner was unfairly "stuck in administrative limbo"). Petitioners cannot challenge the final rule until EPA issues that rule—that alone is sufficient prejudice to warrant issuance of the writ. *See id.* Petitioners have also expended significant organizational resources to combat stormwater pollution that would be addressed by a legally adequate rule. *See* Levine Decl. ¶¶ 6-13 (describing NRDC's efforts to address these issues); Bailey Decl. ¶¶ 10-15 (describing EDC's efforts to address these issues). For example, NRDC has spent years litigating over New York's small MS4 general permit, which improperly relies on the invalidated portions of the Phase II Rule. Levine Decl. ¶¶ 8-9. Furthermore, EPA's continued delay in adopting a legally adequate stormwater rule has caused harm to Petitioners' members. *See* Kush, Meade, Van Alyn Booraem, Shimata, Schweitzer, Stevens, Kimball,

Cooper, Ferry, and Dudley Decls. While EPA dithers, stormwater from small MS4s and forest roads continues to pollute our nation's waters.

Sixth, although the Court need not find any impropriety behind the delay to find it unreasonable, here, EPA is plainly and consciously disregarding this Court's order. EPA has repeatedly acknowledged that it must comply with the order, yet it has withheld that action for more than eleven years. Levine Decl. ¶ 4, Ex. A at 1-2; 77 Fed. Reg. at 72,973.

All six *TRAC* factors favor Petitioners. In addition, EPA's failure to heed a court order for more than a decade is, by itself, dispositive. *In re People's Mojahedin Org. of Iran*, 680 F.3d at 837. Accordingly, the Court should grant the Petition for a Writ of Mandamus and compel EPA to comply with the 2003 order by a date certain.

REQUEST FOR RELIEF

Petitioners respectfully request that the Court grant the Petition for a Writ of Mandamus and order EPA to comply with the 2003 order by the dates outlined below. Given EPA's delay up to this date, a deadline for compliance with the Court's mandamus is critical; without such a deadline, EPA will be able to continue to disregard the 2003 order, as it has for eleven years. Courts that have granted similar writs have directed the agency to comply with an

order by a specific time. *See In re People's Mojahedin Org. of Iran*, 680 F.3d at 833; *In re Core Commc'ns, Inc.*, 531 F.3d at 861.

Petitioners first request that the Court order EPA to immediately revise the Phase II small MS4 regulations to include a statement that directs permitting authorities to comply with the 2003 *EDC* order pending further rulemaking. This action is needed to ensure that state permitting agencies do not continue to mistakenly rely on the vacated rules. EPA has made similar notations in other sections of the Code of Federal Regulations. *See, e.g.*, 40 C.F.R. § 63.99, Delegation Status for Part 63 Standards—State of Oklahoma, n.3 (stating that the standard was vacated and remanded to EPA by the D.C. Circuit in *Mossville Environmental Action Network v. EPA*, 370 F. 3d 1232 (D.C. Cir. 2004)); 40 C.F.R. § 52.21, note to paragraph (b)(2)(iii)(a) (stating that the second sentence of the paragraph was stayed indefinitely by court order).

Petitioners further request that the Court order EPA to propose a rule, within six months, revising the small MS4 regulations to address the problems outlined in this Court's 2003 order. EPA has already had more than a decade to consider that order, and revising the rule to address the procedural deficiencies the order identified should be straightforward. Petitioners also request that the Court order EPA to take final action on the proposed rule

within six months of proposing it. EPA has shown that it can move quickly when it chooses. In 2012, EPA, in just over six months, revised the Phase I Rule to specifically state that logging roads do not require NPDES permits. *See* 77 Fed. Reg. at 72,970, 72,972 (showing that EPA issued the notice of intent, proposed rule, and final rule on May 23, September 4, and December 7, 2012, respectively). Petitioners' proposed schedule gives EPA twice as much time to revise this rule.

Petitioners also request that the Court order EPA to decide, within six months, in an appropriate proceeding allowing it to set forth judicially reviewable findings, whether to regulate forest roads. EPA has already stated that its Phase II authority "may be well-suited" to regulate forest roads and that it has been considering options for doing so for years. *Id.* at 72,973. If EPA ultimately decides to regulate forest roads, as it has repeatedly implied it would, Petitioners request that the Court order EPA to propose a rule within a year of that decision and finalize that rule no later than a year after issuing the proposed rule.

Finally, Petitioners request their reasonable attorneys' fees and costs for bringing this action, pursuant to 33 U.S.C. § 1369, 28 U.S.C. § 2412, or any other applicable provision of law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the Petition for a Writ of Mandamus.

December 18, 2014

Respectfully submitted,

/s/ Jaclyn H. Prange
Jaclyn H. Prange
Michael E. Wall
Natural Resources Defense Council
Attorneys for Petitioner
Natural Resources Defense Council

/s/ Margaret Morgan Hall
Margaret Morgan Hall
Brian P. Segee
Environmental Defense Center
Attorneys for Petitioner
Environmental Defense Center

STATEMENT OF RELATED CASES

NRDC is unaware of any related cases within the definition of Circuit Rule 28-2.6.

December 18, 2014

/s/ Jaclyn H. Prange
Jaclyn H. Prange

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014 I will serve a copy of the foregoing Petition for a Writ of Mandamus and Declarations of Owen Bailey, Abigail Van Alyn Booraem, Scott Dean Cooper, Thomas Leavitt Dudley, Stephen James Ferry, Bryn Kimball, Edward Kush, Lawrence M. Levine, Bernadette Meade, Marsha Schweitzer, Kathy Shimata, and Brendan Stevens by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

Avi Garbow
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Mail Code 2310A
Washington, DC 20460

Gina McCarthy
William Jefferson Clinton Building
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Mail Code 1101A
Washington, DC 20460

Civil Process Clerk
United States Attorney for the
Northern District of California
Federal Courthouse, 11th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Eric Holder, Jr.
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Certified Mail, Return Receipt Requested: I placed the envelope, sealed with first-class postage fully prepaid, and with Certified Mail labels and Return Receipt attached, for collection and mailing at a facility regularly maintained by the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this December 18, 2014, at San Francisco, California.

/s/ Sharmeen E. Morrison
Sharmeen E. Morrison

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF EDWARD KUSH IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF EDWARD KUSH

I, Edward Kush, declare as follows:

1. I reside in Water Mill, which is a community in Southampton, New York. I have lived in Water Mill since 1997 and in the Southampton area since 1993.

2. I am a dues-paying member of the Natural Resources Defense Council (NRDC), a petitioner in this proceeding. I have been a member of NRDC since 1987.

3. I regularly visit beaches near Southampton, as well as other nearby water bodies. I go to Flying Point Beach in Water Mill two to three times per week during the summer to swim, run, and walk, and once a week during the rest of the year to walk. In the summer, I also swim at Mecox Beach, Sagg Main Beach, and Hampton Bays Dune Road Beach approximately once a month. I kayak in Shinnecock Bay, Hampton Bay, and the Peconic River once or twice a summer. Additionally, I visit Mecox Bay and Shinnecock Bay, and their surrounding wetlands, once or twice a month to bird watch. Each December, I participate in the Audubon Society's annual bird count throughout the Water Mill area.

4. I intend to continue to engage in the activities described in paragraph 3, now and in the future.

5. I am seriously concerned about the effects of stormwater pollution on beaches, water bodies, and wetlands where I spend time and recreate. It is common knowledge in my area that it can be unsafe to swim after a rainstorm, and I will sometimes avoid swimming at those times. Similarly, after strong rainstorms, I regularly see signs warning against shellfish harvesting because of water pollution hazards. In the bays I visit, I have seen, and continue to see, poor water clarity due to nutrient pollution and its accompanying algae growth, and an unacceptable level of floating debris. For this reason, I sometimes do not swim in the bays when I otherwise would. Further, in recent years, I have seen and continue to see, the effects of nutrient run-off pollution in Mill Pond near my home in Water Mill. The nutrient pollution has led to algae growth, including algae "blooms," and even to a fish kill in the pond. This increase in debris and algae growth, and the accompanying loss of water clarity and fish, makes these waters much less aesthetically pleasing. Finally, in the wetlands where I bird watch, I now see fewer water fowl than I used to, particularly uncommon and unique species, such as grebes and loons. The decrease in water fowl is especially prevalent in wetlands that are nearest development.

6. I am also concerned that stormwater pollution throughout the Southampton area will affect my property value. Because my home's property

value is based largely on its proximity to the ocean and other water bodies, I am concerned that its value has been, and will continue to be, diminished by the water pollution in and around Southampton.

7. I would enjoy and visit the beaches and water bodies in and around Southampton more if there were less stormwater pollution. Conversely, if stormwater pollution continues to degrade these waters further, I will likely spend less time recreating in and around them.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Nov. 10, 2014, in WATER MILL, New York.

Edward A. Kush Jr.

EDWARD KUSH

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF BERNADETTE MEADE IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF BERNADETTE MEADE

I, Bernadette Meade, declare as follows:

1. I reside in the Town of Southampton, New York. I have resided in Southampton since 1976, and, before then, summered in the area since 1965. As a resident of Southampton, I regularly use and visit the nearby beaches and water bodies.

2. I am a dues-paying member of the Natural Resources Defense Council, Inc., the petitioner in this proceeding. I have been a member of NRDC since 2005.

3. I regularly visit beaches near Southampton and other nearby water bodies. Since it is only a short walk from my house, I visit the beach in Little Peconic Bay almost daily during the summer, swimming occasionally. I go on walks along the Little Peconic Bay's and Noyac Bay's beaches about twice a week during the rest of the year. I sail on Little Peconic Bay and Noyac Bay about twice a month from May through October. I also swim and walk at Flying Point Beach approximately twice a month during the summer. Additionally, on occasion throughout the year, I visit Big Fresh Pond while on walks in Emma Rose Elliston Park.

4. I intend to continue to engage in the activities described in paragraph 3 now and in the future.

5. I am aware that small municipal separate storm sewer systems, including those of the Town of Southampton, Village of Southampton, Town of Riverhead, Village of Westhampton Beach, Village of Quogue, Village of Sag Harbor, and Village of North Haven discharge untreated stormwater into the water bodies where I spend time and recreate. I am seriously concerned about the effect of stormwater pollution on those waters. I am especially concerned about the effects of nutrient pollution on the waters I enjoy. Almost every year now, I witness the water clarity of Little Peconic Bay deteriorate because of algae growth, and there comes a point during the summer when I stop swimming because of the algae. In fact, in the last ten years, there have been a number of summers where I felt uncomfortable swimming for more than a quarter of the swimming season. Similarly, I feel that Big Fresh Pond, where I used to swim as a child, is no longer safe for swimming due to algae.

6. I can also no longer be certain I will be able to enjoy scallops, as I did in the past, because of the algae. I used to celebrate the opening of the scallop season with friends in late September, cooking gallons of local scallops with different recipes, and I would then continue to enjoy them through the fall. Now the scallop season often does not begin until late October because of nutrient pollution and the algal Brown Tide, leaving far less time to enjoy the scallops. This year's scallop harvest was better than last year's—perhaps

because we had a relatively cool summer—but I worry that this is only an anomaly. Peconic Bay scallops are a treat; they are plumper and sweeter than other bay scallop varieties. But we have been having problems with the scallop harvest for at least fifteen years. I would like to think that this year will mark the beginning of an upward trend, but I cannot be sure.

7. I am concerned that water pollution surrounding Southampton will affect my property value. People find Southampton attractive because of the availability of water activities. If the waters in and around Southampton deteriorate to a point where water activities are unsafe, people will be much less eager to buy homes in the area. Therefore, I am concerned that if water quality in and around Southampton is not improved, or gets worse, my property's value will diminish.

8. I would enjoy and visit the beaches and water bodies in and around Southampton more if there were less stormwater pollution. Conversely, if stormwater pollution continues to degrade these waters further, I will likely spend less time recreating in and around them.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 21st 2014, in Saratoga, New York.

Bernadette Meade

BERNADETTE MEADE

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF ABIGAIL VAN ALYN BOORAEM IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF ABIGAIL VAN ALYN BOORAEM

I, Abigail Van Alyn Booraem, declare as follows:

1. I reside in Yreka, California, a small town in Siskiyou County, just south of the Oregon border. I have lived in Yreka since 2007, though I visited the region often starting in the 1970s.

2. I am a dues-paying member of the Natural Resources Defense Council (NRDC), a petitioner in this proceeding. I have been a member of NRDC since 1990.

3. I regularly hike, camp, backpack, or swim in the forests of Northern California, specifically near the Klamath, Scott, and Salmon Rivers, and the tributaries to those rivers. Many of these areas are in the Klamath National Forest.

4. In the area around the Klamath River, I hike, swim, or camp in several different spots: Ash Creek; Trees of Heaven Campground, which is on the banks of the Klamath; Dutch Creek and Horse Creek. All these creeks flow into the Klamath River.

5. I also enjoy hiking, swimming, and camping in several areas around the Scott River: near the town of Scott Bar, at Indian Scotty Campground, which is on the banks of the Scott River; and up Box Canyon. I also hike up Shackleford Creek, which flows into Quartz Valley. The trails in

this area lead up to the beautiful Marble Mountains. This area is covered in logging roads that cause erosion into the nearby streams. Some of these water bodies serve as sources of drinking water for downstream communities.

6. Further east, I like to hike on Goosenest Mountain. There are tiny creeks scattered around this area, much of which has been heavily logged. I see debris from the logging left everywhere in this area.

7. My favorite place to recreate is in and near the Idlewild Campground, on the North Fork of the Salmon River. The trails from the campground go up into the most beautiful part of the Marble Mountains.

8. Every year, from roughly May or June to October, I take hiking or camping trips in the areas mentioned above, usually about twice a month. I also go swimming in one or more of these areas nearly every weekend. I plan on continuing these activities for the foreseeable future.

9. I am acutely aware of the ecological damage that forest roads can cause. Sediment pollution is a serious problem in many of the watersheds I visit. In some places in Northern California, I pass by miles of devastation from logging until I reach a place that has not been logged, to the point where I think, "thank God this tree was left standing." The erosion from logging roads is visible—the water gets cloudy, or full of algae because erosion and debris have interfered with the flow of water, and in some places no one swims

because we'd basically be swimming in mud. In addition to sediment, there are also often larger pieces of debris left over from the logging. I worry about how this pollution affects the fish and other species in the water. This disruption of nature disturbs me greatly and affects my enjoyment of these beautiful places.

10. I would enjoy and visit the above-mentioned areas more if there were less pollution from forest roads. Conversely, if forest road stormwater pollution continues to degrade these waters further, I am concerned not only that I will enjoy the area less, but that these conditions will undermine my home county's fragile economy, through loss of nature tourism.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 12-13-2014, in Houston, TX.

Abigail Van Alyn Booraem

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF BRENDAN STEVENS IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF BRENDAN STEVENS

I, Brendan Stevens, declare as follows:

1. I reside in Haiku, Hawaii, on the island of Maui. I have lived in Haiku since 1998.

2. I am a dues-paying member of the Natural Resources Defense Council (NRDC), a petitioner in this proceeding. I have been a member of NRDC since 2003.

3. I regularly surf, windsurf, swim, free dive, and SCUBA dive in the waters of Maui. In particular, I often windsurf, surf, swim, and free dive on the northern beaches of Maui, in the area between Kanaha Beach Park (next to the Kahului Airport) and Hookipa. The area from Kanaha Beach Park east to Hookipa is a world-class windsurfing and kitesurfing destination because of the trade winds. It is not unusual to see up to 100 kitesurfers and 100 windsurfers in this area on a good day. I have also surfed in the Kahului Harbor on occasion.

4. I live about 15 minutes from the coast and engage in the activities listed above a couple times a week, depending on the season. Winter is better for surfing; in the summer there is less wave activity, so I swim and free dive. I plan to continue surfing, windsurfing, swimming, and free diving in these areas for the foreseeable future.

5. The waters near the urbanized area of Kahului often suffer from stormwater pollution. The water gets really murky and dark after a storm. When there is stormwater runoff, I try to stay out of the water, both to avoid the pollution and to avoid the increased shark activity that often occurs when there is runoff. This means that I cannot surf, windsurf, swim and free dive in these waters as often as I would like.

6. I would enjoy the above-mentioned activities more if there were less stormwater pollution. Conversely, if stormwater pollution continues to degrade these waters further, I will enjoy my activities in these areas less.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 12/13/14, in HAIKU, Hawaii.

Brendan Stevens

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF MARSHA SCHWEITZER IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF MARSHA SCHWEITZER

I, Marsha Schweitzer, declare as follows:

1. I reside in Honolulu, Hawaii, on the island of O'ahu. I have lived in Hawaii for 43 years.

2. I am a dues-paying member of the Natural Resources Defense Council (NRDC), a petitioner in this proceeding. I have been a member of NRDC since 1982, with annual gifts since 1998 and in most years between 1997 and 1982.

3. I love snorkeling and I go about twice a month, on average, often times at beaches in the Honolulu metro area. Most regularly, I visit Ala Moana Beach Park in Honolulu, which is in between Kewalo Basin Harbor on the west and Ala Wai Boat Harbor and Waikiki on the east. I like to snorkel there because it's a breeding ground: I see lots of nursery fish, as well as eels, manta rays, and sea turtles. When I'm in the neighborhood, I visit Blaisdell Beach Park on Pearl Harbor, and just sit and read my book. I don't go in the water there because it's too polluted, but I would consider going in if it were safe. Also, I occasionally visit Ka'ena Point State Park, on the western tip of O'ahu, and the windward beaches on the eastern side of O'ahu. I plan on continuing these activities for the foreseeable future.

4. I very much enjoy snorkeling and swimming, or just visiting the beach. It's calming and pleasant to be by the ocean. I also love seeing the wildlife by the water. The concept of "aumakua," or guardian spirits, often in animal form, is strong in Hawaiian tradition, and I like to think of sea turtles as my guardian animals.

5. I recognize that there are a number of factors that threaten the health and beauty of Hawaii's marine environment, but I feel particularly concerned about stormwater pollution in my area. Everyone knows that the water is more turbid after storms. The visibility underwater gets bad, and you can see from the shore that the water is more brown than blue. I live on the side of a hill; the street beside my home becomes a river when there's a heavy rainstorm. I know that people work on their cars outside, and that the oil and grease from those activities is winding up in storm drains. Many of those storm drains go directly into the ocean, and I worry that all kinds of pollutants flood into it during storms. From time to time, I've changed my recreational plans out of concerns around stormwater pollution.

6. Due to the importance of Hawaii's tourism industry, government agencies are not anxious to publicize when there are safety problems with the water, so it can be hard to tell when we should be staying away from the ocean. If NRDC's lawsuit were successful, and there were less stormwater

pollution, I would enjoy my beach-going and snorkeling experiences more. Conversely, if stormwater pollution continues to degrade these waters further, my enjoyment of these areas and activities will be considerably decreased.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 12/13/14, in Honolulu, Hawaii.

Marsha Schweitzer

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF KATHY SHIMATA IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF KATHY SHIMATA

I, Kathy Shimata, declare as follows:

1. I reside in Honolulu, Hawaii, on the island of O'ahu. I have lived in Hawaii for 40 years.

2. I am a dues-paying member of the Natural Resources Defense Council (NRDC), a petitioner in this proceeding. I have been a member of NRDC since 2001.

3. My home borders the Manoa Stream, which runs from its headwaters in the mountains southwest through Honolulu. The stream passes by the University of Hawaii before it flows into the Ala Wai Canal, which enters the Pacific Ocean at the Ala Wai Boat Harbor near Waikiki.

4. I enjoy watching the birds and other wildlife near Manoa Stream. I have also seen teenagers fishing for bait fish in the stream. The stream runs directly past my yard, so I have viewed it daily over the 10 years that I've lived in my home. I plan to continue to view and enjoy the stream for the foreseeable future.

5. I am concerned about the effects of stormwater runoff on the stream and the ocean. When there are storms, I see large amounts of soil running off into the stream. This might be due in part to the invasive non-native Albizia trees that line the banks of the stream in places. These trees

break easily in storms and are a huge problem throughout Hawaii. I also often see warnings not to contact the water because of leptospirosis, a bacterial disease transmitted by rats and mongooses. Further south, the Ala Wai Canal is full of garbage—people avoid that water entirely because of the pollution.

6. My enjoyment of Manoa Stream is harmed by this stormwater pollution. I'm concerned about the overall health of the stream. If NRDC's lawsuit is successful, and there is less stormwater pollution, I would enjoy the stream more. Conversely, if stormwater pollution continues to degrade Manoa Stream, my enjoyment of this area will be considerably decreased.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 12/14/14, in Honolulu, Hawaii.

Kathy Shimata

Kathy Shimata

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF SCOTT DEAN COOPER IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF SCOTT DEAN COOPER

I, Scott Dean Cooper, declare as follows:

1. My full, legal name is Scott Dean Cooper.

2. I am a current member of, and contributor to, the Environmental Defense Center and have been for over three years.

3. I was born in 1952. I am a citizen of the United States, and a resident of the City of Goleta, Santa Barbara County, and the State of California. I have lived in the Santa Barbara area for the past 35 years.

4. I am a Research Professor at the University of California, Santa Barbara.

5. I have long and often used the Santa Barbara hiking trails to enjoy the wildlands surrounding Santa Barbara, including many in the Los Padres National Forest. I particularly like hiking the trails that parallel streams because I enjoy watching the aquatic and terrestrial wildlife associated with streams and their riparian zones. My entire family and I explore and appreciate local streams because of their aesthetic, recreational, and ecological amenities. We often engage in walking, hiking, wading, sitting in solitude, painting, drawing, and photography, and trails and streams constitute one of our major recreational venues. I intend to continue these activities in the near future.

6. Specifically, I often use trails that are near, adjacent to, or intersect Carpinteria, Romero, San Ysidro, Cold Springs, Sycamore, Rattlesnake, Mission, San Roque, San Antonio, San Jose, El Capitan, Refugio, Arroyo Hondo, San Onofre, and Gaviota Creeks, collectively at approximately monthly intervals. I engage in recreation at each of these creeks by wading in the water, hiking, and observing wildlife, among other activities. I intend to regularly return to each of these waterways, and continue these activities. I also occasionally use trails in other locations, such as those in the Sespe, Matilija, and Santa Ynez River watersheds, for the same recreational activities. I certainly plan to continue this use into the foreseeable future. Many of these trails and associated streams are near or are crossed by forest roads.

7. Because the aesthetic, recreational, and wildlife values of streams depend critically on stream water quality, I am concerned about activities or developments that affect stream water quality, including storm water runoff from forest roads. Excessive inputs of sediment and contaminants can reduce the beneficial values of streams by clogging streams with excessive sediment, clouding the water and reducing visibility, degrading habitat, promoting algal blooms, and reducing the diversity and abundance of aquatic life.

8. Excessive sediment deposition and algal blooms caused by erosion and nutrient inputs certainly affect my aesthetic enjoyment of these

streams. My enjoyment of aquatic species is negatively affected by these inputs because these inputs cause harm to the species and these species are less visible when sediment or algal levels are high. As a consequence, I am unable to observe and enjoy wildlife that I otherwise could observe when water quality is better. I hope that management agencies would insure that sediment and contaminant inputs are minimized so that we have clear, clean, flowing streams that support a diversity of plants and animals.

9. My appreciation for streams and aquatic life, and concerns about the water quality needed to support these values, is informed by my professional career. I have been a professor at the University of California – Santa Barbara for 35 years, and my area of expertise is stream ecology. During that time, I have conducted ecological research in streams in Santa Barbara County, as well as in many streams throughout California and the world. I also have taught many university courses in stream ecology and aquatic biology. Because of my extensive knowledge of, and experience with, the ecology of streams, I am familiar with the critical links among water quality, plant and animal communities, and natural resource values.

10. A particular concern I have is regarding the impacts of road systems and road crossings on streams, primarily because they alter the routing of water through landscapes and, most importantly, act as sources of

stormwater pollution. Forest road runoff contributes fine sediment to waterways, which can coat stream bottoms, smother aquatic life, reduce the oxygenation of sediments with effects on the survival of aquatic invertebrates and fish eggs, degrade habitat, and cover food sources for aquatic animals. There is an extensive literature on stream degradation owing to the input of sediments from roads and road crossings and a more recent literature on best management practices for ameliorating these impacts.

11. As outlined above, increased sediment and nutrient inputs affects my enjoyment of these streams by reducing visibility, creating unsightly conditions, and negatively affecting aquatic species that I enjoy viewing. Forest road runoff also diminishes the academic value of these streams by degrading natural conditions and reducing the natural complement of species originally found in these streams. If runoff continues to pollute these waterways, I will find it increasingly difficult to study and enjoy natural, unperturbed ecosystems.

12. My enjoyment of and academic interests in these streams would be enhanced by regulations and practices which reduce sediment and nutrient inputs because these practices would increase visibility, reduce deleterious sedimentation, and preserve species which benefit from clear water flowing over natural coarse substrates.

13. I believe that these management practices would be best instituted through appropriate regulations that insure that road construction and maintenance are protective of water quality. Regulations should minimize road construction and impacts so as to protect the aesthetic, recreational, and biological values of streams.

14. I care deeply about the protection of our streams and hope that future regulatory, judicial, and management decisions safeguard this resource for me, my family, and many like-minded citizens.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 15th day of December, 2014, at Santa Barbara, California.

Scott D. Cooper

Scott Dean Cooper

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF STEPHEN JAMES FERRY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF STEPHEN JAMES FERRY

I, Stephen James Ferry, declare as follows:

1. My full, legal name is Stephen James Ferry. I have been a dues-paying member of the Environmental Defense Center for more than 10 years.

2. I was born in Idaho in 1945. I am a citizen of the United States and a current resident of Santa Barbara, California in Santa Barbara County. I have lived in the State of California since 1953 and in Santa Barbara County for the past 31 years.

3. I have made many trips to the backcountry of the Los Padres National Forest (LPNF), where I hike along and through different waterways. My first backpack trip to LPNF was in 1985 with my son and friends when my son was five years old. We left NIRA campground and walked a short distance down Manzana Creek. We camped next to the creek. Since then I have made several other backpack trips from NIRA both up- and downstream on Manzana Creek. On all those trips there were many stream crossings where I have walked and waded through the water. On a trip to Manzana Schoolhouse we crossed the creek 43 times each way, mostly in knee-deep water. I intend to return to Manzana Creek in the future for other backpacking trips, and continue to regularly access the water.

4. There are many forest roads in the vicinity of Manzana Creek. Stream crossings on forest roads 8N02, 29W02, 8N09, 8N09A and 8N09B are likely to cause pollution of the tributaries of Manzana Creek. This pollution will inevitably wash down to Manzana Creek itself, where I recreate.

5. Given the fact that I come in contact with the water when I wade through the creek, it is very important to me that the water be clean. I am concerned about pollution and the threat of pollution in the waters where I recreate, including Manzana Creek. If the water were dirty I would not want to come into contact with it, and would not enjoy the wilderness experience as much. If stormwater runoff from forest roads continues to harm local waterways, I will not enjoy them as much.

6. Even more crucial to me is the importance of water quality because I actually drink the water! I am careful to always filter the water with a hand pump when I am backpacking in LPNF, but certain particles in dirty water can get past the filter and have the potential to damage my health. The dirty water will also degrade my equipment. My filter will become clogged with dirt if there is increased sediment in the water. Also, I use the water in the creek to wash my hands and other parts of my body. Of course it's important to me that the water I use for that purpose is as clean as possible.

7. In addition, dirty water will destroy wildlife habitat, reducing the quantity of wildlife and thus my enjoyment of the wilderness.

8. If the water were cleaner and clearer, I would enjoy the wilderness experience of recreating along waterways more, because it would improve my ability to drink the water, come into contact with it, and support the wildlife that I enjoy observing.

9. I also enjoy serving as a volunteer California Condor nest watcher for the United States Fish and Wildlife Service at Hopper Mountain National Wildlife Refuge in Ventura County, CA. I have been a condor nest watcher for the last 10 years. I will continue to participate as a nest watcher in the future, and to regularly return to Hopper Mountain for volunteer and other purposes.

10. During my trips to Hopper Mountain on Squaw Flat Road, 6N16, I must make several crossings of tributaries to Sespe Creek, which itself is a tributary to the Santa Clara River. During those crossings I directly observe the fact that erosion and stream crossings are disturbing sediment and causing it to go into the water at the crossings. Eventually that sediment will go into Sespe Creek and degrade its quality. I intend to continue regularly visiting Hopper Mountain, and plan to drive on Squaw Flat Road in the future.

11. Squaw Flat Road is also used for access to oil fields in the Sespe watershed. On my trips to Hopper Mountain I have observed large trucks

travelling to and from oil fields, which heightens my concern about increased sedimentation impacting Sespe Creek, and the species that rely on it. The large trucks that service the oil fields further degrade the quality of the forest road, which exacerbates its water quality impacts.

12. Sespe Creek supports numerous special status aquatic and amphibious species, including southern California steelhead, the red legged frog, and the western pond turtle, all species that can be negatively impacted by sedimentation. Sespe Creek also serves as critical habitat for steelhead. I am concerned about the impacts of sedimentation from forest road runoff on all of these species. My concern would be alleviated, at least in part, if runoff were reduced.

13. This degradation of water quality injures me and other users of the backcountry by creating a visually offensive appearance and by making me concerned that the pollution will affect the wildlife using the stream. I would enjoy my experience of the backcountry more if water quality were improved.

14. If storm water pollution continues to degrade waters in and around the Los Padres National Forest, including Manzana and Sespe Creeks, I will likely spend less time recreating in and around these waterways, and,

conversely, I would enjoy and visit these water bodies more if there were less stormwater pollution.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of December, 2014, at Santa Barbara, California.

Stephen James Ferry

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF THOMAS LEAVITT DUDLEY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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DECLARATION OF THOMAS LEAVITT DUDLEY

I, Thomas Leavitt Dudley declare as follows:

1. My full, legal name is Thomas Leavitt Dudley.

2. I am an aquatic ecologist with the Marine Science Institute at the University of California, Santa Barbara, and my research is focused on the ecology and conservation of stream and riparian ecosystems in western North America.

3. I am a current member and supporter of the Environmental Defense Center, and have been for approximately 10 years. I am also a member and supporter of several other organizations and professional societies promoting sustainable management of natural resources.

4. I am a citizen of the United States, and resident of the State of California and Santa Barbara County. I have lived in the State of California and Santa Barbara County for the past 11 years. I was born in Ventura County, California in 1953 and lived in California from birth to 1975, from 1982 to 1998, and from 2003 until the present. I currently live in Santa Barbara, California.

5. My research experience with stream and riparian ecosystems in California and the western U.S. involves interactions among all trophic levels of community organization. These studies are directed to understanding

relationships among predators, herbivorous invertebrates, plants and algae, and nutrient regimes, many in the context of anthropogenic impacts to natural riparian and aquatic communities and how to improve conditions for native fauna and flora. This has included work with listed species such as Southern steelhead trout in rivers, particularly the Santa Clara, Santa Ynez, and the Sespe, and coastal streams, including San Carpoforo, Malibu, Rattlesnake, Refugio, and Carpinteria. I also study Golden trout in the South Fork Kern River, Golden Trout Creek, and other southern Sierra waters, and Southwestern willow flycatcher in the Virgin River, Gila River, Muddy River, and Owens River. My work also includes studies of other sensitive taxa in other waterways. I intend to continue studying these species in all of these specific waterways, and return to these areas in the future.

6. Specifically, I study the role of natural and anthropogenic disturbances such as wildfire, flooding and drought, livestock grazing, and invasions by non-native plant and animal species. All of these interactions are affected by activities that alter the physical condition of near-stream riparian zones, and published literature of mine and of others document that such alterations can exacerbate processes that favor non-native over native species, reduce biological diversity and otherwise damage the quality of natural resources, including water resources.

7. In particular, erosion processes create some of the greatest impacts to these ecosystems, as increased sediment loads are invariably exacerbated by near-stream activities, and typically sediment transport is transformed from an ephemeral process of short duration during and immediately following unusually heavy precipitation events (rain) to a more chronic condition. Overland flows become more common, and any water present will carry sediments into stream channels from soils that have been left bare or physically disturbed. While natural biota are adapted to sporadic high sediment loads, longer-term periods of sediment input and deposition will degrade substrates, smother algal resources necessary for invertebrate feeding and development, fill substrate spaces required for egg development of fish and other aquatic wildlife, and pollute downstream resources, eliminating the values of pure, clean stream waters.

8. These impacts are particularly acute in association with road construction or maintenance, as such activities disrupt massive volumes of land surface as material is cut and filled, natural water flow from hillslopes are altered and generally focused more intensively at points where erosion is also exacerbated. In addition, the roads themselves are kept as exposed soil subject to erosion and sediment transport into nearby watercourses, resulting in stormwater pollution.

9. I have experienced these sorts of negative impacts from human activities, particularly vegetation clearing, and trail and road construction in the riparian zones of lotic ecosystems throughout the western U.S., including Siuslaw, Willamette, Ochoco and Malheur National Forests in Oregon, Toiyabe N.F. in Nevada, Tonto and Apache N.F. in Arizona, and Mendocino, Los Padres, Angeles, Cleveland, Tahoe, Inyo, Sierra and Sequoia National Forests in California. I intend to return to all of these areas. Roadways, forest clearings for wildland fuels management, pack trails and other activities that disturb soils adjacent to stream systems have invariably resulted in sediment inputs and subsequent degradation of the in-stream substrates.

10. Increased sedimentation from these sources, including forest road runoff, interferes with my studies and reduces my enjoyment of these waterways. In-stream studies using experimental substrates (e.g. clay tiles, concrete blocks) are often diminished in terms of potential for useful results by these sediment inputs that interfere with algal growth and herbivorous insects that I attempt to study. I have encountered this problem with experiments in coastal streams, including Rattlesnake and Refugio Creeks in the Los Padres National Forest. This problem would not have been so prominent had it not been for upstream and adjacent human activities that

disrupt riparian soils, particularly forest roads. If sedimentation were reduced, my ability to conduct these studies would be improved.

11. My research focus on anthropogenic impacts is related in large part to the frequency and scope of human impacts to stream biodiversity and ecosystem function, as nearly all systems that I study are affected in some manner by roadways and other developments that degrade conditions, and I would greatly prefer to change the course of development so that such damages can be repaired, and I could return to my earlier research focus on NATURAL function of western streams and riparian systems. If storm water pollution from forest roads were reduced, streams would better resemble natural conditions and my ability to study these systems would be enhanced.

12. In addition, I often hike, view birds and other wildlife, picnic, swim, wade, and engage in other recreational activities in and along waterways in the Santa Barbara and Ventura backcountry. I especially enjoy observing fish with a mask and snorkel in local creeks. Specifically, I engage in these activities in and along Rattlesnake, Mission, San Ysidro, and Gaviota Creeks, and Arroyo Hondo, Santa Ynez River and its tributaries, among other waterways in Santa Barbara County. I also enjoy recreating in and along Santa Paula, Sespe, Sisar, San Antonio, and Matilija Creeks, among other waterways.

I intend to return to all of these waterways in the future, and continue recreating along them regularly.

13. With regard to each of these waterways, I have routinely experienced sediment and other types of stream pollution where roadways and trails cross streams. This pollution decreases my enjoyment of these waterways, and makes me concerned about impacts to species that rely on them. I am less likely to swim, observe fish under water, and hike along streams when there is increased sedimentation.

14. In addition, I often take out-of-town visitors and colleagues, such as prospective graduate students, out to the field, including the waterways described above, to see what it has to offer, recreationally, as well as in terms of research opportunities. Environmental damage and pollution, including forest road runoff, certainly detracts from presenting local stream and riparian systems in their best light for educational purposes, interfering with my ability to teach students about natural stream functions.

15. While the waters would otherwise be safe for drinking, as Giardia is rare or absent from these streams, the sediment-laden stream water instead is undrinkable without extensive filtration. Often this is even a consideration when the roadways are not crossing nor immediately adjacent to streams, as rivulets also carry sediments rapidly into streams from roads established on

hillslopes, particularly on fairly steep aspects, well away from the riparian zone. This is very common in southern California, in which the uplifted sedimentary geology is especially prone to erosion, subsidence, slope wasting, etc. and the non-consolidated soil particles are readily transported into the stream systems. This problem is exacerbated by runoff from forest roads.

16. While I intend to continue these activities in the region where I live, the increasing amount of degradation related to expanding road and trail networks, excessive and counter-productive fire/fuels management actions, and other degradation to natural streams and watersheds both diminishes my enjoyment of these public resources, and discourages me from local activities leaving me with a desire to experience unspoiled Nature far away from where I live. Pollution in creeks makes it more difficult for me to enjoy their aesthetic and recreational values. For example, it is more difficult to view fish when the water has increased sediment.

17. In particular, I find it increasingly difficult to ask research questions related to natural stream function in this area, and am increasingly seeking study sites in other regions, even other countries, owing to management decisions that impair stream function in California and the Western states. I would prefer to conduct this research in the Los Padres National Forest, and other Western locations.

18. If local waterways were less polluted from stormwater runoff, I would more likely be able to pursue my academic needs in these waterways, and would enjoy recreating in and along these waterways more than I do when there is increased sedimentation in the water. On the other hand, I would be less likely to swim and come into contact with the waterways described above, if stormwater pollution persists in theses waterways.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of December, 2014, at Santa Barbara, California.

Thomas Leavitt Dudley

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF OWEN BAILEY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF OWEN BAILEY

I, Owen Bailey, declare as follows:

1. I am the Executive Director of the Environmental Defense Center (EDC), a petitioner in this action. My business address and phone number are 906 Garden Street, Santa Barbara, CA 93101, (805) 963-1622. EDC has an office in Santa Barbara, California, and in Ventura, California.

2. I am a citizen of the United States, and a resident of Santa Barbara, California, in Santa Barbara County.

3. EDC is a non-profit public interest environmental law firm that works primarily within Santa Barbara, Ventura, and San Luis Obispo counties. EDC's mission is to protect and enhance the local environment through education, advocacy, and legal action. Since 1977, EDC has empowered community based organizations to advance environmental protection. EDC's program areas include protecting coast and ocean resources, open spaces and wildlife, and human and environmental health.

4. EDC has approximately 3,000 members within the south-central California coast region. EDC's members use and enjoy local waterways that are impacted by stormwater runoff for a variety of recreational, academic, and other pursuits, including hiking, picnicking, fishing, sailing, swimming, surfing, diving, and studying. There is a vast network of forest roads throughout our

region, serving the oil and gas industry, recreation, and fire protection, among other uses. When it rains these roads exacerbate problems of erosion and pollute our local watersheds. In addition, our service area contains many small municipalities that discharge stormwater into the Santa Barbara Channel. Pollution in stormwater interferes with our members' abilities to enjoy our local water resources.

5. EDC, along with petitioner Natural Resources Defense Council (NRDC), filed a lawsuit against the Environmental Protection Agency (EPA) in 2000, challenging its 1999 "Phase II" stormwater rule. In *Environmental Defense Center v. Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003), this Court ruled in our favor on issues related to stormwater pollution from urban sources and forest roads.

6. In the 2003 case, EDC and NRDC argued that EPA's rule illegally lacked adequate public participation procedures, failed to require proper oversight of small municipal separate storm sewer systems (MS4s) permits, and failed to address runoff from forest roads, despite evidence of their harmful impacts to water quality. The Court issued an opinion in which it agreed with EDC and NRDC on these three issues and remanded the rule back to EPA. Specifically, the Court vacated and remanded portions of the rule

related to urban stormwater, and remanded the forest road issue to EPA to decide, in an appropriate proceeding, whether to regulate forest roads.

7. However, more than ten years later, EPA has failed to comply with the Court's remand order.

8. EDC now brings this petition to enforce the order in our prior case, thereby compelling EPA to revise its stormwater regulations, and decide in an appropriate proceeding whether to regulate forest road runoff.

9. EDC has a strong interest in ensuring compliance with the 2003 order as EDC was a petitioner in the original case, which resulted in a judgment in EDC's favor on the issues described above. As a party that has obtained a judgment in its favor, EDC is entitled to seek EPA's compliance with that judgment.

10. EPA's failure to comply with the Court's order has also caused injury to EDC and its members. As an organization, EDC is "in it for the long haul," meaning we are committed to ensuring that our cases are fully carried out, and that our victories are implemented, so that the environmental improvements we seek are realized on the ground. EPA's delay in implementing the Court's order frustrates this organizational goal. In addition, the issue of stormwater pollution spans all three of our program areas—

protecting coast and ocean resources, open spaces and wildlife, and human and environmental health.

11. EDC's work to ensure water quality protections extends back over 20 years. We have developed ongoing projects and cases to protect the Ventura River, Santa Ynez River, Santa Clara River, Santa Barbara Channel, and numerous creeks and streams that are a critical part of our coastal watersheds.

12. Specifically, EDC has worked to enforce California's General Industrial Stormwater Permit, ensure strong protections in Clean Water Act permits for offshore oil drilling platforms, conduct community creek clean ups, and ensure protections for streams and rivers throughout the Los Padres National Forest. In addition, EDC endorsed and worked to pass Measure B-2000 in the City of Santa Barbara, which resulted in roughly $2 million per year for clean water projects in the City. EDC has also successfully advocated for larger creek setbacks to protect stream water quality from development projects; co-founded the South Coast Watershed Alliance, which worked for a decade to promote clean water policies and projects in Santa Barbara County; and partnered with Santa Barbara County on Project Clean Water. EDC also works to protect the species that rely on our local waterbodies, including, for example, southern California steelhead, arroyo toad, red-legged frog, two-

striped garter snake, western pond turtle, southern sea otter, and great whales, among other species.

13. EDC has expended resources attempting to reduce pollution from forest roads through other avenues. For example, in 1994 EDC commented on the Army Corps of Engineers' proposed general permit for repair and maintenance of road crossings, including crossings in the Los Padres National Forest. Forest road crossings of streams in the Los Padres continue to threaten water quality and we have subsequently evaluated potential enforcement to address these impacts, as recently as 2009.

14. EDC also runs an intake program for local environmental concerns, and has received numerous complaints about stormwater runoff and sedimentation in our local waterways. Many of these intakes result in EDC's follow up action, including monitoring, tracking, and reporting activities related to the impact of forest roads on water quality. For example, EDC expended resources to attempt to reduce water pollution caused by the construction of roads within Slippery Rock Ranch and the Los Padres Forest between 2009 and the present. EDC also reported illegal road construction at Sespe Ranch, involving a ranch road that was constructed along Sespe Creek and the adjacent Los Padres National Forest with no erosion control measures.

15. If EPA were to comply with the Court's remand order from our 2003 case, EDC's injury would be addressed because we would accomplish implementation of our objectives in our prior case. In addition, adequate oversight and regulation of municipal and forest road discharges would enhance environmental protection for our members' benefit and reduce the drain on EDC's resources expended to address these sources of pollution.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of December, 2014, at Santa Barbara, California.

Owen Bailey

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF BRYN E. KIMBALL IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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Attorneys for Petitioner Environmental Defense Center

DECLARATION OF BRYN E. KIMBALL

I, Bryn E. Kimball, declare as follows:

1. I reside in Walla Walla, Washington, a small town near the Oregon border. I have lived in Walla Wall since the summer of 2014, though I have visited Washington and Oregon many times in the past, and I lived in Eugene, Oregon from 2000 to 2004.

2. I am a dues-paying member of the Natural Resources Defense Council (NRDC), a petitioner in this proceeding. I have been a member of NRDC since 2002, with annual gifts since 2004.

3. I am currently a Visiting Assistant Professor in Geology and Environmental Studies at Whitman College in Walla Walla. I hold a PhD in geosciences and biogeochemistry from Pennsylvania State University. My research background is in issues related to metal contamination associated with mining, though I have a broad background in geology, chemistry, and biology. This academic year, I am teaching mineralogy, environmental studies, and environmental geology.

4. I regularly hike in the forests of Washington and Oregon, specifically in the areas around Walla Walla and on the Olympic Peninsula. I take my students to the Blue Mountains area of northeastern Oregon, in and near the Umatilla National Forest, where they study the local environment.

Mill Creek, which has its headwaters in the Umatilla National Forest flows through this area. I plan to return to the Blue Mountains with my students in the future, including this spring.

5. I also visit the Juniper Canyon section of the U.S. Fish and Wildlife Service's McNary Wildlife Refuge in northeastern Oregon. An important tributary to the Columbia River flows through this area. I take students to Juniper Canyon to study geology and ecology, and I plan to return to this area with my students in the future.

6. I have family members who live in the town of Sequim, Washington, just north of the Olympic National Forest and Olympic National Park. I visit these family members regularly. When I visit, I enjoy hiking in the Olympic Peninsula area—I have hiked near Sol Duc Hot Springs and Sol Duc River, and also in the Hood Canal region further east. I plan to return to the Olympic region in the future.

7. When I am hiking, I enjoy viewing forest streams and rivers, and the wildlife they attract. Although my specific expertise is in acid mine drainage, I know from my studies that sediment pollution can negatively affect the ecosystems of streams and rivers. I am also aware that many of the streams and rivers I visit in Oregon and Washington are polluted by sediment from logging and other forest roads. I am concerned about how this pollution

affects these beautiful areas that I like to visit, both for my own personal purposes and in my capacity as a teacher.

8. I would enjoy the above-mentioned areas more if there were less stormwater pollution from forest roads. Conversely, if forest road stormwater pollution continues to degrade these waterways further, my enjoyment of these areas will be considerably decreased.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Dec. 17, 2014, in San Francisco.

Bryn Kimball

Bryn E. Kimball

No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

DECLARATION OF LAWRENCE M. LEVINE IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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DECLARATION OF LAWRENCE M. LEVINE

I, Lawrence M. Levine, declare as follows:

1. I am an attorney licensed to practice in the State of New York and a Senior Attorney in the Water Program at Natural Resources Defense Council (NRDC), a petitioner in this action.

2. NRDC is a national non-profit organization incorporated under the laws of New York. Its mission is "to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends." NRDC engages in advocacy on behalf of its approximately 300,000 members on a variety of environmental issues, including stormwater and water quality issues. NRDC's members use and enjoy the waters of the United States that are polluted by stormwater runoff.

3. In 2000, NRDC, along with Environmental Defense Center, filed suit against the Environmental Protection Agency (EPA) over its "Phase II" stormwater rule. In 2003, in *Environmental Defense Center v. Environmental Protection Agency* (*EDC*), this Court vacated and remanded portions of that rule after holding that EPA had violated the Clean Water Act and the Administrative Procedure Act. 344 F.3d 832, 858, 863 (9th Cir. 2003).

4. On April 16, 2004, James Hanlon, Director of EPA's Office of Wastewater Management, issued a non-binding guidance memorandum,

"Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s." On December 16, 2014, I downloaded this memorandum from EPA's website at www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf. A true and correct copy of that memorandum is attached to this declaration as Exhibit A.

5. In April 2010, EPA's Water Permits Division in the Office of Wastewater Management issued a "MS4 Permit Improvement Guide." On December 16, 2014, I downloaded this guide from EPA's website at www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf. Excerpts from a true and correct copy of the 2010 Permit Improvement Guide are attached to this declaration as Exhibit B.

6. EPA has yet to comply with the Court's 2003 order. EPA's failure to comply with the Court's order has caused injury to NRDC and its members. As an organization, NRDC has expended significant resources attempting to compel state permitting agencies to issue small MS4 general permits consistent with the Court's holding in *EDC*.

7. In April 2010, the New York State Department of Environmental Conservation issued a "SPDES [State Pollution Discharge Elimination System] General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s)," which regulates discharges for a variety of types of

small MS4s. The state modified the permit on October 14, 2011. On December 16, 2014, I downloaded this permit from the Department of Environmental Conservation's website at www.dec.ny.gov/docs/water_pdf/ms4gp2011.pdf. A true and correct copy of that permit is attached to this declaration as Exhibit C.

8. The 2010 New York small MS4 general permit (Exhibit C) allows precisely the self-regulatory system the Court's 2003 order declared unlawful, and fails to provide for public participation that the 2003 order declared to be required by the Clean Water Act. Because of these deficiencies and others, in 2010, NRDC and other organizations challenged the permit on these grounds and others in state court; I am lead counsel in this matter. The petitioners prevailed on these claims in the trial court in 2012, but the intermediate appellate court reversed. *NRDC v. N.Y. State Dep't of Envtl. Conservation*, 940 N.Y.S.2d 437, 443, 449, 453-54 (N.Y. Sup. Ct. 2012), *aff'd in part and rev'd in part*, 994 N.Y.S.2d 125, 136 (N.Y. App. Div. 2014). The New York Court of Appeals (the highest court in the state) recently granted NRDC's request for review. *NRDC v. N.Y. State Dep't of Envtl. Conservation*, 10 N.E.3d 189 (N.Y. 2014) (unpublished disposition). The parties are currently briefing the appeal. A true and correct copy of the New York State Department of Conservation's January 16, 2014 Memorandum of Law in Opposition to

Motion for Leave to Appeal, which was served on me in the state court litigation, is attached to this declaration as Exhibit D.

9. NRDC has expended significant resources litigating over the New York small MS4 general permit in the New York state court system, including both direct costs and hundreds of hours of NRDC staff attorney time. In that litigation, the New York State Department of Conservation has argued that it is entitled to issue permits in reliance on the portions of the Phase II Rule vacated by this Court in *EDC*, and that the Court's order is not binding. *See* Exhibit D at 15-17. If EPA had revised its Phase II Rule as required by the Court in *EDC*, NRDC would not have had to expend resources rebutting this argument in state court.

10. NRDC has also expended significant resources attempting to ensure that small MS4 general permits in other states comply with the 2003 order. For example, in 2012, the California State Water Resources Control Board proposed a small MS4 general permit that was not consistent with the 2003 order. NRDC submitted detailed comments pointing out the deficiency. A true and correct copy of NRDC's July 23, 2012 comment letter to the Water Resources Control Board is attached to this declaration as Exhibit E. If EPA had revised its Phase II Rule as required by the Court in *EDC*, NRDC would not

have had to expend resources addressing this issue in its comments to the Water Resources Control Board.

11. More recently, on February 4, 2014, NRDC and other groups submitted a petition to the New Jersey Department of Environmental Protection, requesting that it modify, revoke, or reissue its general permits for hundreds of small MS4s because, among other things, those permits are not consistent with this Court's 2003 order. A true and correct copy of NRDC's February 4, 2014 petition to the Department of Environmental Protection is attached to this declaration as Exhibit F. If EPA had revised its Phase II Rule as required by the Court in *EDC*, NRDC would not have had to expend resources addressing this issue in its petition to the Department of Environmental Protection. The Department of Environmental Protection has not modified, revoked, or reissued its general permits for small MS4s to address the concerns raised in NRDC's petition.

12. Going forward, if EPA does not revise the small MS4 portion of its Phase II Rule as required by the Court in *EDC*, NRDC will have to continue to expend resources, like those expended during the activities described in paragraphs 8 through 11, to ensure that states' small MS4 general permits comply with the law. These efforts will be necessary to protect the interests of

NRDC's members in clean water. This expenditure of resources constitutes a concrete harm to NRDC as an organization.

13. Similarly, NRDC has expended resources attempting to reduce pollution from forest roads, to protect the interests of NRDC's members in clean water. In 2007, NRDC drafted and submitted an amicus brief in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011) *rev'd and remanded on other grounds sub nom. Decker v. NEDC*, 133 S. Ct. 1326 (2013), arguing that logging roads should be regulated under EPA's Phase I authority. The Supreme Court ultimately decided that EPA had properly exempted logging roads from regulation under the Phase I Rule. *Decker*, 133 S. Ct. at 1333, 1338. Going forward, if EPA continues to refuse to decide whether to regulate forest roads under its Phase II authority, NRDC may have to expend organizational resources to attempt to convince or otherwise require EPA to make such a determination, which is a necessary prerequisite to EPA using its existing authority under section 402(p)(6) of the Clean Water Act to regulate forest road stormwater.

14. The Regulatory Information Service Center, a component of the U.S. General Services Administration, compiles the Unified Agenda of Federal Regulatory and Deregulatory Actions, which is published at www.reginfo.gov. The Unified Agenda includes regulatory agendas from all federal entities that

currently have regulations under development or review, including EPA. Using the search tool on that website, I searched for entries relating to EPA's proposed action, "Stormwater Regulations Revision to Address Discharges From Developed Sites," Regulation Identifier Number 2040-AF13. On December 16, 2014, I found nine entries for this proposed action, from Spring 2010 to Fall 2014. True and correct copies of those entries are attached to this declaration as Exhibit G.

15. Using the search tool on www.reginfo.gov, I also searched for entries relating to EPA's proposed action, "NPDES Regulations to Address Water Quality Impacts From Forest Road Discharges," Regulation Identifying Number 2040-AF43. On December 16, 2014, I found five entries for this proposed action, from 2012 to Fall 2014. True and correct copies of those entries are attached to this declaration as Exhibit H.

16. On December 16, 2014, I visited EPA's webpage, "Proposed National Rulemaking to Strengthen the Stormwater Program" at water.epa.gov/polwaste/npdes/stormwater/Proposed-National-Rulemaking-to-Strengthen-the-Stormwater-Program.cfm. A true and correct copy of that webpage is attached to this declaration as Exhibit I.

/ / /

/ / /

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Dec. 18, 2014, in Philadelphia, PA.

LAWRENCE M. LEVINE

EXHIBIT A

TO THE DECLARATION OF LAWRENCE M. LEVINE

April 16, 2004

MEMORANDUM

Subject: Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s

From: James A. Hanlon /s/
Director, Office of Wastewater Management

To: Water Management Division Directors, Regions I - X

The purpose of this memorandum is to provide guidance on implementing a partial remand of the Stormwater Phase II regulations. The U.S. Court of Appeals for the Ninth Circuit recently denied EPA's petition for rehearing in the Phase II litigation. Environmental Defense Center, et al. v. EPA, No. 70014 & consolidated cases (9th Cir., Sept. 15, 2003). The Department of Justice has informed us that further review by the U.S. Supreme Court is not available. This memorandum provides interim guidance to EPA and State NPDES permitting authorities pending a rulemaking to conform the Phase II rule to the court's order.

The Relevant Provisions of the Rules

This case challenged the NPDES stormwater regulations issued pursuant to Clean Water Act ("CWA") section 402(p)(6). That section directs EPA to "establish a comprehensive program to regulate" stormwater discharges designated by EPA. We commonly describe these regulations as stormwater "Phase II." The regulations require NPDES permits for discharges from certain municipal separate storm sewer systems ("MS4s") for which NPDES permits were not required under CWA section 402(p)(2) and the Phase 1 regulations.

The Phase II regulations require that MS4s reduce the discharge of pollutants "to the maximum extent practicable" (or "the MEP standard"). The regulations also require the MS4s to develop, implement and enforce a stormwater management program containing, among other things, best management practices ("BMPs") identified by the discharger. The regulations authorize the use of "general permits" and require that these BMPs (as well as measurable goals associated with these BMPs) be identified in the Notice of Intent ("NOI") filed by the MS4 in seeking authorization under a general permit. Relying on the "traditional" general permit model, the Agency did not require NOIs to be subject to public hearings.

The Ninth Circuit's Decision

The Ninth Circuit held that these NOI requirements violated various provisions of CWA section 402. They concluded that "the EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act." The remand raises important questions regarding the procedures that would be appropriate for authorization of Phase II MS4 discharges *other than* through an individual permit.

In denying EPA's motion for rehearing the court "vacated" the portions of the Phase II rule that address the procedural issues relating to the general permitting option for Phase II MS4s. Therefore, the Agency needs to take affirmative action to clarify the general permitting option for Phase II MS4s. In any such action, we believe it is imperative that implementation of the MEP standard remain an "iterative" process that optimizes the reduction of stormwater pollutants, rather than a static pollution reduction requirement.

In looking at options for implementing the court's decision, we want to continue to provide States with maximum flexibility. Some State Phase II MS4 permitting procedures already appear to meet the court's intent and will not need changes. However, the general permits and procedures of other States, along with the provisions developed by EPA in States where EPA has program implementation responsibilities, will need to change. To assist MS4 permitting authorities in moving forward with implementing program revisions where needed, EPA provides the following recommendations to address the court's decision.

Guidance for Issuance of New General Permits

1. Public availability of NOIs The Phase II rules already require that Phase II MS4 permittees make the records of their stormwater management plans publicly available at reasonable times during regular business hours. 40 C.F.R. 122.34(g)(2). NOIs (which essentially summarize stormwater management plans) should also be made publicly available. Permitting authorities can ensure the public availability of Phase II MS4 NOIs by providing notice on the web of the facilities applying for coverage under a general permit with either an electronic posting of the NOIs or information on how NOIs can be accessed. NOIs could also be public noticed in a newspaper, or by another effective manner.

Unless a permitting authority has already otherwise incorporated public notice procedures into its processes for issuance of Phase II MS4 general permits, NPDES agencies that have not yet issued final permits should include permit language explaining that (and how) NOIs will be made available to the public with sufficient time to allow for meaningful public comment. EPA recommends that permitting authorities make the NOIs available to the public at least thirty days before authorization to discharge.

2. Opportunity for public hearing The court's decision requires that the public be given an opportunity to request a public hearing. If the Phase II MS4 general permittee provides public notice for the NOI, the permitting authority will still need to provide the public an opportunity to request a hearing. EPA recommends that permitting authorities include permit language explaining the process for requesting a public hearing on an NOI, the standard by which such requests will be judged, the procedures for conducting public hearing requests that are granted, and the procedures for permitting authority consideration of the information submitted at the hearing in determining whether to grant authorization to discharge to the submitter of the NOI. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.

3. Permitting Authority reviews of NOIs The permitting authority will need to conduct an appropriate review of Phase II MS4s' NOIs to ensure consistency with the permit. General permits should, to the extent practicable, specify in objective terms what is expected of a Phase II MS4 in order to meet the MEP standard. Due to the iterative nature of the MEP standard, we do not believe official "approval" of NOIs is necessary, but the general permits will need to specify when authorization occurs, such as after notice from the permitting authority that review is complete, or after a specified waiting period. EPA notes that this process does not preclude the permitting authority from denying an MS4 authorization to discharge. Either of these timing options should provide the permitting authority with sufficient time to review NOIs, to ensure that NOIs have been publicly available, and that there has been an opportunity to request a public hearing to provide input.

Guidance for General Permits Already Issued for MS4s

Permitting authorities that already have issued general permits should determine the most effective way to provide public notice and review of MS4 NOIs. Unless a permitting authority has already otherwise incorporated such procedures into its processes for issuance of Phase II MS4 general permits, NPDES agencies that have issued final permits should:

- List on the State or EPA Region's web site those MS4 permittees who have submitted NOIs and how NOIs can be reviewed by the public. Include information on how comments can be submitted and a hearing can be requested. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.

- Conduct an appropriate review of submitted NOIs (to determine compliance with the permit) and contact the MS4 when changes appear to be needed.

MS4s continue to have an obligation to apply for permit coverage, whether under an individual NPDES permit or an NPDES general permit. We do not believe that the court ruling

creates legal vulnerability for violations of the CWA for Phase II MS4 permittees that have filed timely applications, whether or not authorization has been granted. The Phase II regulations establish application deadlines, not authorization deadlines. Even when Phase II MS4 permittees are authorized, the regulations do not require immediate compliance with the MEP standard, i.e., development and full implementation of the Phase II MS4 stormwater management program. Instead, the permitting authority specifies the applicable time period, which maybe be as long as five years after permit issuance.

We request that you communicate this guidance to States within your Region which are authorized to administer the NPDES program. If you have questions or concerns, please contact Linda Boornazian at (202) 564-0221 or Wendy Bell at (202) 564-0746.

cc: Ben Grumbles, OW
NPDES Branch Chiefs, EPA Regions I - X
Susan Lepow, OGC
Mark Pollins, ORE
Robbi Savage, ASIWPCA

EXHIBIT B

TO THE DECLARATION OF LAWRENCE M. LEVINE

MS4 Permit Improvement Guide

U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF WATER

OFFICE OF WASTEWATER MANAGEMENT

WATER PERMITS DIVISION

APRIL 2010

EPA 833-R-10-001

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

APR 14 2010

OFFICE OF WATER

Dear NPDES Stormwater Managers,

I am pleased to announce that the Environmental Protection Agency (EPA) has completed the "Municipal Separate Storm Sewer System Permit Improvement Guide." The primary purpose of this guidance document is to assist National Pollutant Discharge Elimination System (NPDES) permit writers in strengthening municipal separate storm sewer system (MS4) permits.

This Guide contains examples of permit conditions and supporting rationale that could be used in fact sheets that accompany NPDES permits. The Guide also includes recommendations for permit writers on how to tailor the language depending on the type of permit. For example, permits covering traditional municipalities may contain different permit provisions than those covering non-traditional entities like departments of transportation, universities, and prisons.

I ask that permit writers review the permit language and corresponding discussion presented in this Guide and consider how to incorporate this, or similar, language into their MS4 permits. Some modification of the language may be necessary to make it suitable for use with specific MS4 permits, and to better tailor it to meet the needs and goals of the various permitting authorities.

The permit language suggested in this Guide is not intended to override already existing, more stringent or differently-worded provisions that are equally as protective in meeting the applicable regulations. EPA expects the permitting authority to continue to make significant progress and ensure that the intent of the regulations or more stringent requirements is captured in the permit.

In addition, EPA would like to particularly stress the following key principles:

- Permit provisions should be clear, specific, measurable, and enforceable. Permits should include specific deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation.
- Permits should contain a performance standard for post-construction that is based on the objective of maintaining or restoring stable hydrology to protect water quality of receiving waters or another mechanism as effective.

EPA has begun a rulemaking to strengthen the stormwater program. Using this Guide to improve permits represents the direction that EPA is taking to strengthen the program. This Guide is a living document that will be updated as new information for improving the stormwater program is obtained.

I appreciate your continued efforts in strengthening the NPDES municipal stormwater program. If you have any questions about this Guide or suggestions for further improvements, please contact Rachel Herbert of my staff at herbert.rachel@epa.gov or call her at 202-564-2649.

Sincerely,

Linda Y. Boornazian

Linda Y. Boornazian, Director
Water Permits Division

CC: State Stormwater Coordinators
Association of State and Interstate Water Pollution Control Administrators

Contents

INTRODUCTION & GETTING STARTED

Purpose

The primary purpose of the MS4 Permit Improvement Guide (Guide) is to assist National Pollutant Discharge Elimination System (NPDES) permit writers in strengthening municipal separate storm sewer system (MS4) stormwater permits. The objective of the Guide is to facilitate the creation of MS4 permits which are clear, consistent with applicable regulations, and enforceable. This Guide contains examples of permit conditions and supporting rationale that could be used in fact sheets that accompany NPDES permits. Permit language should include controls that identify specific actions permittees must perform to comply with the Permit Requirements.

This Guide focuses in large part on permits for small (Phase II) MS4s. However, while the contents of the Guide are generally organized consistent with the six minimum control measures (40 CFR 123.34(b)) applicable to Phase II MS4 permits, however, permit writers may find this Guide useful for Phase I MS4 permits. In addition, the Guide specifically addresses Phase I MS4 Permit Requirements with regard to the industrial program elements set forth in the Phase I regulations at 40 CFR 122.26(d)(2)(ii) and (iv)(C). These are addressed in Chapter 7. The Guide may also be useful for "non-traditional" MS4 permittees, such as departments of transportation (DOTs), universities and prisons.

EPA has developed a Stormwater Phase II Final Rule Fact Sheet Series (www.epa.gov/npdes/stormwater/swfinal) to assist permitting authorities and permittees in understanding the Phase II regulations. Further, EPA has developed the National Menu of Stormwater Best Management Practices (www.epa.gov/npdes/stormwater/menuofbmps) which provides descriptive information in fact sheets about various best management practices associated with the Phase II six minimum control measures.

The Guide was created by reviewing numerous MS4 permits and fact sheets from around the country. Some of the example permit and fact sheet language presented in this Guide has been adapted from these permits; in those instances where existing language that meets the purpose of this document was not available, EPA has crafted new language.

Contents of this Guide

This document is divided into parts, as noted above, based largely on the six minimum control measures required in the Phase II stormwater regulations (see 40 CFR 122.34(b)). Chapters 1 -6 address development and implementation of a stormwater management program (SWMP) and the six minimum control measures that must be included in the SWMP. Chapter 7 addresses industrial facilities programs relevant for Phase I MS4 permits. Chapter 8, Overall Evaluation and Adaptive Management, discusses reporting, evaluation, and tracking requirements. This Guide does not focus on the water quality provisions of the Clean Water Act, which may require more stringent requirements than those programmatic elements specified here.

Each chapter opens with an introduction providing a brief overview of relevant regulatory requirements pertaining to the subject of the chapter. Each chapter is then divided into sections in which the following topics are addressed:

- *Example Permit Provision* – This section includes example MS4 permit language. The language has been formatted and numbered in such a way that each section corresponds directly to a permit structured in accordance with the chapter sequence of this Guide. EPA developed these examples by first surveying existing EPA and State MS4 permit language and drawing upon agency experience in implementing permits. EPA has identified the source of the language (in footnotes) if adapted from specific permits.
- *Example Permit Requirement Rationale for the Fact Sheet* – This section describes the rationale for the example permit provision. This language can assist the permit writer in developing the fact sheet, which accompanies all NPDES permits; however, it is up to the permit writer to ensure that a complete and customized version of the fact sheet accompanies the permit. Example Permit Requirement Rationale for the Fact Sheet sections often describe "requirements" or steps that "must" be taken. To the extent this language is used in these sections, it is intended to describe requirements included in the example permit provisions. It does not mean that all permits "must" include the specific "requirement" described.
- *Recommendations for the Permit Writer* (included where appropriate) – This section discusses issues the permit writer should consider in determining how to use the example permit provisions.

How to Use this Guide

This guidance includes "example" MS4 permit language for specific program elements, but is not intended to be definitive or comprehensive for all MS4 Permit Requirements.[1] EPA recommends that permit writers review the example permit language presented in this guide and consider how to incorporate this, or similar, language into MS4 permits as appropriate. Each state may have different NPDES requirements along with varied experience overseeing MS4 programs, and MS4 permittees vary widely in storm water management experience and sophistication, size, topography, precipitation patterns, land use, receiving water conditions and other factors. In most instances, EPA anticipates that permit writers will modify the language to make it suitable for specific MS4 permits, and to tailor example provisions to meet the various needs and goals that apply.

When possible, this Guide has tried to provide examples that can be used for both Phase I and Phase II permits. However, in some instances EPA has provided suggestions for how the language can be tailored to better fit within the context of a Phase I or Phase II permit. In addition, EPA acknowledges that some language presented in this Guide may be more suitable for an individual permit rather than a general permit. While EPA has presented a discussion for ways the language could be altered to fit these scenarios in Recommendations for the Permit Writer sections, it is up to the permit writer to determine the best use of the material for the permit being crafted.

[1] For example, the guide does not explicitly address provisions for compliance with CWA section 402(p)(3)(B)(ii), water quality standards, applicable wasteload allocations in TMDLs or such other conditions as the permitting authority deems necessary. For information on integrating TMDLs into stormwater permits see USEPA's DRAFT TMDLs to Stormwater Handbook (www.epa.gov/owow/tmdl/stormwater)

The example permit language in this Guide has been written as if the permit is a reissued permit and not an initial permit, since most MS4 permittees have been subject to NPDES permits for at least one permit term. Requirements to develop the initial SWMP are not included in this Guide since they would have been included in the first permit term. It is important that permit writers consider the different stages in the development and implementation of SWMPs when establishing permit conditions as well as the experience learned from other more advance programs. So, for example, this Guide includes brackets to indicate the place for an appropriate schedule or deadline rather than indicating specific timeframes in all instances. These examples are available to the permit writer, along with other resources such as the permittee's draft or existing SMWP document, annual reports, prior permit experience, receiving water quality information and the permit writer's best professional judgment, to issue permits suitable for their specific MS4s.

The permit language suggested in this Guide is not intended to override already existing, more stringent or differently-worded provisions that are equally as compliant in meeting the applicable regulations and protective of water quality standards. EPA expects the permitting authority to ensure that the intent of all applicable regulations is captured in the permit. States with more stringent permit provisions should continue to strengthen these provisions as the permits are reissued. This Guide includes suggestions on how to develop permit language for MS4 permittees. This Guide does not impose any new legally binding requirements on EPA, States, or the regulated community, and does not confer legal rights or impose legal obligations upon any member of the public. In the event of a conflict between the discussion in this Guide and any statute, regulation, or permit the statute, regulation or permit controls.

Terminology: SWMP and SWMP Document
This guide uses the term SWMP to refer to the stormwater management program that is required by the Phase I and Phase II regulations to be developed by MS4 permittees. The SWMP document is the written plan that is used to describe the various control measures and activities the permittee will undertake to implement the stormwater management program.

Preparing to Write an MS4 Permit

Most Phase II MS4 permittees are regulated under a general permit (with some exceptions where individual permits have been used for Phase II and non-traditional MS4 permittees). Phase I MS4 permittees are regulated under individual permits, and can include multiple co-permittees. EPA regulations require that initial MS4 permits (i.e. first permit term) set the foundation of the permittee's SWMP. For Phase II MS4 the focus is on the six minimum control measures in 40 C.F.R. 122.34(b), while the Phase I MS4 permittees are informed by the regulations at 40 C.F.R. 122.26(d). See Chapter 1 of this Guide.

As the permit writer prepares to reissue an MS4 permit, regardless of whether the permit is an individual or general permit, EPA recommends that the permit writer review, at a minimum, the following sources of information:

Past annual reports
For currently regulated MS4s, annual reports submitted by the permittee can include information that will help permit writers develop more specific and measurable Permit Requirements. The most recent annual report is usually the most helpful to review, but additional annual reports can be reviewed if time allows. If the permit writer is developing a general permit, a broad selection of

annual reports from various permittees should be reviewed. In particular, EPA recommends that the permit writer review, at a minimum, the following specific information:

Areas of obvious strengths or weaknesses in the SWMP

- For example, is the permittee vague about specific activities (often an indicator of a weak program area), or is the permittee clearly meeting the requirements of the permit and/or going above and beyond the minimum requirements?

Trends or common compliance problems

- For example, does the permittee analyze the data to assess the most common compliance problems, and then modify their controls/programs to address these problems? For example, do they use the common compliance issues identified to target their training and outreach/education efforts for construction operators?

Level of implementation of SWMP activities (e.g., frequency and numbers of inspections, frequency of catch basin cleaning, street sweeping)

- Does the permittee report the total universe when reporting the quantity of an activity achieved? For example, if the MS4 is required to conduct industrial inspections, does it report it did 100 inspections (which may be good or bad, depending on how many it was required to inspect), or that it did 100 out of 5,000 (only 2% of the total)?

Water quality priorities for the permittee (e.g. impaired waters, TMDLs, high quality waters)

- Does the permittee's annual report describe priority pollutants for impaired waters and other water quality programs and what was done to reduce and/or eliminate their contact with stormwater? Does the SWMP target both impaired and high quality waters?

Specific sources or pollutants of concern permittee is currently focusing on

- Does the SWMP target pollutants of concern in its activities?

Level and type of enforcement currently being used by permittee

- Does the annual report provide data and summary information on the different types of enforcement actions taken (how many verbal warnings, written notes, fines, etc)?

Any trends (i.e. water quality, compliance, control measure implementation levels) being reported by Permittees which indicate success or failure of particular SWMP components

- Does the permittee analyze the data, or just report the data in the MS4 annual report?

Types of measurable goals being applied and achieved by permittees

- Has the permittee met the measurable goals stated in the permit and SWMP?

Stormwater management program (SWMP)
Review the most current SWMP documents for potential gaps that may need to be specifically addressed in the reissued MS4 permit. EPA's *MS4 Program Evaluation Guidance* (available at www.epa.gov/npdes/pubs/ms4guide_withappendixa.pdf) can be used to assess the key elements in a SWMP.

NPDES MS4 audit reports, construction/industrial/commercial site inspection reports
Review the findings from any MS4 audits conducted during the past permit term to help identify key issues that should be addressed in the next permit. For example, if the audits identified weak or missing program elements and other controls, these should be addressed in the reissuance of the permit. Construction, industrial, and/or commercial site inspection reports for facilities within the MS4's boundary should be reviewed to determine if there are common compliance issues that should be addressed in the MS4 permit (for example, more training, more frequent inspections, more complete inventory or prioritization, etc.).

Monitoring/Information on Quality of Receiving Waters
Review any monitoring data collected by the permittee or any other entity that has collected useful monitoring data to identify potential pollutants of concern. In addition, the most recent information on impaired waters and total maximum daily loads (TMDLs) for the permit area should be reviewed. If there are waste load allocations (WLAs) applicable to the permittee, these should be addressed in the permit. If no WLA has been assigned to the MS4, the permit writer should still consider pollutants of concern identified in 303(d) lists and TMDLs when developing Permit Requirements. Such information will help identify whether more targeted permit conditions are needed to reduce the discharge of these pollutants. This Guide does not specifically address the inclusion of TMDL requirements in MS4 permits.

Permit renewal application data or past notice of intent (NOI) information
Review any permit renewal applications or NOIs submitted to establish coverage for the previous permit term. Permit writers should consider the recommendations made in the EPA "Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems" (www.epa.gov/npdes/pubs/owm0125.pdf) published in 1996 (40 CFR Part 122; Federal Register, Volume 61, Number 155). This document provides information which clarifies the MS4 reapplication requirements and explains that MS4 permit applicants and NPDES permit writers have discretion to customize appropriate and streamlined reapplication requirements on a case-by-case basis.

Previous MS4 permit
Finally, review any past MS4 permits to identify where permit language should be revised or completely rewritten, for example, because language was vague. This MS4 permit improvement Guide should be used help strengthen key areas in the permit.

Note that if the MS4 permit is being issued for the first time, some of the above information will not exist yet, such as past annual reports or old SWMP documents.

MS4 Permit Writing Tips

There are a few general tips to keep in mind when writing MS4 permits. First, and most importantly, permit provisions should be clear, specific, measurable, and enforceable. Permits should include specific

deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation. Doing so will allow permitting authorities to more easily assess compliance, and take enforcement actions as necessary.

For example, the following permit provision could be strengthened: "The permittee shall demonstrate compliance with this Permit through the timely implementation of control measures and other actions to reduce pollutants in discharges to the maximum extent practicable in accordance with their SWMP..." This permit provision does not define what "timely implementation" is, allowing the permittee to determine what is timely. Timely implementation could be, although it probably was not intended to be, interpreted as meaning up to five years, or it could mean that implementation must occur within six months. In addition, "other actions" are mentioned in this provision, but they are never described. If a permit requires "other actions," these actions should be specifically described in the permit. Finally, it is important to strike a balance of providing specific Permit Requirements while still allowing the permittee come up with innovative controls.

In addition, vague phrases such as "as feasible" and "as possible" should be avoided because they result in inconsistent implementation by permittees and difficulties in permit authority oversight and enforcement. The permit writer's role is to determine what is necessary to achieve in a permit term, and to develop clear, enforceable language that conforms to these determinations. Accordingly, the permit should set forth objective standards, criteria or processes, which will aid the permittee in complying with the permit, as well as the permitting authority in determining compliance in the MS4 permit.

In order for permit language to be clear, specific, measurable and enforceable, each Permit Requirement will ideally specify:

- *What* needs to happen
- *Who* needs to do it
- *How much* they need to do
- *When* they need to get it done
- *Where* it is to be done

For each Permit Requirement: "What" is usually the stormwater control measure or activity required. "Who" in most cases is implied as the permittee (although in some cases the permitting authority may need to specify who exactly will carry out the requirement if there are co-permittees). "How much" is the performance standard the permittee must meet (e.g., how many inspections). "When" is a specific time (or a set frequency) when the stormwater control measure or activity must be completed. "Where" indicates the specific location or area (if necessary). These questions will help determine compliance with the permit requirement.

The Use of Partnerships in MS4 Permits

Since the Phase II Rule applies to all small MS4s within an urbanized area regardless of political boundaries it is very likely that multiple governments and agencies within a single geographic area are subject to MS4 permitting requirements. For example, a city government that operates a small MS4 within an urbanized area may obtain permit coverage under a general Phase II permit while other MS4s in the same vicinity (such as a county, other cities, or a state DOT) may have individual Phase I MS4 permits. All permittees are responsible for permit compliance in their permitted area. Given the

potential for overlapping activities in close proximity, EPA encourages permittees in a geographic area to establish cooperative agreements in implementing their stormwater programs. Partnerships and agreements between permittees and/or other agencies can minimize unnecessarily repeating activities and result in using available resources as efficiently as possible. Using existing tools and programs instead of creating new ones can allow permittees to focus resources on high priority program components instead. In addition by forming partnerships, water quality can be examined and improved on a larger, consolidated scale rather than on a piece-meal, site-by-site basis.

In addition to requiring MS4 permittees to maintain records of program implementation such as inspection forms, monitoring data, dry weather screening reports, and notices of violation, EPA recommends that MS4 permits include requirements for permittees to summarize and analyze data and submit the analysis to the permitting authority. For example, as permittees are required to evaluate program compliance and appropriateness of best management practices, the permit could require permittees to address in annual reports questions such as:

- For illicit discharge data, what are the most prevalent sources and pollutants in the illicit discharge data, and where are these illicit discharges occurring? How many illicit discharges have been identified, and how many of those have been resolved? How many outfalls or screening points were visually screened, how many had dry weather discharges or flows, at how many were field analyses completed and for what parameters, and at how many were samples collected and analyzed? Does the permittee need to conduct more inspections in these areas, or develop more specific outreach targeting these sources and pollutants?
- For the construction data, what are the most common construction violations, and are there any trends in the data (e.g., construction operators who receive more violations than others, areas of the MS4 with more violations, need to refine guidance or standards to more clearly address common violations) How has the permittee responded to these trends? Over the last year, how many construction site SWPPP reviews were completed and approved? How many inspections were conducted, how many noncompliant sites were identified, and how many enforcement actions (and of what type) were taken?

Also, although the stormwater Phase II rule requires reports, after the first permit term, reports are required to be submitted only in years two and four of the permit term. EPA strongly encourages annual reports for all permittees. (See 40 CFR 122.34(g)(3))

CHAPTER 1: ESTABLISHMENT OF THE STORMWATER MANAGEMENT PROGRAM

Introduction

Included Concepts

- Requirement to develop a stormwater management program
- Necessary legal authority
- Enforcement Measures and Tracking
- Adequate resources

An over-arching legal authority framework must be established in order for the SWMP to be effective. Ensuring that the permittee has established the legal authority to meet the requirements of the permit, created a well described enforcement response plan (ERP), and allocated adequate resources will set a necessary foundation for the SWMP.

Legal Authority

Permittees must have the authority to carry out all aspects of their stormwater management programs, including requiring the control of pollutants flowing into the MS4 system, having access to inspect sources of pollutant discharges, and being able to compel compliance and issue citations in the event of violations. Legal authority is especially critical for construction site runoff control, post-construction/permanent runoff control, industrial and commercial inspections, and illicit discharge detection and elimination programs. (See 40 CFR 122.26(d)(2)(i) and 40 CFR 122.34(b)(3)(ii)(B), (b)(4)(ii)(A), and (b)(5)(ii)(B))

A permittee seeking permit coverage under individual permits is required to describe the legal authority it has to implement and enforce the SWMP. EPA recommends that general permits also require regulated MS4s to describe their applicable legal authority in their Notices of Intent (NOIs) (40 CFR 122.26(d)(2)(i), 122.33(b)). This legal authority is typically established through the adoption of one or more ordinances, or by modifying existing ordinances to provide the necessary authority. In some cases, a permittee might already have codified water quality provisions to address previous MS4 Permit Requirements; in this case, the permittee should be required to review existing codes and ordinances and prepare a statement detailing any necessary changes required to address the new MS4 permit requirements. Some permittees, such as, DOTs, universities, and prisons, may not have the authority to create and enforce ordinances. For these entities other mechanisms and authorities that they do possess should be utilized (e.g. DOT right-of-way permits).

Enforcement Measures and Tracking

Permittees are required by the Phase I and Phase II regulations to include in their ordinance, or other regulatory mechanism, penalty provisions to ensure compliance with construction and industrial requirements, to require the removal of illicit discharges, and to address noncompliance with post-construction requirements. In complying with these requirements, EPA recommends the use of enforcement responses that vary with the type of permit violation, and escalate if violations are repeated or not corrected. EPA recommends that the permittee be required to develop and implement an enforcement response plan (ERP), which clearly describes the action to be taken for common violations associated with the construction program, industrial and commercial program, or other SWMP programs. A well-written ERP provides guidance to inspectors on the different enforcement

responses available, actions to address general permit non-filers, when and how to refer violators to the State, and how to track enforcement actions.

Adequate Resources

Each permittee will fund its SWMP differently; therefore, in order to assess whether adequate resources have been allocated to carry out the requirements of the MS4 permit, the permitting authorities should require their permittees to submit an accounting of stormwater-related budgets, costs, and staffing resources updated annually. The fiscal analysis should document and explain changes to budgets from year to year and describe how each type of funding can and cannot be used for stormwater program activities. (See 40 CFR 122.26(d)(2)(vi)).

1.1 Requirement to Develop a Stormwater Management Program

Example Permit Provision

1.1.1 Requirement to Develop Program – The permittee must revise and update its written stormwater management program (SWMP) document and submit the SWMP to the [*insert name of Permitting Authority*] for review by [*insert deadline, e.g., within one year of permit issuance*]. The permittee must continue to implement the current SWMP until the revised SWMP is submitted. The SWMP does not contain effluent limitations; the limitations are contained in Parts [*insert relevant part of the permit*] of the permit.

1.1.2 Contents of the SWMP document – At a minimum, the permittee must include the following information in its SWMP document:

a. Ordinances, or other regulatory mechanisms, providing the legal authority necessary to implement and enforce the requirements of this permit (see Part 1.1);

b. Statement by the permittee's legal counsel certifying to adequacy of legal authority (see Part 1.2);

c. Written procedures describing how the permittee will implement provisions described in Parts 2-8.

1.1.3 Modifications to the SWMP document – The [*insert applicable name of permitting authority*]may notify the permittee of the need to modify the SWMP document to be consistent with the permit, in which case the permittee will have [*insert deadline, e.g. 90 days*] to finalize such changes to the program. The permittee is required to keep the SWMP document up to date during the term of the permit. Where the permittee determines that modifications are needed to address any procedural, protocol, or programmatic change, such changes must be made as soon as practicable, but not later than [*insert deadline, e.g. 90 days*].

Example Permit Requirement Rationale for the Fact Sheet

The permittee is required to develop a SWMP document that describes how the permittee will meet the control requirements in the permit. (See 40 CFR 122.26(d)(2)(iv), 122.34(a)). The SWMP document is a consolidation of all of the permittee's relevant ordinances or other regulatory requirements, the description of all programs and procedures (including standard forms to be used for reports and inspections) that will be implemented and enforced to comply with this permit and to document the selection, design, and installation of all stormwater control measures. The permittee is required to submit its SWMP document to the permitting authority. If modifications to the SWMP are necessary then the permitting authority will notify the permittee.

Recommendation for the Permit Writer

The permit writer should include in this section the relevant parts of the permit that require specific descriptions or justifications to be included in the SWMP document. Also, permit writers may need to include an additional requirement regarding the submittal of the SWMP document since some information contained in the SWMP document is required to be submitted prior to the permittee obtaining permit coverage. In addition, permit writers should refer to the memo entitled *Interim Guidance on Implementation of NPDES Regulations for Storm Water Phase II for Small Municipal Separate Storm Sewer Systems in Response to Recent Ninth Circuit Decision in Environmental Defense Center, et al. v. EPA, No. 00-70014 & consolidated cases (9th Cir.)* for additional guidance on the implementation of regulations for Phase II MS4s (www.epa.gov/npdes/pubs/interim_guidelines_memo_final.pdf).

1.2 Requirement to Develop Adequate Legal Authority to Implement and Enforce Stormwater Management Program

Example Permit Provision

1.2.1 Within [*insert deadline, e.g., one year from permit issuance*] the permittee must review and revise its relevant ordinances or other regulatory mechanisms, or adopt any new ordinances or other regulatory mechanisms that provide it with adequate legal authority to control pollutant discharges into and from its MS4, and to meet the requirements of this permit.

1.2.2 To be considered adequate, this legal authority must, at a minimum, address the following:

a. Authority to Prohibit Illicit Discharges – Prohibit and eliminate illicit connections and discharges to the MS4. Illicit connections include pipes, drains, open channels, or other conveyances that have the potential to allow an illicit discharge to enter the MS4. Illicit discharges include all non-stormwater discharges except fire fighting discharges, discharges from NPDES permitted industrial sources and discharges not otherwise authorized under Part 1.2.2.b. of this permit.

b. Allowable Non-Stormwater Discharges –Exceptions to the prohibition in Part 1.2.2.a. may include the following, only if they are considered non-significant contributors of pollutants: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water.

c. Authority to Prohibit Spills or Other Releases – Control the discharge of spills, and prohibit dumping or disposal of materials other than stormwater into the MS4.

d. Authority to Require Compliance – Require compliance with conditions in the permittee's ordinances, permits, contracts, or orders (i.e., hold dischargers accountable for their contributions of pollutants and flows).

e. Authority to Require Installation, Implementation, and Maintenance of Control Measures – Require owners/operators of construction sites, new or redeveloped land, and industrial and commercial facilities to minimize the discharge of pollutants to the MS4 through the installation, implementation, and maintenance of stormwater control measures consistent with [*insert references to applicable stormwater control measure manuals, guidance documents, etc.*].

f. Authority to Receive and Collect Information – The permittee must have the authority to request from operators of construction sites, new or redeveloped land, and industrial and commercial facilities information such as stormwater plans, inspection reports, and monitoring results, and other information deemed necessary to assess compliance with this permit. The permittee must also have the authority to review designs and proposals for new development and redevelopment to determine whether adequate stormwater control measures will be installed, implemented, and maintained.

g. Authority to Inspect – The permittee must have the authority to enter private property for the purpose of inspecting at reasonable times any facilities, equipment, practices, or operations related to stormwater discharges to determine whether there is compliance with local stormwater control ordinances/standards or requirements in this Permit.

h. Response to Violations – The permittee must have the ability to promptly require that violators cease and desist illicit discharges or discharges of stormwater in violation of any ordinance or standard and/or cleanup and abate such discharges, including the ability to:

   1. Effectively require the discharger to abate and clean up their discharge, spill, or pollutant release within [*insert deadline, e.g. 48 hours*] of notification; or

   2. For uncontrolled sources of pollutants that could pose an environmental threat, require abatement within [*insert timeframe, e.g. 30 days of notification*]; or,

3. Perform the clean up and abatement work and bill the responsible party, if necessary.
4. If a situation persists where pollutant-causing sources or activities are not abated, provide the option to order the cessation of activities until such problems are adequately addressed.
5. When all parties agree that clean-up activities cannot be completed within the timeframe provided, determine a new timeframe and notify the [*insert name of permitting authority*].

i. Monetary Penalties – The permittee must have the ability to:

1. Levy citations or administrative fines against responsible parties either immediately at the site, or within a few days.
2. Require recovery and remediation costs from responsible parties.

j. Civil/Criminal Penalties – The permittee must have the ability to impose more substantial civil or criminal sanctions (including referral to a city or district attorney) and escalate corrective response, consistent with its enforcement response plan developed pursuant to Part 1.3, for persistent non-compliance, repeat or escalating violations, or incidents of major environmental harm.

k. Interagency Agreements – Control of the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements or other similar agreements with other owners of the MS4, such as [*insert other applicable permittees*].

1.2.3 The permittee must include as part of its written SWMP document a statement certified by its chief legal counsel that the permittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in this permit. This statement must include:

a. Identification of all departments within the permittee's jurisdiction that conduct stormwater-related activities and their roles and responsibilities under this permit. Include an up-to-date organizational chart specifying these departments, key personnel, and contact information.

b. Identification of the local administrative and legal procedures and ordinances available to mandate compliance with stormwater-related ordinances and therefore with the conditions of this permit.

c. A description of how stormwater related-ordinances are implemented and appealed.

d. A description of whether the municipality can issue administrative orders and injunctions, or whether it must go through the court system for enforcement actions.

Example Permit Requirement Rationale for the Fact Sheet

Adequate legal authority is required to implement and enforce most parts of the SWMP. (See 40 CFR 122.26(d)(2)(i) and 40 CFR 122.34(b)(3)(ii)(B), (b)(4)(ii)(A), and (b)(5)(ii)(B)). Without

adequate legal authority the MS4 would be unable to perform many vital SWMP functions such as performing inspections and requiring installation of control measures. In addition, the permittee would not be able to penalize and/or attain remediation costs from violators.

Recommendations for the Permit Writer

A major difference between a traditional MS4 and a non-traditional MS4 (such as a DOT, military base, or university) is often the scope of legal authority available to the MS4. Non-traditional MS4 permittees often cannot pass "ordinances" nor do they have enforcement authority like a typical municipality, so legal authority may consist of policies, standards, or specific contract language. Non-traditional MS4 permittees also do not generally have the authority to impose a monetary penalty. Although these differences exist, just like traditional MS4s, non-traditional MS4s must have the legal authority to develop, implement, and enforce the program. Moreover, the scope of legal authority that may be exercised by MS4 operators that are municipalities may vary from state to state. Therefore, permit writers should tailor the legal authority section depending on the types of permittees covered and the scope of authority that may be exercised by the permittee. For example, non-traditional MS4 permittees often have authority over what their contracts require. Therefore, the permit could require that contracts for construction and maintenance activities include specific stormwater requirements that ensure the permittee's requirements are met. In addition, cooperative agreements could be maintained with those permittees that do possess the legal authorities to enforce stormwater measures within the permittee's MS4 boundary.

The discharge prohibitions listed in Part 1.2.2 are taken from the Phase II regulations and are the minimum requirements. Note that, unlike Phase II MS4s, Phase I MS4 permittees are required to address the sources of non-stormwater discharges in Part 1.2.2.b. when they are identified as sources of pollutants in stormwater discharges. (See 40 CFR 122.26(d)(2)(iv)(B)). The permit writer may choose to apply additional or more stringent prohibitions. For example, some states have chosen to prohibit discharges from street washing activities as they can be significant sources of pollutants such as oil and grease and heavy metals.

1.3 Enforcement Measures and Tracking

Example Permit Provision

1.3.1 The permittee must continue to implement, and revise within [*specify deadline for completion, e.g. 12 months of permit issuance*] if necessary, an enforcement response plan (ERP), which sets out the permittee's potential responses to violations and addresses repeat and continuing violations through progressively stricter responses as needed to achieve compliance. The ERP must describe how the permittee will use each of the following types of enforcement responses based on the type of violation:

a. Verbal Warnings – Verbal warnings are primarily consultative in nature. At a minimum, verbal warnings must specify the nature of the violation and required corrective action.

b. Written Notices – Written notices of violation (NOVs) must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.

c. Escalated Enforcement Measures – The Permittee must have the legal ability to employ any combination of the enforcement actions below (or their functional equivalent), and to escalate enforcement responses where necessary to address persistent non-compliance, repeat or escalating violations, or incidents of major environmental harm:

1. Citations (with Fines) – The ERP must indicate when the permittee will assess monetary fines, which may include civil and administrative penalties.
2. Stop Work Orders – The permittee must have the authority to issue stop work orders that require construction activities to be halted, except for those activities directed at cleaning up, abating discharge, and installing appropriate control measures.
3. Withholding of Plan Approvals or Other Authorizations – Where a facility is in non-compliance, the ERP must address how the permittee's own approval process affecting the facility's ability to discharge to the MS4 can be used to abate the violation.
4. Additional Measures – The permittee may also use other escalated measures provided under local legal authorities. The permittee may perform work necessary to improve erosion control measures and collect the funds from the responsible party in an appropriate manner, such as collecting against the project's bond or directly billing the responsible party to pay for work and materials.

1.3.2 Enforcement Tracking – The Permittee must track instances of non-compliance either in hard-copy files or electronically. The enforcement case documentation must include, at a minimum, the following:

a. Name of owner/operator of facility or site of violation
b. Location of stormwater source (i.e., construction project, industrial facility)
c. Description of violation
d. Required schedule for returning to compliance
e. Description of enforcement response used, including escalated responses if repeat violations occur or violations are not resolved in a timely manner
f. Accompanying documentation of enforcement response (e.g., notices of noncompliance, notices of violations)
g. Any referrals to different departments or agencies
h. Date violation was resolved.

1.3.3 Recidivism Reduction – The permittee is required to identify chronic violators of any SWMP component and reduce the rate of noncompliance recidivism. The permittee

must summarize inspection results by these chronic violators and include incentives, disincentives, or an increased inspection frequency at the operator's sites. [2]

Example Permit Requirement Rationale for the Fact Sheet

The permit requires permittees to have an established, escalating enforcement policy that clearly describes the action to be taken for common violations. The policy must describe the procedures to ensure compliance with local ordinances and standards, including the sanctions and enforcement mechanisms that will be used to ensure compliance. (See 40 CFR 122.26(d)(2)(i)). It is critical that the MS4 have the authority to initiate a range of enforcement actions to address the variability and severity of noncompliance. Enforcement responses to individual violations must consider criteria such as magnitude and duration of the violation, effect of the violation on the receiving water, compliance history of the operator, and good faith of the operator in compliance efforts. Particularly for construction sites, enforcement actions must be timely in order to be effective.

Recommendations for the Permit Writer

Typical enforcement mechanisms include verbal warnings, written NOVs, administrative fines and orders, stop work orders, and civil or criminal penalties. Some non-traditional MS4 permittees, such as DOTs and universities, may not have the authority to use the mechanisms described above. Therefore the enforcement requirements in the permit should take the permittee's enforcement limitations and abilities into consideration, allow for alternative mechanisms such as related contract obligations or right-of-way permits, and/or require entities that cannot enforce to coordinate with those entities that can. For example, if a DOT discovers an illicit discharge to the right-of-way, a mechanism should be in place for the DOT to communicate with the adjacent municipality to eliminate the discharge in a timely manner.

Some permit writers include specific language as to when permittees can refer violations of NPDES permits to the permitting authority. Because of the often similar control measures required in MS4 construction programs and NPDES CGP SWPPP requirements, permit writers want the permittee to make an honest effort at achieving compliance with their local requirements before referring a violator to the NPDES permitting authority. An example of permit language on NPDES referrals, which require the MS4 permittee to make a good faith effort at ensuring compliance by conducting at least two inspections and notices of violation, follows:

> NPDES Permit Referrals–For those construction projects or industrial facilities subject to the [*insert name of applicable NPDES general construction/industrial permit*], the permittee must:

[2] Adapted from 2009 San Francisco Bay Municipal Regional Stormwater Permit (Order No. R2-2009-0074; www.swrcb.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2009/R2-2009-0074.pdf) and the Los Angeles MS4 Permit (Part 3; www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ms4_permits/los_angeles/2001-2007/LA_MS4_Permit2001-2007.pdf)

a. Refer non-filers (i.e., those facilities that cannot demonstrate that they obtained permit coverage) to the [*insert name of permitting authority*] within [*insert number of days, e.g. 30 days*] of making that determination. In making such referrals, the permittee must include, at a minimum, the following documentation:

   1. Construction project or industrial facility location.
   2. Name of owner or operator.
   3. Estimated construction project size or type of industrial activity (including SIC code if known).
   4. Records of communication with the owner or operator regarding filing requirements.

b. Refer violations to the [*insert name of permitting authority*] provided that the permittee has made a good faith effort of progressive enforcement to achieve compliance with its own ordinances. At a minimum, the permittee's good faith effort must include documentation of two follow-up inspections and two warning letters or notices of violation. In making such referrals, the permittee must include, at a minimum, the following documentation:

   1. Construction project or industrial facility location
   2. Name of owner or operator
   3. Estimated construction project size or type of industrial activity (including SIC code if known)
   4. Records of communication with the owner or operator regarding the violation, including at least two follow-up inspections, two warning letters or notices of violation, and any response from the owner or operator

It is important to note that a referral to the permitting authority does not relieve the MS4 from its enforcement obligations. The MS4 must continue to work with the permitting authority, using all available enforcement authority in order to gain compliance.

1.4 Requirement to Ensure Adequate Resources to Comply with MS4 Permit

Example Permit Provision

1.4.1 Secure Resources – The permittee must secure the resources necessary to meet all requirements of this permit.

1.4.2 Annual Fiscal Analysis – The permittee must conduct an annual analysis of the capital and operation and maintenance expenditures needed, allocated, and spent as well as the necessary staff resources needed and allocated to meet the requirements of this permit, including any development, implementation, and

enforcement activities required. The analysis must include estimated expenditures for the reporting period, the preceding period, and the next reporting period and be submitted with the annual report.

a. Each analysis must include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

b. Each analysis must include a narrative description of circumstances resulting in a [*insert percentage, e.g. 25 percent or greater*] annual change for any budget line items.

c. Each analysis must include a description of the staff resources necessary to meet the requirements of this permit.

Example Permit Requirement Rationale for the Fact Sheet

The annual fiscal analysis will show the allocated resources, expenditures, and staff resources necessary to comply with the permit, and implement and enforce the permittee's SWMP. (See 40 CFR 122.26(d)(2)(vi). The annual analysis is necessary to show that the permittee has adequate resources to meet all Permit Requirements. The analysis can also show year-to-year changes in funding for the stormwater program. A summary of the annual analysis must be reported in the annual report (see Section 8.4 and Appendix A). This report will help the Permitting Authority understand the resources that are dedicated to compliance with this permit, and to implementation and enforcement of the SWMP, and track how this changes over time.

Recommendations for the Permit Writer

Permit writers should be specific when requesting financial analysis information from the permittee. The Annual Report Template provided in this Guide includes basic questions that should be adequate for Phase II MS4s. However, more detailed information may be warranted from more established programs and larger Phase I MS4s.

Because stormwater is a component in many different program areas, it can often be difficult to get an accurate accounting of costs. For example, inspection staff may have multiple responsibilities in addition to stormwater inspections. Is it appropriate to count an entire inspector's time (i.e. full-time equivalent (FTE)) as a stormwater cost if the inspector is also doing building inspections? Also, some permittees count street sweeping as a stormwater compliance cost, while others consider their street sweeping costs as an aesthetic or air quality cost. Permittees should provide a detailed breakdown of costs, along with background or additional discussion so the permit writer knows what the costs include.

EXHIBIT C

TO THE DECLARATION OF LAWRENCE M. LEVINE

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

SPDES GENERAL PERMIT
FOR STORMWATER DISCHARGES

from

MUNICIPAL SEPARATE STORM SEWER SYSTEMS
(MS4s)

Permit No. GP-0-10-002

Issued Pursuant to Article 17, Titles 7, 8 and Article 70
of the Environmental Conservation Law

Effective Date: May 1, 2010
Modified Date:

Expiration Date: April 30, 2015

Address:

John Ferguson
Chief Permit Administrator

NYS DEC
Div. Environmental Permits
625 Broadway
Albany, N.Y. 12233-1750

10-14-11

Date

PREFACE

Pursuant to Section 402 of the Clean Water Act ("CWA"), operators of *small municipal separate storm sewer systems* ("small MS4s"), located in *urbanized areas* ("UA") and those *additionally designated* by New York State are unlawful unless they are authorized by a *National Pollutant Discharge Elimination System* ("NPDES") permit or by a state permit program. New York's *State Pollutant Discharge Elimination System* ("SPDES") is an NPDES-approved program with permits issued in accordance with the *Environmental Conservation Law* ("ECL").

Only those *small MS4 operators* who *develop* and *implement* a *stormwater management program* (SWMP) and obtain permit coverage in accordance with Part II of this *SPDES general permit* are authorized to *discharge stormwater* from their *small MS4* under this *SPDES general permit*.

A *covered entity* authorized under GP-0-08-002 as of the effective date of GP-0-10-002, shall be permitted to discharge in accordance with the renewed permit, GP-0-10-002, upon the submission of their Annual Report, unless otherwise notified by the *Department*.

An *operator* not authorized under GP-0-10-002 may[1] obtain coverage under this *SPDES general permit* by submitting a Notice of Intent (NOI) to the address provided on the NOI form. For newly regulated MS4s, authorization under this *SPDES general permit* is effective upon written notification from the *Department* of the receipt of a complete NOI. Copies of this *SPDES general permit* and the NOI for New York are available by calling (518) 402 - 8109 or at any Department of Environmental Conservation (*Department*) regional office (Appendix A). They are also available on the *Department*'s website:

http://www.dec.ny.gov/permits/6045.html

Submitting an NOI is an affirmation that an initial *SWMP* has been *developed* and will be *implemented* in accordance with the terms of this *SPDES general permit*.

*** Note: all italicized words within this *SPDES general permit* are defined in Part X. Acronyms and Definitions.**

[1] The term "may is used to recognize that there are circumstances under which the *operator* is ineligible for coverage under this *g SPDES general permit* because of exclusionary provisions of this permit. *Operators* that are excluded from coverage under this *SPDES general permit* as provided for in Part I, for example, are not authorized to *discharge* under this permit. This clarification also applies to situations in which an NOI has been submitted; submission of an NOI by an entity excluded from *SPDES general permit* coverage does not authorize the *small MS4* to *discharge stormwater* runoff under the authority of this *SPDES general permit*

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
SPDES GENERAL PERMIT FOR DISCHARGES FROM
SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)

Table of Contents

Part I. PERMIT COVERAGE AND LIMITATIONS

A. Permit Application

1. This *SPDES general permit* authorizes *discharges* of *stormwater* from *small municipal separate storm sewer system*s ("MS4"s) as defined in 40 CFR 122.26(b)(16), provided all of the eligibility provisions of this *SPDES general permit* are met.

2. Exempt Non-Stormwater Discharges. The following non-stormwater *discharges* are exempt from the need for *SPDES general permit* coverage unless the *Department* has determined them to be substantial contributors of pollutants to a particular *small MS4* applying for coverage under this *SPDES general permit*. If the *Department* determines that one or more of the *discharges* listed below is a substantial contributor of pollutants to a *small MS4*, the identified *discharges* will be considered *illicit*. In that event, the *covered entity* must eliminate such discharges by following the *illicit discharge* minimum control measure ("MCM") requirements (See Part VII.A.3 or VIII.A.3, and Part IX.A.3, B.3, C.3, and D.3 where applicable).

   a. water line flushing
   b. landscape irrigation
   c. diverted stream flows
   d. rising ground waters
   e. uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20))
   f. uncontaminated ground water
   g. discharges from potable water sources
   h. foundation drains
   i. air conditioning condensate
   j. irrigation water
   k. springs
   l. water from crawl space and basement sump pumps
   m. footing drains
   n. lawn and landscape watering runoff provided that all pesticides and fertilizers have been applied in accordance with the manufacturer's product label;
   o. water from individual residential car washing
   p. flows from riparian habitats and wetlands
   q. dechlorinated swimming pool discharges
   r. residual street wash water
   s. discharges or flows from fire fighting activities

(Part I.A.2.)

t. dechlorinated water reservoir discharges
u. any SPDES permitted discharge.

Even if the non-stormwater discharges are determined not to be substantial contributors of pollutants, the *Department* recommends that the *covered entity's stormwater management program* ("SWMP") include public education and outreach activities directed at reducing pollution from these discharges.

B. Limitations on Coverage

The following are not authorized by this *SPDES general permit*:

1. *Stormwater discharges* whose unmitigated, direct, indirect, interrelated, interconnected, or interdependent impacts would jeopardize a listed endangered or threatened species or adversely modify designated critical habitat;

2. *Stormwater discharges* or *implementation* of a *covered entity's SWMP*, which adversely affect properties listed or eligible for listing in the National Register of Historic Places, unless the covered entity is in compliance with requirements of the National Historic Preservation Act and has coordinated with the appropriate State Historic Preservation Office any activities necessary to avoid or minimize impacts;

3. *Stormwater discharges* to territorial seas not of the State of New York, the contiguous zone, and the oceans unless such *discharges* are in compliance with the ocean *discharge* criteria of 40 CFR 125 subpart M;

4. *Stormwater discharges*, the permitting of which is prohibited under 40 CFR 122.4 and/ or the *ECL*;

C. Exemption Criteria

For *stormwater discharges* from a designated *small MS4* that are mixed with non-*stormwater* or *stormwater* associated with *industrial activity*, the *Department* may determine them to be exempt from the requirements of this *SPDES general permit* if the *discharges* are:

1. Effectively addressed by and in compliance with a different *SPDES general permit* or an *individual SPDES permit*; or

2. Identified by and in compliance with Part I.A.2 of this *SPDES general permit*.

Part II. OBTAINING PERMIT COVERAGE

A. Permit coverage is obtained by submission of a complete and accurate Notice Of Intent.

B. Permit coverage is public noticed by the Department.

NOIs will be public noticed and an opportunity for public comment provided on the contents of submitted NOIs.

a. NOIs and the location of the SWMPs and Annual Reports for existing MS4s will be posted in the Environmental Notice Bulletin (ENB).

b. A deadline of 28 calendar days from the posting in the ENB will be provided for receiving comments.

c. After the public comment period has expired, the *Department* may extend the public comment period, require submission of an application for an individual SPDES permit or alternative *SPDES general permit*, or accept the NOI or SWMP as complete.

C. Continuance of Permit Coverage for Covered Entities Authorized by GP-0-08-002 (Continuing Covered Entities)

As of May 1, 2010, entities with coverage under GP-0-08-002 will continue to have authorization to discharge on an interim basis for up to 180 days from the effective date of this *SPDES general permit*. Covered entities may gain coverage under this *SPDES general permit* by submission of their 2009 Annual Report due in June 2010. For public participation purposes, the updated Annual Report will be considered equivalent to submission of an NOI.

When the operator changes, a new operator is added, or the individual responsible for the SWMP changes, these changes must be indicated on the MCC form submitted in accordance with Part V.D. It is not necessary to submit a revised Notice of Intent (NOI).

D. Permit Coverage for Covered Entities Newly Designated Under GP-0-10-002 (Small MS4s not Previously Authorized by GP-0-08-002)

Certain *small MS4s* designated by 40CFR Section 122.32(a)(1) were not authorized by GP-0-08-002, but are now required to gain coverage under this *SPDES general permit*. The *small MS4s* were not previously authorized because they were either:

- required to gain coverage under GP-0-08-002, but were granted a waiver from that requirement;

- were not required to gain coverage under GP-0-08-002 based on the designation criteria, but they are now within an *Additionally Designated Area*; or

(Part II.D.)

- were otherwise not permitted under GP-0-08-002.

1. In order for *stormwater discharges* from *small MS4s* to be newly authorized under this *SPDES general permit*, an *operator* must:

   a. within 180 days of receiving written notification from the *Department* that a permit for discharges from MS4s is required, prepare an NOI using the form provided by the *Department* (or a photocopy thereof); and

   b. submit the NOI, signed in accordance with Part VI.J of this *SPDES general permit*, to:

      NOTICE OF INTENT
      NYS DEC, Bureau of Water Permits
      625 Broadway, 4th Floor
      Albany, NY 12233-3505

2. *Operators* who submit a complete NOI in accordance with the requirements of this *SPDES general permit* are authorized to *discharge stormwater* from *small MS4s,* under the terms and conditions of this *SPDES general permit,* upon written notification from the Department that a complete NOI has been received.

E Small MS4s Not Required to Gain Coverage

Operators of unregulated *small MS4s* may apply for coverage under this *SPDES general permit* at any time, per Part II.B.

F. Extension of Permit Coverage to Covered Entity's Full Jurisdiction

Operators of traditional land use control MS4s must extend the implementation of minimum control measures (MCMs) 4 and 5 in accordance with *Criterion 3* of the Designation Criteria or apply for a waiver, if eligible.

Operators of all regulated *small MS4*s may also extend the implementation of any of the six MCMs to areas under their control, but outside of the existing area covered by this *SPDES general permit*. This may be done by describing the program components (MCMs) being extended and the geographic extent to which they are being extended in the annual report (Part V.C.) and indicating in the Municipal Compliance Certification (MCC) form (Part V.D.) that the program was extended to the *covered entity's* full jurisdiction.

(Part II.)

G. Single Entity to Cover the MS4

A single entity may gain coverage for, and on behalf of, one or more regulated MS4s to implement a part of an MCM, one, or all the MCMs. A single entity shall be defined by watershed, municipal boundaries, special district boundaries, or other specifically defined boundaries. The single entity must demonstrate to the *Department* that it was formed in accordance with applicable state and/or local legislation, and that it has the legal authority and capacity (financial, resources, etc.) to meet the requirements of this *SPDES general permit*. Depending on the MCM(s) implemented, the single entity shall demonstrate that it has the following capacities, as applicable for each MCM that the single entity is seeking coverage under this SPDES general permit:

1. Initiate and administer appropriate enforcement procedures,
2. Collect, finance, bond or otherwise borrow money for capital projects,
3. Control the management and operation of the storm sewer system,
4. Implement best management practices at all municipal facilities discharging to the MS4, and
5. Obtain access to property that may be necessary for siting stormwater management facilities and/or practices.

The single entity must submit a complete NOI form to the *Department*, detailing which of the regulated MS4s it will gain coverage for and which of the MCMs, or parts of MCMs, it will implement for each particular regulated MS4. A copy of the document forming the single entity, and detailing the legal authority and capacity of the single entity, must be attached to the NOI. Prior to the single entity gaining coverage under this SPDES general permit, each regulated MS4, for which the single entity will implementing one or more MCM must submit a complete notice of termination (NOT). This notice shall specify which of the minimum control measures the single entity will implement for the MS4 and which of the minimum control measures the MS4 will implement.

Part III. SPECIAL CONDITIONS

A. Discharge Compliance with Water Quality Standards

Where a *discharge* is already authorized under this *SPDES general permit* and is later 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 *Department* will notify the *covered entity* of such violation(s) and may take enforcement actions for such violations. The *covered entity* must take all necessary actions to ensure future *discharges* do not directly or indirectly cause or contribute to the violation of a *water quality standard*, and the *covered entity* must document these actions in the *SWMP*.

(Part III.A.)

Compliance with this requirement does not preclude, limit, or eliminate any enforcement activity as provided by the Federal and / or State law for the underlying violation. Additionally, if violations of applicable water quality standards occur, then coverage under this *SPDES general permit* may be terminated by the *Department* in accordance with 750-1.21(e), and the Department may require an application for an alternative *SPDES general permit* or *individual SPDES permit* may be issued.

B. Impaired Waters

1. Impaired Waters Without Watershed Improvement Strategies or Future TMDLs

If a *small MS4 discharges* a stormwater pollutant of concern (POC) to an *impaired* water listed in Appendix 2, the covered entity must ensure no net increase in its *discharge* of the listed *POC* to that water.

By January 8, 2013, *covered entities* must assess potential sources of discharge of stormwater *POC*(s), identify potential stormwater pollutant reduction measures, and evaluate their progress in addressing the POC(S). Newly authorized covered entities must perform the above tasks within 5 years after gaining coverage under this SPDES general permit. Covered entities must evaluate their *SWMP* with respect to the MS4's effectiveness in ensuring there is no net increase discharge of stormwater *POC*(s) to the impaired waters for *storm sewersheds* that have undergone non-negligible changes such as changes to land use and impervious cover greater than one acre, or stormwater management practices during the time the MS4 has been covered by this *SPDES general permit*. This assessment shall be conducted for the portions of the *small MS4 storm sewershed* that *discharge* to the listed waters (see Appendix 2). The assessment shall be done using *Department* supported modeling of pollutant loading.

If the modeling shows increases in loading of the POC, the SWMP must be modified to reduce the loading to meet the no net increase requirement. The subsequent annual reports must contain an assessment of priority stormwater problems, potential management practices that are effective for reduction of stormwater POC(s), and document a gross estimate of the extent and cost of the potential improvements.

2. Watershed Improvement Strategies

The *SWMP*s for *covered entities* in the watersheds listed below must be modified to comply with the following requirements and the watershed improvement strategies. *Covered entities* implementing the pollutant-specific BMPs in addition to the BMPs required of all *covered entities* will be taking satisfactory steps towards achieving compliance with TMDL requirements. *Covered entities* under the MS4 *SPDES general*

(Part III.B.2.)

permit are required to make best efforts to participate in locally based watershed planning efforts that involve the NYSDEC, other covered entities, stakeholders and other interested parties for implementation of load reduction BMPs. Covered entities may form a Regional Stormwater Entity (RSE) to implement stormwater retrofits collectively. The *covered entities* must ensure that discharges of the *POC* to the *TMDL* waterbody are reduced through these or additional changes to the *SWMP* so that the waste load allocation is met.

MS4s are required to meet the reduction of the POC defined by the TMDL program defined in Part IX of this *SPDES general permit*. By the deadlines defined in Part IX of the general permit, *covered entities* must assess their progress and evaluate their *SWMP* to determine the *MS4's* effectiveness in reducing their discharges of *TMDL POC*(s) to *TMDL* water bodies. Newly designated watershed improvement strategy areas must perform the assessment within 5 years from authorization under this SPDES general permit. This assessment shall be conducted for the portions of the *small MS4 storm sewershed* that are within the *TMDL* watershed. The assessment shall be done using *Department* supported modeling of pollutant loading from the *storm sewershed*. The *covered entities* or an RSE must prepare and implement, participate in or utilize the results of existing or ongoing ambient water quality monitoring programs to validate the accuracy of models and evaluate the effectiveness of the additional BMPS for watershed improvement strategies.

If the modeling shows that loading of the POC is not being reduced to meet the waste load allocation, the SWMP must be modified to reduce the pollutant loading to meet the waste load allocation.

Each regulated MS4 is responsible for an individual load reduction, which is a fraction of the total required load reduction in the TMDL. If MS4s form an RSE and stormwater retrofits are approached collectively, the *Department* would allow compliance with this condition of the SPDES general permit to be achieved on a regional basis.

In this case the load reduction requirement for each participating MS4 will be aggregated, to create an RSE load reduction, to allow design and installation of retrofits where they are most feasible, without restricting MS4s to site retrofit projects within their municipal boundaries.

Each member of an RSE is in compliance if the aggregate reduction number associated with the retrofit plans is met. If the aggregate number is not met, each of the participating MS4s would be deemed non-compliant until such time as they had met their individual load reduction requirements.

(Part III.B.2.)

a. New York City Watershed East of the Hudson River
Covered entities shall modify their *SWMP* to meet the additional requirements as set forth in Part IX.A to address phosphorus as the *POC* for the portion of their *storm sewershed* in the watershed. A map of the watershed is shown in Appendix 3.

b. Other Phosphorus Watersheds
Covered entities shall modify their *SWMP* to meet the additional requirements as set forth in Part IX.B to address phosphorus as the *POC* for the portion of their *storm sewershed* in the watershed. Maps of the watersheds are shown in Appendices 4, 5, and 10.

c. Pathogen Watersheds
Covered entities shall modify their SWMP to meet the additional requirements as set forth in Part IX.C to address pathogens as the *POC* for the portion of their *storm sewershed* in any of the watersheds. Maps of the watersheds are shown in Appendices 6, 7, and 9.

d. Nitrogen Watersheds
Covered entities shall modify their *SWMP* to meet the additional requirements as set forth in Part IX.D to address nitrogen as the *POC* for the portion of their *storm sewershed* in the watershed. Maps of the watersheds are shown in Appendix 8.

3. Future TMDL Areas
If a *TMDL* is approved in the future by EPA for any waterbody or watershed into which a *small MS4 discharges*, the *covered entity* must review the applicable *TMDL* to see if it includes requirements for control of *stormwater discharges*. If a *covered entity* is not meeting the *TMDL* wasteload allocations, it must, within 180 days of written notification from the *Department*, modify its *SWMP* to ensure that the reduction of the *POC* specified in the *TMDL* is achieved. It will be the MS4's obligation to meet the waste load allocations specified in the TMDL through modification of its *SWMP plan* according to the schedule of Part IX of this *SPDES general permit.*

Modifications must be considered for each of the six MCMs. Refer to assistance documents or enhanced requirements for specific pollutants in documents on the *Department*'s website for modifications specific to the *TMDL*. Revised *SWMPs* must include updated schedules for implementation.

(Part III.B.3.)

Within three years of having modified its SWMP to ensure that reduction of the POC specified in the TMDL is achieved, covered entities in future TMDL areas must assess their progress and evaluate their *SWMP* to determine the *MS4's* effectiveness in reducing their discharges of *TMDL POC*(s) to *TMDL* water bodies. This assessment shall be conducted for the portions of the *small MS4 storm sewershed* that are within the *TMDL* watershed. The assessment shall be done using *Department* supported modeling of pollutant loading from the *storm sewershed*.

Part IV. Stormwater Management Program (SWMP) Requirements

A. SWMP Background

Covered entities must *develop (for newly authorized MS4s* , *implement)*, and enforce a *SWMP* designed to reduce the *discharge* of pollutants from *small MS4s* to the *maximum extent practicable* ("MEP") in order to protect water quality and to satisfy the appropriate water quality requirements of the *ECL* and the CWA. The objective of the permit is for MS4s to assure achievement of the applicable water quality standards. *Covered entities* under GP-0-08-002 must have prepared a *SWMP plan* documenting modifications to their *SWMP*. See Part X.B. (Definitions) for more information about the *SWMP* and *SWMP plan*.

The *SWMP* and *SWMP plan* may be created by an individual *covered entity,* by a shared effort through a group or coalition of individual *covered entities,* or by a third party entity. The *SWMP plan* shall be made readily available to covered entity's staff, to the public and to *Department* and EPA staff.

B. Cooperation Between Covered entities Encouraged

The *Department* encourages *covered entities* to cooperate when *developing* and *implementing* their *SWMP*[2]. However, each *covered entity* is responsible for obtaining its own permit coverage and for filing its own NOI. Irrespective of any agreements between *covered entities*, each individual *covered entity* remains legally responsible for satisfying all GP-0-10-002 requirements and for its own *discharges*. If one *covered entity* is relying on another *covered entity* to satisfy one or more of its permit obligations, that fact must be noted on the *covered entity's* MCC form. The other entity must, in fact, *implement* the MCM(s) and must agree to *implement* the MCM(s) on the first *covered entity's* behalf. This agreement between the two or more parties must be documented

[2] For example, villages are encouraged to cooperate with towns, towns with counties, and adjacent counties with each other. In addition, municipal governments are encouraged to coordinate and cooperate with *non-traditional MS4s* such as DOT, school and fire districts, Federal and State facilities located within and adjacent to their jurisdictions. Sewer boards, water boards, or other non-traditional entities are encouraged to partner with the municipality (municipalities) that they serve.

in writing and signed by both (all) parties. Part IV.G. below may apply if such an agreement

(Part IV.B.)

is not already in place. The agreement must be included in the *SWMP plan*, and be retained by the *covered entity* for the duration of this *SPDES general permit*, including any administrative extensions of the permit term.

Covered entities that are working together to *develop (for newly authorized MS4s)* or *implement* their *SWMP*s are encouraged to complete shared annual reports. *Covered entities* may also hold a group meeting to present their annual reports to the public and to receive comments on their annual reports. These options are discussed in more detail in Part V.C.2.

C. SWMP Coverage Area

At a minimum, *covered entities* are required to *develop (for newly authorized MS4s)* and *implement SWMP*s in the automatically designated *urbanized areas* ("UA") and *additionally designated* areas (40CFR Section 122.32(a)(1) or 122.32(a)(2)) under their jurisdiction[3].

SWMP coverage shall include all UA or additionally designated areas within the *covered entity*'s jurisdiction that drain into their *small MS4* and subsequently *discharge* to *surface waters of the State* directly or through other *small MS4s*.

Operators of *small MS4s* whose jurisdiction includes regulated and unregulated areas are encouraged to include their entire jurisdiction in their *SWMP* (refer to Part II.D).

D. SWMP Development and Implementation for Covered entities Authorized by GP-0-08-002(Continuing Covered entities)

Covered entities authorized under GP-0-08-002 shall continue to fully *implement* their *SWMP,* unless otherwise stated in this *SPDES general permit*. A *covered entity* may modify its *SWMP* if it determines changes are needed to improve *implementation* of its *SWMP*. Any changes to a *SWMP* shall be reported to the *Department* in the MS4's

[3] The purpose of this section is to minimize conflicts between adjacent *small MS4s*. For the purposes of this *SPDES general permit*, areas under the *covered entity's* jurisdiction shall mean areas where the legal authority exists for the subject *covered entity* to *develop* and *implement* an *SWMP* including the six MCMs. It is not a permit requirement for *covered entities* to *implement* and enforce any portion of their *SWMP* in any area that is under the jurisdiction of another *covered entity*. For example, if a portion of a town drains directly into a stormwater system owned and operated by the State DOT, and this area of the town is regulated, the DOT will not be required to implement and enforce any portion of a *SWMP* in the area lying outside of its right of way. In this case, the town would be required to implement the program in the subject area in accordance with this *SPDES general permit*, this despite the fact that the subject drainage does not directly enter the town's system.

annual report and Municipal Compliance Certification (MCC) form (See Part V.C and V.D).

(Part IV.)

E. SWMP Development and Implementation for Newly Regulated Covered entities (Small MS4s not Previously Authorized by GP-0-08-002)

Certain *small MS4s* designated by 40CFR Section 122.32(a)(1) were not authorized by GP-0-08-002, but are now required to gain coverage under this *SPDES general permit*. The *small MS4s* were not previously authorized because they were either:

- required to gain coverage under GP-0-08-002, but were granted a waiver from that requirement;
- were not required to gain coverage under GP-0-08-002 based on the designation criteria, but they now meet the additional designation criteria in NYS DEC "Designation Criteria for Identifying Regulated Municipal Separate Storm Sewer Systems" ; or
- were otherwise not permitted under GP-0-08-002.

Operators of *small MS4s* newly regulated under this *SPDES general permit* must *develop* an initial *SWMP* and provide adequate resources to fully *implement* the *SWMP* no later than three years from the date of the individual MS4's authorization.

A newly regulated *covered entity* may modify its *SWMP* to comply with the terms and conditions of this *SPDES general permit* if it determines changes are needed to improve *implementation* of its *SWMP*. Any changes to a *SWMP* shall be documented in the *SWMP plan* and reported to the *Department* in the annual report (See Part V.C).

Covered entities are required to make steady progress toward full *implementation* in the first three years after the date of authorization. Full *implementation* of *SWMP*s for newly regulated *small MS4s* is expected no later than three years from the date of coverage under this *SPDES general permit*.

F. Minimum Control Measures

Each *covered entity* is required to develop *(for newly authorized MS4s)* and implement a *SWMP* that satisfies the requirements for each of six required program components, known as minimum control measures (MCMs).

The MCMs for *traditional land use control MS4s* are listed in Part VII. The MCMs for *traditional non-land use control MS4s* and *non-traditional MS4s* are listed in Part VIII. Additional MCMs that *covered entities* in watersheds with improvement strategies must address, referred to in Part III.B.2, are described in Part IX.

(Part IV.)

G. Reliance Upon Third Parties

This section applies when a *covered entity* relies upon any third party entity to *develop* or *implement* any portion of its *SWMP*. Examples of such entities include, but are not

limited to a non-government, commercial entity that receives payment from the *covered entity* for services provided (for example businesses that create policies or procedures for *covered entities*, perform illicit discharge identification and track down, maintain roads, remove snow, clean storm sewer system, sweep streets, etc as contracted by the covered entity).

The covered entity must, through a signed certification statement, contract or agreement provide adequate assurance that the third parties will comply with permit requirements applicable to the work performed by the third party. The certification statement, contract or other agreement must:

- provide adequate assurance that the third party will comply with permit requirements;
- identify the activities that the third party entity will be responsible for and include the name and title of the person providing the signature;
- the name, address and telephone number of the third party entity;
- an identifying description of the location of the work performed; and
- the date the certification statement, contract or other agreement is signed.

Example certification language is provided below:

<u>Contracted Entity Certification Statement:</u>

"I certify under penalty of law that I understand and agree to comply with the terms and conditions of the (covered entity's name) stormwater management program and agree to implement any corrective actions identified by the (covered entity's name) or a representative. I also understand that the (covered entity's name) must comply with the terms and conditions of the New York State Pollutant Discharge Elimination System ("SPDES") general permit for stormwater discharges from the Municipal Separate Storm Sewer Systems ("MS4s") and that it is unlawful for any person to directly or indirectly cause or contribute to a violation of water quality standards. Further, I understand that any non-compliance by (covered entity's name) will not diminish, eliminate, or lessen my own liability."

Part V. PROGRAM ASSESSMENT, RECORD KEEPING, REPORTING AND CERTIFICATION REQUIREMENTS

A. Assessment

Covered entities are required to collect and report information about the *development* and *implementation* of their SWMPs. Specific information the *small MS4s* are required to collect is identified in Parts VII or VIII, depending on the type of *small MS4*. The *small MS4s* are encouraged to collect additional information that will help them evaluate their *SWMP*. Collection of information over time will facilitate the evaluation of the *covered entity's SWMP* by allowing the examination of trends in the information collected.

The *covered entity* must conduct an annual evaluation of its program compliance, the appropriateness of its identified *BMPs*, meeting new permit requirements, and progress towards achieving its identified *measurable goals*, which must include reducing the *discharge* of pollutants to the *MEP*.
Where the evaluation shows that the SWMP is not reducing discharges to the *MEP*, the SWMP shall be revised to reduce discharges to the *MEP*. Update to the SWMP and the SWMP plan must be completed within a year from the annual evaluation of their SWMP with an implementation schedule no later than 3 years from the annual evaluation.

B. Recordkeeping

The *covered entity* must keep records required by this *SPDES general permit* (records that document *SWMP*, records included in *SWMP plan*, other records that verify reporting required by the permit, NOI, past annual reports, and comments from the public and the *Department*, etc.) for at least five (5) years after they are generated. Records must be submitted to the *Department* within 5 business days of receipt of a *Department* request for such information. The *covered entity* shall keep duplicate records (either hard copy or electronic), to have one copy for public observation and a separate working copy where the *covered entity's* staff, other individuals responsible for the *SWMP* and regulators, such as *Department* and EPA staff can access them. Records, including the NOI and the *SWMP plan*, must be available to the public at reasonable times during regular business hours.

C. Annual Reporting

1. Annual Report Submittal

The annual reporting period ends March 9 of each year. The annual report must be received in the *Department*'s Central Office, electronic or hard copy, no later than June 1 of each reporting year. If electronic, submit in accordance with procedures set forth by the *Department*. If mailed, send to the address below:

(Part V.C.1.)

NYS DEC "MS4 Coordinator"
Bureau of Water Permits
625 Broadway, 4th Floor
Albany, NY 12233-3505

Failure to submit a complete annual report and a complete MCC form (Part V.D) shall constitute a permit violation.

a. **Annual Report Submittal for Newly Regulated Covered entities (Small MS4s not Previously Authorized by GP-0-08-002)**
Newly regulated covered entities *developing* their *SWMP* are to submit their Annual Report in a format provided by the *Department*. They will provide, at a minimum, the information on the annual report form and the information required by Parts VII or VIII.

Newly regulated *covered entities* are required to submit their first annual report the year that authorization is granted if authorization is granted on or before December 31 of that reporting year.

b. **Annual Report Submittal for Covered entities Authorized by GP-0-08-002 (Continuing Covered entities)**
Beginning with annual reports due in 2010 *covered entities* implementing their *SWMP* shall submit, at a minimum, information specified by the *Department* in Part VII or VIII in a format provided by the *Department*.

2. **Shared Annual Reporting and Submittal**
Covered entities working together to *develop (for newly authorized MS4s)* and /or *implement* their *SWMP*s may complete a shared annual report. The shared annual report is an annual report that outlines and explains group activities, but also includes the tasks performed by individual *covered entities* (*BMPs, measurable goals*, schedules of planned activities, etc.). To facilitate the submission of one annual report for the entire group of *covered entities*, individual *covered entity's* activities may be incorporated into the report by either:

- providing the details specific to their *small MS4*(s) to a person(s) who incorporates that information into the group report. That one group report is submitted to the *Department* for all participating *small MS4s*; or
- providing the details specific to their *small MS4*(s) on a separate sheet(s) that will be attached with the one group report.

(Part V.C.2.)

Regardless of the method chosen, each *covered entity* must, by June 1 of the annual reporting year:

a. Provide their individual MCC form (see Part V.D) to be submitted with the shared annual report. Each *covered entity* must sign and submit an MCC form to take responsibility for all of the information in the annual report, which includes specific endorsement or acceptance of the shared annual report on behalf of the individual *covered entity*;

b. Present their draft annual report at a meeting (see Part VII.A.2.d or Part VIII.A.2.d for more information). For completed shared annual reports, the report may be presented by each participating individual *covered entity* at an existing *municipal* meeting or may be made available for comments on the internet. Additionally, *covered entities* participating in shared annual reporting may combine meetings to have a group or regional meeting. While the group meeting is allowable, each *covered entity* shall ensure that local public officials and members of the public are informed about the program, activities and progress made; and

c. Submit a summary of any comments received and (intended) responses on the individual *covered entity*'s information or the shared annual report information, as applicable. This information should be included with the annual report submission. Changes made to the *SWMP* in response to comments should be described in the annual report.

3. Annual Report Content

The annual report shall summarize the activities performed throughout the reporting period (March 10 to March 9) and must include at a minimum:

a. The status of compliance with permit conditions, including Watershed Improvement Strategy conditions;
b. An assessment/evaluation of:
   i. the appropriateness of the identified *BMPs*;
   ii. progress towards achieving the statutory goal of reducing the *discharge* of pollutants to the *MEP*; and
   iii. the identified *measurable goals* for each of the MCMs.

c. Results of information collected and analyzed, monitoring data, and an assessment of the *small MS4*'s *SWMP* progress toward the statutory goal of reducing the *discharge* of *pollutants* to the *MEP* during the reporting period. This could include results from required *SWMP* reporting, estimates of pollutant loading (from parameters such as identified illicit discharges, physically interconnected *small MS4*s that may contribute substantially to pollutant

(Part V.C.3.c.)

loadings from the *small MS4*) and pollutant load reductions (such as illicit discharges removed). This assessment may be submitted as an attachment;

d. When required to be completed, results of assessments of effectiveness in meeting no net increase requirements or TMDL loadings as required by III. B.1 and 2. These results must be submitted in evaluation forms and as an attachment;

e. A summary of the stormwater activities planned to be undertaken during the next reporting cycle (including an implementation schedule);

f. Any change in identified *BMPs* or *measurable goals* and justification for those changes;

g. Notice that a *small MS4* is relying on another entity to satisfy some or all of its permit obligations (if applicable);

h. A summary of the public comments received on this annual report at the public presentation required in Part VII.A.2. or VIII.A.2. And, as appropriate, how the *small MS4* will respond to comments and modify the program in response to the comments;

i. A statement that the final report and, beginning in 2009, the SWMP plan are available for public review and the location where they are available; and

j. The information specified under the reporting requirements for each MCM (Part VII or VIII).

D. Annual Report Certification

A signed original hard copy and a photocopy of the MCC form must be submitted to the *Department* no later than June 1 of each reporting year. If the annual report is mailed (Part V.C. above), the MCC form must be submitted with the annual report.

The MCC form, provided by the *Department*, certifies that all applicable conditions of Parts IV, VII, VIII and IX of this *SPDES general permit* are being *developed*, *implemented* and complied with. It must be signed by an individual as described in Part VI.J.2. The certification provided by the MCC form does not affect, replace or negate the certification required under Part VI.J(2)(d). If compliance with any requirement cannot be certified to on the MCC form, a complete explanation with a description of corrective measures must be included as requested on the MCC form.

Failure to submit a complete annual report (Part V.C.) and a complete MCC form shall constitute a permit violation.

Part VI. STANDARD PERMIT CONDITIONS

A. General Authority to Enforce

Three of the MCMs (illicit discharge detection and elimination, construction site *stormwater* runoff control and post-construction *stormwater* management) require local laws, ordinances or other regulatory mechanisms to ensure successful implementation of the MCMs. Some *covered entities*, however, are not enabled by state law to adopt local laws or ordinances. Those *covered entities* (typically non-traditional MS4s and traditional, non-land use control MS4s) are expected to utilize the authority they do possess to create or modify existing regulatory mechanisms, including but not limited to contracts, bid specifications, requests for proposals, etc. to ensure successful implementation.

B. Duty To Comply

A *covered entity* must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the CWA and the *ECL* and is grounds for enforcement action.

C. Enforcement

Failure of the *covered entity,* its contractors, subcontractors, agents and/or assigns to strictly adhere to any of the *SPDES general permit* requirements contained herein shall constitute a permit violation. There are substantial criminal, civil, and administrative penalties associated with violating the provisions of this permit. Fines of up to $37,500 per day for each violation and imprisonment for up to fifteen (15) years may be assessed depending upon the nature and degree of the offense.

D. Continuation of the Expired SPDES General Permit

This *SPDES general permit* expires five years from the effective date of this permit. However, an administratively extended *SPDES general permit* continues in force and effect until the *Department* issues a new permit, unless a *covered entity* receives written notice from the *Department* to the contrary. *Operators* of the *MS4s* authorized under the administratively extended expiring *SPDES general permit* seeking coverage under the new *SPDES general permit* must refer to the terms within the new *SPDES general permit* to continue coverage.

E. Technology Standards

Covered entities, in accordance with written notification by the *Department*, must comply with all applicable technology-based effluent standards or limitations promulgated by EPA pursuant to Sections 301 and 304 of the CWA. If an effluent standard or limitation more stringent than any effluent limitation in the *SPDES general permit* or controlling a pollutant not limited in the permit is promulgated or approved

(Part VI.E.)

after the permit is issued, the *SWMP plan* shall be promptly modified to include that effluent standard or limitation.

F. Need To Halt or Reduce Activity Not a Defense

It shall not be a defense for a *covered entity* in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this *SPDES general permit*.

G. Duty to Mitigate

The *covered entity* shall take all reasonable steps to minimize or prevent any *discharge* in violation of this *SPDES general permit* which has a reasonable likelihood of adversely affecting human health or the environment.

H. Duty to Provide Information

The *covered entity* shall, within five (5) business days, make available for inspection and copying or furnish to the *Department* or an authorized representative of the *Department* any information that is requested to determine compliance with this *SPDES general permit*. Failure to provide information requested shall be a violation of the terms of this *SPDES general permit* and applicable regulation.

I. Other Information

Covered entities who become aware of a failure to submit any relevant facts or have submitted incorrect information in the NOI or in any other report to the *Department* must promptly submit such facts or information.

J. Signatory Requirements

All NOIs, reports, certifications or information submitted to the *Department*, or that this *SPDES general permit* requires be maintained by the *covered entity*, shall be signed as follows:

1. **Notices of Intent**
   All NOIs shall be signed by either a principal executive officer or ranking elected official. Principal executive officer includes (1) the chief executive officer of the municipal entity agency, or (2) a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency.

2. **Reports Required and Other Information Requested**
   All reports required by this *SPDES general permit* and other information requested by the *Department,* including MCC forms (part V.D.), shall be signed by a person

(Part VI.J.2.)

described above or by a duly authorized representative of that person[4]. A person is a duly authorized representative only if:

a. The authorization is made in writing by a person described in VI.J.1 above and submitted to the *Department*; and

b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or well field, superintendent, or position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the *covered entity* (a duly authorized representative may thus be either a named individual or any individual occupying a named position); and

c. The written authorization shall include the name, title and signature of the authorized representative and be attached to the MCC form; and

d. **Changes to authorization.** If an authorization to discharge is no longer accurate because a different *covered entity* has responsibility for the overall operation of another *covered entity's* program, these changes must be indicated on the MCC form submitted to the *Department* per Part V.D.

e. **Initial signatory authorization or changes to signatory authorization.** The initial signatory authorization must be submitted to the *Department* with any reports to be signed by a signatory representative. If a signatory authorization under VI.J.2 is no longer accurate because a different individual, or position, has responsibility for the overall operation of the facility, a new signatory authorization satisfying the requirements of VI.J.2 must be submitted to the *Department* with any reports to be signed by an authorized representative.

f. **Certification.** Any person signing documents under paragraph VI.H shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the

[4] Positions that must be duly authorized include, but are not limited to, Environmental Directors, Deputy Supervisors, Safety and Environmental Managers, Assistant Directors, and Chief Health and Safety Officers.

(Part VI.J.2.f.)

information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information."

Under Part VI.J. (Signatory Requirements), it shall constitute a permit violation if an incorrect and/or improper signatory authorizes any required forms, and/or reports.

K. Penalties for Falsification of Reports

Article 17 of the *ECL* provides a civil penalty of $37,500 per day per violation of this permit. Articles 175 and 210 of the New York State Penal Law provide for a criminal penalty of a fine and / or imprisonment for falsifying reports required under this permit..

L. Oil and Hazardous Substance Liability

Nothing in this *SPDES general permit* shall be construed to preclude the institution of any legal action or relieve the *covered entity* from any responsibilities, liabilities, or penalties to which it is or may be subject under section 311 of the CWA or section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

M. Property Rights

The issuance of this *SPDES general permit* does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations, nor does it limit, diminish and / or stay compliance with any terms of this permit.

N. Severability

The provisions of this *SPDES general permit* are severable, and if any provision of this *SPDES general permit*, or the application of any provision of this *SPDES general permit* to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit shall not be affected thereby.

O. Requiring an Individual Permit or an Alternative General Permit

1. In its sole discretion, the *Department* may require any person authorized by this *SPDES general permit* to apply for and/or obtain either an *individual SPDES permit* or an alternative *SPDES general permit*. Where the *Department* requires a *covered entity* to apply for an *individual SPDES permit*, the *Department* will notify such

(Part VI.O.1.)

person in writing that a permit application is required. This notification shall include a brief statement of the reasons for this decision, an application form, a statement setting a deadline for filing the application, and a deadline not sooner than 180 days from covered entity's receipt of the notification letter, whereby the authorization to discharge under this general permit shall be terminated. Applications must be submitted to the appropriate Regional Office. The *Department* may grant additional time to submit the application upon request of the applicant.

2. Any *covered entity* authorized by this *SPDES general permit* may request to be excluded from the coverage of this *SPDES general permit* by applying for an *individual SPDES permit or an alternative SPDES general permit*. In such cases, a *covered entity* must submit an individual application or an application for an alternative *SPDES general permit* in accordance with the requirements of 40 CFR 122.26(c)(1)(ii), with reasons supporting the request, to the *Department* at the address for the appropriate Regional Office. The request may be granted by issuance of any *individual SPDES permit* or an alternative *SPDES general permit* if the reasons cited by the *covered entity* are adequate to support the request.

3. When an individual SPDES permit is issued to a discharger authorized to discharge under a *SPDES general permit* for the same discharge(s), the general permit authorization for outfalls authorized under the individual permit is automatically terminated on the effective date of the individual permit unless termination is earlier in accordance with 6 NYCRR Part 750.

P. Other State Environmental Laws

1. Nothing in this *SPDES general permit* shall be construed to preclude the institution of any legal action or relieve a *covered entity* from any responsibilities, liabilities, or penalties established pursuant to any applicable *State* law or regulation under authority preserved by section 510 of the CWA.

2. No condition of this *SPDES general permit* releases the *covered entity* from any responsibility or requirements under other environmental statutes or regulations.

Q. Proper Operation and Maintenance

A *covered entity* must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the *covered entity* to achieve compliance with the conditions of this *SPDES general permit*. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems,

(Part VI.Q.)

installed by a *covered entity* only when necessary to achieve compliance with the conditions of the *SPDES general permit*.

R. Inspection and Entry

The *covered entity* shall allow the Commissioner of NYSDEC, the Regional Administrator of the USEPA, the applicable county health department, or their authorized representatives, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the *covered entity's* premises where a regulated facility or activity is located or conducted or where records must be kept under the conditions of this *SPDES general permit*;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit, including records required to be maintained for purposes of operation and maintenance; and

3. Inspect at reasonable times any facilities or equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit.

S. Permit Actions

At the *Department*'s sole discretion, this *SPDES general permit* may be modified, revoked, suspended, or renewed for cause at any time.

T. Anticipated noncompliance

The covered entity shall give advance notice to the *Department* of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements. Notification of planned changes or anticipated noncompliance does not limit, diminish and / or stay compliance with any terms of this permit.

U. Permit Transfers

Coverage under this *SPDES general permit* is not transferable to any person except after notice to the *Department.* The *Department* may require modification or revocation and reissuance of this SPDES general permit to change the responsible party and incorporate such other requirements as may be necessary.

Part VII. MINIMUM CONTROL MEASURES - TRADITIONAL LAND USE CONTROL

A. Traditional Land-Use Control MS4 Minimum Control Measures (MCMs)

These MCMs apply to *traditional land use control MS4s* (cities, towns, villages). The SWMP for these *small MS4s* must be comprised of the 6 MCMs below. It is recommended that covered entities refer to assistance and guidance documents available from the *State* and EPA.

Continuing covered entities were required to develop a SWMP with the MCM requirements below by January 8, 2008 (if authorized by GP-02-02) and within three years of gaining coverage (if authorized by GP-0-08-002). Under this *SPDES general permit*, the continuing *covered entities* are required to implement their SWMP, including the MCM requirements below. Notwithstanding any sooner deadlines contained elsewhere within this permit, newly regulated *covered entities* are required to develop their SWMP, containing the MCM requirements below, within the first 3 years of coverage and then commence implementation.

For each of the elements of the SWMP plan, the *covered entity* must identify (i) the agencies and/or offices that would be responsible for implementing the SWMP plan element and (ii) any protocols for coordination among such agencies and/or offices necessary for the implementation of the plan element.

The *covered entity* may *develop (for newly authorized MS4s)* and /or *implement* their *SWMP* within their jurisdiction on their own. The *covered entity* may also *develop (for newly authorized MS4s)* and / or *implement* part or all of their *SWMP* through an intermunicipal program with another *covered entity*(s) or through other cooperative or contractual agreements with third parties that provide services to the *covered entities*.

1. **Public Education and Outreach - SWMP Development / Implementation**
   At a minimum, all *covered entities* must:

   a. Identify *POCs*, waterbodies of concern, geographic areas of concern, target audiences;

   b. *Develop (for newly authorized MS4s)* and *implement* an ongoing public education and outreach program designed to describe to the general public and target audiences:
      i. the impacts of *stormwater discharges* on waterbodies;
      ii. *POC*s and their sources;
      iii. steps that contributors of these pollutants can take to reduce pollutants in *stormwater* runoff; and

(Part VII.A.1.b.)

iv. steps that contributors of non-*stormwater discharges* can take to reduce pollutants (non-*stormwater discharges* are listed in Part I.A.2);

c. *Develop (for newly authorized MS4s)*, record, periodically assess, and modify as needed, *measurable goals*; and

d. Select and implement appropriate education and outreach *activities* and *measurable goals* to ensure the reduction of all *POC*s in *stormwater discharges* to the *MEP*.

Required SWMP Reporting

e. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

i. list education / outreach *activities* performed for the general public and target audiences and provide any results (for example, number of people attended, amount of materials distributed, etc.);

ii. *covered entities* performing the education and outreach activities required by other MCMs (listed below), may report on those activities in MCM 1 and provide the following information applicable to their program:
- IDDE education *activities* planned or completed for public employees, businesses, and the general public, as required by Part VII.A.3;
- construction site *stormwater* control training planned or completed, as required by Part VII.A.4; and
- employee pollution prevention / good housekeeping training planned or completed, as required by Part VII.A.6; and

To facilitate shared annual reporting, if the education and outreach activities above are implemented by a third party, and the third party is completing the associated portions of the annual report, that third party may report on the education and outreach activities within MCM 1 of the annual report and not within the MCMs that the education and outreach activities are required by,

iii. report on effectiveness of program, *BMP* and *measurable goal* assessment; and

iv. maintain records of all training activities.

f. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

i. **program *development* deadlines and reporting**:

(Part VII.A.1.f.i.)

Complete in Year 1 (report changes in Year 2 and 3 as needed):
- list (and describe if necessary) *POCs*;
- *development* of education and outreach program and *activities* for the general public and target or priority audiences that address *POC*s, geographic areas of concern, and / or *discharges* to *303(d)* / *TMDL* waterbodies;
- *covered entities* developing education and outreach programs required by other MCMs (listed below), may report on development (and implementation of those activities, if occurring during the three year development period) in MCM 1 and provide the following information applicable to their program:
  - IDDE education *activities* planned or completed for public employees, businesses, and the general public for IDDE, as required by Part VII.A.3;
  - Construction site stormwater control training planned or completed, as required by Part VII.A.4; and
  - employee pollution prevention / good housekeeping training planned or completed, as required by Part VII.A.6;

  To facilitate shared annual reporting, if the education and outreach activities above are developed by a third party, and the third party is completing the associated portions of the annual report, that third party may report on the education and outreach activities within MCM 1 of the annual report and not within the MCMs that the education and outreach activities are required by.

ii. **program *implementation* reporting** as set forth in Part VII.A.1(e) above. Commence *implementation* reporting after three year *development* period. *Implementation* reporting may begin earlier if *implementation* begins during *development* period.

2. **Public Involvement / Participation - SWMP Development / Implementation**
   At a minimum, all *covered entities* must:

   a. Comply with the *State Open Meetings Law* and local public notice requirements, such as *Open Meetings Law*, when implementing a public involvement / participation program;

   b. *Develop (for newly authorized MS4s)* and *implement* a public involvement/participation program that:

      i. identifies key individuals and groups, public and private, who are interested in or affected by the *SWMP* ;

(Part VII.A.2.b.)

ii. identifies types of input the *covered entity* will seek from the key individuals and groups, public and private, to support *development* and *implementation* of the SWMP program and how the input will be used; and

iii. describes the public involvement / participation activities the *covered entity* will undertake to provide program access to those who want it and to gather the needed input. The activities included, but are not limited to a water quality hotline (report spills, dumping, construction sites of concern, etc.), stewardship activities like stream cleanups, storm drain marking, and volunteer water quality monitoring;

iv. provide the opportunity for the public to participate in the *development*, *implementation,* review, and revision of the *SWMP.*

c. **Local stormwater public contact.**
Identify a local point of contact for public concerns regarding *stormwater* management and compliance with this *SPDES general permit*. The name or title of this contact and the telephone number must be published in public outreach and public participation materials and kept updated with the *Department* on the MCC form;

d. **Annual report presentation.**
Below are the requirements for the annual report presentation:

i. prior to submitting the final annual report to the *Department*, by June 1 of each reporting year (see Part V.C.), present the draft annual report in a format that is open to the public, where the public can ask questions about and make comments on the report. This can be done:

- at a meeting that is open to the public, where the public attendees are able to ask questions about and make comments on the report. This may be a regular meeting of an existing board, such as planning, zoning or the town board. It may also be a separate meeting, specifically for *stormwater*. If multiple *covered entities* are working together, they may have a group meeting (refer to Part V.C.2); or

- on the internet by:
  - making the annual report available to the public on a website;
  - providing the public the opportunity to provide comments on the internet or otherwise; and

(Part VII.A.2.d.i.)

- making available the opportunity for the public to request an open meeting to ask questions about and make comments on the report. If a public meeting is requested by 2 or more persons, the covered entity must hold such a meeting. However, the covered entity need only hold a public meeting once to satisfy this requirement.

ii. provide public notice about the presentation, making public the following information when noticing the presentation in accordance with the local public notice requirements:

- the placement of the annual report on the agenda of this meeting or location on the internet;
- the opportunity for public comment. This *SPDES general permit* does not require a specified time frame for public comments, although it is recommended that *covered entities* do provide the public an opportunity to comment for a period after the meeting. Comments received after the final annual report is submitted shall be reported with the following year's annual report. *Covered entities* must take into account those comments in the following year;
- the date and time of the meeting or the date the annual report becomes available on the internet; and
- the availability of the draft report for prior review prior to the public meeting or duration of availability of annual report on the internet;

iii. the *Department* recommends that announcements be sent directly to individuals (public and private) known to have a specific interest in the *covered entity's SWMP*;

iv. include a summary of comments and (intended) responses with the final annual report. Changes made to the *SWMP* in response to comments should be described in the annual report; and

v. ensure that a copy of the final report and, beginning in 2009, the SWMP plan are available for public inspection;

e. *Develop (for newly authorized MS4s)*, record, periodically assess and modify as needed *measurable goals*; and

(Part VII.A.2.)

f. Select and implement appropriate public involvement / participation *activities* and *measurable goals* to ensure the reduction of *POCs* in *stormwater discharges* to the *MEP*.

Required SWMP Reporting

g. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

   i. annual report presentation information (date, time, attendees) or information about how the annual report was made available for comment;
   ii. comments received and intended responses (as an attachment);
   iii. public involvement / participation *activities* (for example stream cleanups including the number of people participating, the number of calls to a water quality hotline, the number and extent of storm drain stenciling); and
   iv. report on effectiveness of program, *BMP* and *measurable goal* assessment.

h. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

   i. **program *development* deadlines and reporting**:
      Complete for Year 1, 2 and 3:
      - annual report presentation information (date, time, attendees);
      - comments received and intended responses (as an attachment);

      Complete by end of Year 2 (report changes by end of Year 3 as needed):
      - key stake holders identified;
      - *development* of public involvement / participation plan based on the *covered entity's* needs, *POCs*, target audiences, geographic areas of concern, *discharges* to *303(d)* / *TMDL* waterbodies; and
      - *development* of public involvement / participation *activities* (for example stream cleanups including the number of people participating, the number of calls to a dumping / water quality hotline, the number or percent of storm drains stenciled);

   ii. **program *implementation* reporting**, as set forth in Part VII.A.2(g) above. Commence *implementation* reporting after three year *development* period. *Implementation* reporting may begin earlier if *implementation* begins during development period.

(Part VII.A.)

3. **Illicit Discharge Detection and Elimination (IDDE) - SWMP Development / Implementation**
   At a minimum, all *covered entities* must:
   a. *Develop (for newly authorized MS4s), implement* and enforce a program to detect and eliminate *illicit discharges* (as defined at 40CFR 122.26(b)(2)) into the *small MS4*;

   b. *Develop (for newly authorized MS4s)* and maintain a map, at a minimum within the *covered entity's* jurisdiction in the *urbanized area* and *additionally designated* area, showing:

      i. the location of all *outfalls* and the names and location of all *surface waters of the State* that receive *discharges* from those *outfalls*;
      ii. by March 9, 2010, the preliminary boundaries of the *covered entity's storm sewersheds* have been determined using GIS or other tools, even if they extend outside of the *urbanized area* (to facilitate track down), and *additionally designated* area within the *covered entity's* jurisdiction; and
      iii. when grant funds are made available or for sewer lines surveyed during an illicit discharge track down, the *covered entity's* storm sewer system in accordance with available *State* and EPA guidance;

   c. Field verify *outfall* locations;

   d. Conduct an outfall reconnaissance inventory, as described in the EPA publication entitled Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment, addressing every *outfall* within the *urbanized area* and *additionally designated area* within the *covered entity's* jurisdiction at least once every five years, with reasonable progress each year;

   e. Map new *outfalls* as they are constructed or newly discovered within the *urbanized area* and *additionally designated area*;

   f. Prohibit, through a law, ordinance, or other regulatory mechanism, *illicit discharges* into the *small MS4* and *implement* appropriate enforcement procedures and actions. This mechanism must be equivalent to the *State's* model IDDE local law "NYSDEC Model Local Law to Prohibit Illicit Discharges, Activities and Connections to Separate Storm Sewer Systems". The mechanism must be certified by the attorney representing the *small MS4* as being equivalent to the *State*'s model illicit discharge local law. Laws adopted during the GP-02-02 permit cycle must also be attorney-certified as effectively assuring implementation of the *State*'s model IDDE law;

(Part VII.A.3.)

g. *Develop (for newly authorized MS4s)* and *implement* a program to detect and address non-stormwater *discharges,* including illegal dumping, to the *small MS4* in accordance with current assistance and guidance documents from the State and EPA. The program must include: procedures for identifying priority areas of concern (geographic, audiences, or otherwise) for the IDDE program; description of priority areas of concern, available equipment, staff, funding, etc.; procedures for identifying and locating *illicit discharges* (trackdown); procedures for eliminating *illicit discharges*; and procedures for documenting actions;

h. Inform public employees, businesses, and the general public of the hazards associated with illegal *discharges* and improper disposal of waste, and maintain records of notifications;

i. Address the categories of non-stormwater *discharges* or flows listed in Part I.A.2 as necessary;

j. *Develop (for newly authorized MS4s)*, record, periodically assess, and modify as needed, *measurable goals*; and

k. Select and implement appropriate IDDE *BMPs* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*.

Required SWMP Reporting

l. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

   i. number and percent of *outfalls* mapped;
   ii. number of *illicit discharges* detected and eliminated;
   iii. percent of outfalls for which an outfall reconnaissance inventory has been performed. ;
   iv. status of system mapping;
   v. activities in and results from informing public employees, businesses, and the general public of hazards associated with illegal *discharges* and improper disposal of waste;
   vi. regulatory mechanism status - certification that law is equivalent to the *State's* model IDDE law (if not already completed and submitted with an earlier annual report); and
   vii. report on effectiveness of program, *BMP* and *measurable goal* assessment.

(Part VII.A.3.)

m. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

i. **program *development* deadlines and reporting**:
Complete in Year 1 (revise in Year 2 and 3 if changes are made):
- describe procedures for identifying priority areas of concern (geographic, audiences, or otherwise) for IDDE program;
- describe priority areas of concern, available equipment, staff, funding, etc.;

Initiate by end of Year 1; complete by end of Year 2 (revise in Year 3 if changes are made):

- describe procedures for identifying and locating *illicit discharges* (trackdown);
- describe procedures for eliminating *illicit discharges*;
- describe procedures for enforcing against illicit dischargers;
- describe procedures for documenting actions;
- describe the program being developed for informing public employees, businesses, and the general public of hazards associated with illegal *discharges* and improper disposal of waste;

Initiate by end of Year 1; complete by end of Year 3:
- regulatory mechanism status development and adoption - by end of Year 3 certify that regulatory mechanism is equivalent to the *State's* model IDDE law (if not already completed and submitted with an earlier report);

Initiate by end of Year 2; complete by end of Year 3:
- number and percent of *outfalls* mapped; and

Complete by Year 3:
- *outfall* map.

ii. **program *implementation* reporting** as set forth in Part VIII.A.3(l) above. Commence *implementation* reporting after three year *development* period. *Implementation* reporting may begin earlier if *implementation* begins during development period.

4. Construction Site Stormwater Runoff Control - SWMP Development / Implementation
At a minimum, all *covered entities* must:
a. *Develop (for newly authorized MS4s)*, *implement*, and enforce a program that:

(Part VII.A.4.a.)

i. provides equivalent protection to the NYS SPDES General Permit for Stormwater Discharges from Construction Activities (either GP-02-01, GP-0-08-001 or GP-0-10-001), unless more stringent requirements are contained within this *SPDES general permit*;

ii. addresses *stormwater* runoff to the *small MS4* from *construction activities* that result in a land disturbance of greater than or equal to one acre. Control of *stormwater discharges* from *construction activity* disturbing less than one acre must be included in the program if:
   - that *construction activity* is part of a *larger common plan of development or sale* that would disturb one acre or more; or
   - if controlling such activities in a particular watershed is required by the *Department*;

iii. includes a law, ordinance or other regulatory mechanism to require a *SWPPP* for each applicable land disturbing activity that includes erosion and sediment controls that meet the *State's* most current technical standards:
   - this mechanism must be equivalent to one of the versions of the "NYSDEC Sample Local Laws for Stormwater Management and Erosion and Sediment Control"; and
   - equivalence must be documented
     -by adoption of one of the sample local laws without changes;
     - by using the NYSDEC Gap Analysis Workbook; or
     - by adoption of a modified version of the sample law, or an alternative law, and, in either scenario, certification by the attorney representing the small MS4 that the adopted law is equivalent to one of the sample local laws.

iv. contains requirements for construction site operators to implement erosion and sediment control management practices;

v. allows for sanctions to ensure compliance to the extent allowable by State law;

vi. contains requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality, pursuant to the requirement of construction permit;

vii. describes procedures for *SWPPP* review with consideration of potential water quality impacts and review of individual *SWPPP*s to ensure consistency with *State* and local sediment and erosion control requirements;

(Part VII.A.4.a.vii.)

- ensure that the individuals performing the reviews are adequately trained and understand the *State* and local sediment and erosion control requirements;
- all *SWPPP*s must be reviewed for sites where the disturbance is one acre or greater; and
- after review of *SWPPP*s, the *covered entity* must utilize the "MS4 SWPPP Acceptance Form" created by the *Department* and required by the SPDES General Permit for Stormwater Discharges from Construction Activity when notifying construction site owner / operators that their plans have been accepted by the *covered entity*;

viii. describes procedures for receipt and follow up on complaints or other information submitted by the public regarding construction site storm water runoff;

ix. describes procedures for site inspections and enforcement of erosion and sediment control measures including steps to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and receiving water;
- the *covered entity* must ensure that the individual(s) performing the inspections are adequately trained and understand the *State* and local sediment and erosion control requirements. Adequately trained means receiving inspector training by a *Department* sponsored or approved training;
- all sites must be inspected where the disturbance is one acre or greater;
- *covered entities* must determine that it is acceptable for the owner or operator of a construction project to submit the Notice of Termination (NOT) to the *Department* by performing a final site inspection themselves or by accepting the Qualified Inspector's final inspection certification(s) required by the SPDES General Permit for Stormwater Discharges from Construction Activity. The principal executive officer, ranking elected official, or duly authorized representative (see Part VI.J.) shall document their determination by signing the "MS4 Acceptance" statement on the NOT.

x. educates construction site owner / operators, design engineers, *municipal* staff and other individuals to whom these regulations apply about the *municipality's* construction *stormwater* requirements, when construction *stormwater* requirements apply, to whom they apply, the procedures for submission of *SWPPP*s, construction site inspections, and other procedures associated with control of construction stormwater;

(Part VII.A.4.a.)

xi. ensures that construction site operators have received erosion and sediment control training before they do work within the *covered entity's* jurisdiction and maintain records of that training. Small home site construction (construction where the Erosion and Sediment Control Plan is developed in accordance with Appendix E of the "New York Standards and Specifications for Erosion and Sediment Control") is exempt from the requirements below:
- training may be provided by the *Department* or other qualified entities (such as Soil and Water Conservation Districts);
- the *covered entity* is not expected to perform such training, but they may co-sponsor training for construction site operators in their area;
- the *covered entity* may ask for a certificate of completion or other such proof of training; and
- the *covered entity* may provide notice of upcoming sediment and erosion control training by posting in the building department or distribute with building permit application;

xii. establishes and maintains an inventory of active construction sites, including the location of the site, owner / operator contact information;

xiii. *develop (for newly authorized MS4s)*, record, periodically assess and modify as needed *measurable goals*; and

xiv. select and appropriate construction *stormwater BMPs* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*.

Required SWMP Reporting

b. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

i. number of *SWPPPs* reviewed;
ii. number and type of enforcement actions;
iii. percent of active construction sites inspected once;
iv. percent of active construction sites inspected more than once;
v. number of construction sites authorized for disturbances of one acre or more; and
vi. report on effectiveness of program, *BMP* and *measurable goal* assessment.

c. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

(Part VII.A.4.c.)

i. **program *development* deadlines and reporting**:

Initiate by end of Year 1:

- procedures, activities and identify personnel to educate and train construction site operators about requirements to develop and implement a SWPPP and any other requirements that must be met within the MS4's jurisdiction;

Complete in Year 1 (revise in Year 2 and 3 if changes are made):

- describe procedures for the receipt and consideration of information submitted by the public. Identify the responsible personnel;

Initiate by end of Year 1; complete by end of Year 3:

- regulatory mechanism development and adoption status - by end of Year 3 certify that regulatory mechanism is equivalent to one of the NYSDEC Sample Local Laws for Stormwater Management and Erosion and Sediment Control (if not already completed and submitted with an earlier report);

Initiate by end of Year 2; complete by end of Year 3:

- describe procedures for SWPPP review that incorporate consideration of potential water quality impacts and ensure consistency with local sediment and erosion control requirements;
- describe procedures for construction site inspections; and
- describe procedures for enforcement of control measures and sanctions to ensure compliance.

ii. **program *implementation* reporting** as set forth in Part VII.A.4(b) above. Commence *implementation* reporting after three year *development* period. *Implementation* reporting may begin earlier if *implementation* begins during development period..

5. **Post-Construction Stormwater Management** - **SWMP Development/Implementation**

At a minimum, all *covered entities* must:

a. *Develop(for newly authorized MS4s)*, *implement*, and enforce a program that:

i. provides equivalent protection to the NYS SPDES General Permit for Stormwater Discharges from Construction Activities (either GP-02-01, GP-0-08-001, or GP-0-10-001), unless more stringent requirements are contained within this *SPDES general permit*;

ii. addresses *stormwater* runoff from new development and redevelopment projects to the *small MS4* from projects that result in a land disturbance of greater than or

(Part VII.A.5.a.ii.)

equal to one acre. Control of *stormwater discharges* from projects of less than one acre must be included in the program if:

- that project is part of a *larger common plan of development or sale*; or
- if controlling such activities in a particular watershed is required by the *Department*;

iii. includes a law, ordinance or other regulatory mechanism to require post construction runoff controls from new development and re-development projects to the extent allowable under *State* law that meet the *State*'s most current technical standards:

- the mechanism must be equivalent to one of the versions of the" NYSDEC Sample Local Laws for Stormwater Management and Erosion and Sediment Control"; and
- equivalence must be documented
  -by adoption of one of the sample local laws without changes;
  - by using the NYSDEC Gap Analysis Workbook; or
  - by adoption of a modified version of the sample law, or an alternative law, and, in either scenario and certification by the attorney representing the small MS4 that the adopted law is equivalent to one of the sample local laws;

iv. includes a combination of structural or non-structural management practices (according to standards defined in the most current version of the NYS Stormwater management Design Manual) that will reduce the *discharge* of pollutants to the MEP. In the development of the watershed plans, municipal comprehensive plans, open space preservation programs, local law, ordinances and land use regulations, covered entities must consider principles of *Low Impact Development* (LID), *Better Site Design* (BSD), and other *Green Infrastructure* practices to the MEP. In the development of the watershed plans, municipal comprehensive plans, open space preservation programs, local law, ordinances and land use regulations, covered entities must consider smart growth principles, natural resource protection, impervious area reduction, maintaining natural hydrologic conditions in developments, riparian buffers or set back distances for protection of environmentally sensitive areas such as streams, wetlands, and erodible soils.

- *covered entities* are required to review according to the *Green Infrastructure* practices defined in the Design Manual at a site level, and are encouraged to review, and revise where appropriate, local codes and laws that include provisions that preclude green infrastructure or construction techniques that minimize or reduce pollutant loadings.

(Part VII.A.5.a.iv.)

- if a *stormwater* management practice is designed and installed in accordance with the New York State Stormwater Management Design Manual or has been demonstrated to be equivalent and is properly operated and maintained, then *MEP* will be assumed to be met for post-construction *stormwater* discharged by the practice;

v. describes procedures for *SWPPP* review with consideration of potential water quality impacts and review of individual *SWPPP*s to ensure consistency with state and local post-construction *stormwater* requirements;
- ensure that the individuals performing the reviews are adequately trained and understand the *State* and local post construction *stormwater* requirements;
- ensure that the individuals performing the reviews for SWPPPs that include post-construction stormwater management practices are *qualified professionals* or under the supervision of a *qualified professional*;
- all *SWPPP*s must be reviewed for sites where the disturbance is one acre or greater;
- after review of *SWPPPs*, the *covered entity* must utilize the "MS4 SWPPP Acceptance Form" created by the *Department* and required by the SPDES General Permit for Stormwater Discharges from Construction Activity (GP-0-10-001) when notifying construction site owner / operators that their plans have been accepted by the *covered entity*;

- utilize available training from sources such as Soil and Water Conservation Districts, Planning Councils, The New York State Department of State, USEPA, and/or the *Department* to educate municipal boards and Planning and Zoning Boards on low impact development principles, better site design approach, and green infrastructure applications.

vi. maintain an inventory of post-construction stormwater management practices within the *covered entities* jurisdiction. At a minimum, include practices discharging to the *small MS4* that have been installed since March 10, 2003, all practices owned by the *small MS4*, and those practices found to cause or contribute to water quality standard violations.
- the inventory shall include at a minimum: location of practice (street address or coordinates); type of practice; maintenance needed per the NYS Stormwater Management Design Manual, *SWPPP*, or other provided documentation; and dates and type of maintenance performed; and

(Part VII.A.5.a.)

vii. ensures adequate long-term operation and maintenance of management practices identified in Part VII.5.a.vi by trained staff, including inspection to ensure that practices are performing properly.
- The inspection shall include inspection items identified in the maintenance requirements (NYS Stormwater Management Design Manual, *SWPPP*, or other maintenance information) for the practice. *Covered entities* are not required to collect *stormwater* samples and perform specific chemical analysis;

viii. Covered entities may include in the SWMP Plan provisions for development of a banking and credit system. MS4s must have an existing watershed plan based on which offsite alternative stormwater management in lieu of or in addition to on-site stormwater management practices are evaluated. Redevelopment projects must be evaluated for pollutant reduction greater than required treatment by the state standards. The individual project must be reviewed and approved by the *Department*. Use of a banking and credit system for new development is only acceptable in the impaired watersheds to achieve the no net increase requirement and watershed improvement strategy areas to achieve pollutant reductions in accordance with watershed plan load reduction goals. A banking and credit system must at minimum include:
- Ensure that offset exceeds a standard reduction by factor of at least 2
- Offset is implemented within the same watershed
- Proposed offset addresses the POC of the watershed
- Tracking system is established for the watershed
- Mitigation is applied for retrofit or redevelopment
- Offset project is completed prior to beginning of the proposed construction
- A legal mechanism is established to implement the banking and credit system

b. *Develop (for newly authorized MS4s)*, *implement*, and provide adequate resources for a program to inspect development and re-development sites by trained staff and to enforce and penalize violators;

c. *Develop (for newly authorized MS4s)*, record, annually assess and modify as needed *measurable goals*; and

d. Select and implement appropriate post-construction *stormwater BMPs* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*.

(Part VII.A.5.)

Required SWMP Reporting

e. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

   i. number of *SWPPPs* reviewed;
   ii. number and type of enforcement actions;
   iii. number and type of post-construction stormwater management practices inventoried;
   iv. number and type of post-construction stormwater management practices inspected;
   v. number and type of post-construction stormwater management practices maintained;
   vi. regulatory mechanism status - certification that regulatory mechanism is equivalent to one of the "NYSDEC Sample Local Laws for Stormwater Management and Erosion and Sediment Control" (if not already done); and
   vii. report on effectiveness of program, BMP and measurable goal assessment, and implementation of a banking and credit system, if applicable;

f. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

   i. **program *development* deadlines and reporting**:
   Initiate by end of Year 1; complete by end of Year 3:
   - regulatory mechanism development and adoption status - by end of Year 3 certify that regulatory mechanism is equivalent to one of the NYSDEC Sample Local Laws for Stormwater Management and Erosion and Sediment Control (if not already completed and submitted with an earlier report);

   Initiate by end of Year 2; complete by end of Year 3:
   - procedures for SWPPP review to ensure that post-construction stormwater management practices meet the most current version of the state technical standards;
   - procedures for inspection and maintenance of post-construction management practices;
   - procedures for enforcement and penalization of violators; and

   Complete by the end of year 3:

(Part VII.A.5.f.i.)

- provide resources for the program to inspect new and re-development sites and for the enforcement and penalization of violators.

ii. **program *implementation* reporting** as set forth in Part VII.A.5(e) above. Commence *implementation* reporting after three year *development* period. *Implementation* reporting may begin earlier if *implementation* begins during *development* period.

6. Pollution Prevention/Good Housekeeping For Municipal Operations - SWMP Development / Implementation

At a minimum, all *covered entities* must:

a. *Develop (for newly authorized MS4s)* and *implement* a pollution prevention / good housekeeping program for *municipal* operations and facilities that:

i. addresses *municipal* operations and facilities that contribute or potentially contribute *POCs* to the *small MS4* system. The operations and facilities may include, but are not limited to: street and bridge maintenance; winter road maintenance; stormwater system maintenance; vehicle and fleet maintenance; park and open space maintenance; municipal building maintenance; solid waste management; new construction and land disturbances; right-of-way maintenance; marine operations; hydrologic habitat modification; or other;

ii. at a minimum frequency of once every three years, perform and document a self assessment of all municipal operations addressed by the SWMP to:
- determine the sources of pollutants potentially generated by the *covered entity*'s operations and facilities; and
- identify the *municipal* operations and facilities that will be addressed by the pollution prevention and good housekeeping program, if it is not done already;

iii. determines *management practices*, policies, procedures, etc. that will be *developed* and *implemented* to reduce or prevent the discharge of (potential) pollutants. Refer to management practices identified in the "NYS Pollution Prevention and Good Housekeeping Assistance Document" and other guidance materials available from the EPA, *State,* or other organizations;

iv. prioritizes pollution prevention and good housekeeping efforts based on geographic area, potential to improve water quality, facilities or operations most in need of modification or improvement, and *covered entity*'s capabilities;

(Part VII.A.6.a.)

v. addresses pollution prevention and good housekeeping priorities;

vi. includes an employee pollution prevention and good housekeeping training program and ensures that staff receive and utilize training;

vii. requires third party entities performing contracted services, including but not limited to street sweeping, snow removal, lawn / grounds care, etc., to meet permit requirements as the requirements apply to the activity performed ; and

viii. requires *municipal* operations and facilities that would otherwise be subject to the NYS Multi-sector General Permit (MSGP, GP-0-06-002) for industrial stormwater discharges to prepare and *implement* provisions in the SWMP that comply with Parts III. A, C, D, J, K and L of the MSGP. The covered entity must also perform monitoring and record keeping in accordance with Part IV. of the MSGP. Discharge monitoring reports must be attached to the MS4 annual report. Those operations or facilities are not required to gain coverage under the MSGP. *Implementation* of the above noted provisions of the SWMP will ensure that MEP is met for discharges from those facilities;

b. Consider and incorporate cost effective runoff reduction techniques and green infrastructure in the routine upgrade of the existing stormwater conveyance systems and municipal properties to the MEP. Some examples include replacement of closed drainage with grass swales, replacement of existing islands in parking lots with rain gardens, or curb cuts to route the flow through below grade infiltration areas or other low cost improvements that provide runoff treatment or reduction.

c. *Develop (for newly authorized MS4s)*, record, periodically assess and modify as needed measurable goals; and

d. Select and implement appropriate pollution prevention and good housekeeping *BMPs* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*.

e. Adopt techniques to reduce the use of fertilizers, pesticides, and herbicides, as well as potential impact to surface water.

Required SWMP Reporting

f. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). *Covered entities* are required to report on

(Part VII.A.6.f.)

all *municipal* operations and facilities within their jurisdiction (*urbanized area* and *additionally designated area*) that their program is addressing. The *covered entity* shall report at a minimum on the items below:

i. indicate the *municipal* operations and facilities that the pollution prevention and good housekeeping program assessed;
ii. describe, if not done so already, the management practices, policies and procedures that have been developed, modified, and / or implemented and report, at a minimum, on the items below that the *covered entity's* pollution prevention and good housekeeping program addressed during the reporting year:

- acres of parking lot swept;
- miles of street swept;
- number of catch basins inspected and, where necessary, cleaned;
- post-construction control stormwater management practices inspected and, where necessary, cleaned;
- pounds of phosphorus applied in chemical fertilizer
- pounds of nitrogen applied in chemical fertilizer; and
- acres of pesticides / herbicides applied.

iii. staff training events and number of staff trained; and
iv. report on effectiveness of program, *BMP* and *measurable goal* assessment. If the pollution prevention and good housekeeping program addresses other operations than what is listed above in Part VII.A.6.a(ii), the *covered entity* shall report on items that will demonstrate program effectiveness.

g. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). *Covered entities* are required to report on all *municipal* operations and facilities within their jurisdiction (*urbanized area* and *additionally designated area*) that their program is addressing. The *covered entity* shall report at a minimum on the items below:

i. **program *development* deadlines and reporting** (first three years after authorization is granted):
Complete by end of Year 1:
- identify the municipal operations and facilities that will be considered for inclusion in the pollution prevention and good housekeeping program;
- describe the pollution prevention and good housekeeping program priorities (geographic area, potential to improve water quality; facilities or operations most in need of modification or improvement);

(Part VII.A.6.g.i.)

- describe management practices, policies, procedures, etc. that will be developed or modified;
- identify the staff and equipment available;

Initiate by end of Year 2; complete by end of Year 3:

- describe employee pollution prevention and good housekeeping program training program and begin training, report on number of staff trained; and

Complete by end of Year 3:

- description of developed management practices.

ii. **program *implementation* reporting** as set forth in Part VII.A.6.(d) above. Commence reporting after three year *development* permit. *Implementation* reporting may begin earlier if *implementation* begins during development period.

PART VIII. MINIMUM CONTROL MEASURES - TRADITIONAL NON-LAND USE CONTROL AND NON-TRADITIONAL MS4s

A. Traditional Non-Land Use Control and Non-traditional MS4 Minimum Control Measures (MCMs)

These MCMs apply to *traditional non-land use control MS4s* and *non-traditional MS4s*. The SWMP for these *small MS4s* must be comprised of the 6 MCMs below. It is recommended that covered entities refer to assistance and guidance documents available from the *State* and EPA.

Under this *SPDES general permit*, the continuing *covered entities* are required to implement their SWMP, including the MCM requirements below. Newly regulated covered entities are required to develop their SWMP, containing the MCM requirements below, within the first 3 years of coverage and then commence implementation.

The *covered entity* may *develop (for newly authorized MS4s)* and / or *implement* their *SWMP* within their jursidiction on their own. The *covered entity* may also *develop (for newly authorized MS4s)* and / or *implement* part or all of their *SWMP* through an intermunicipal program with another *covered entity*(s) or through other cooperative or contractual agreements with third parties that provide services to the *covered entity(s)*.

For each of the elements of the SWMP plan, the *covered entity* must identify (i) the agencies and/or offices that would be responsible for implementing the SWMP plan element and (ii) any protocols for coordination among such agencies and/or offices necessary for the implementation of the plan element.

To comply with the requirements of this *SPDES general permit*, the *traditional non-land use control MS4s* and *non-traditional MS4s* should consider their public to be the employee / user population, visitors, or contractors / developers. Examples of the public include, but are not limited to:

- transportation *covered entities* - general public using or living along transportation systems, staff, contractors;
- educational *covered entities* - faculty, other staff, students, visitors;
- other government *covered entities* - staff, contractors, visitors.

1. Public Education and Outreach on Stormwater Impacts SWMP Development / Implementation

At a minimum, all *covered entities* must:

a. Identify *POC*s, waterbodies of concern, geographic areas of concern, target audiences;

(Part VIII.A.1.)

b. *Develop (for newly authorized MS4s)* and *implement* an ongoing public education and outreach program designed to describe:
   i. the impacts of *stormwater discharges* on waterbodies;
   ii. *POCs* and their sources;
   iii. steps that contributors of these pollutants can take to reduce pollutants in *stormwater* runoff; and
   iv. steps that contributors of non-*stormwater discharges* can take to reduce pollutants (non-*stormwater discharges* are listed in Part I.A.2);

c. Educational materials may be made available at, locations including, but not limited to:
   i. at service areas, lobbies, or other locations where information is made available;
   ii. at staff training;
   iii. on *covered entity's* website;
   iv. with pay checks; and
   v. in employee break rooms;

d. *Develop (for newly authorized MS4s)*, record, periodically assess and modify as needed *measurable goals*; and

e. Select and implement appropriate education and outreach *activities* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*.

Required SWMP Reporting

f. At a minimum, the *covered entity* shall report on the items below:

   i. list education / outreach *activities* performed and provide any results (number of people attended, amount of materials distributed, etc.);
   ii. education of the public about the hazards associated with illegal *discharges* and improper disposal of waste as required by Part VIII.A.3, may be reported in this section;
   iii. *covered entity's* performing the education and outreach activities required by other MCMs (listed below), may report on those activities in MCM 1 and provide the following information applicable to their program:
      - IDDE education *activities* planned or completed for the public, as required by Part VIII.A.3;
      - construction site *stormwater* control training planned or completed, as required by Part VIII.A.4; and
      - employee pollution prevention / good housekeeping training planned or completed, as required by Part VIII.A.6;

      To facilitate shared annual reporting, if the education and outreach activities above are implemented by a third party, and the third party is completing the

(Part VIII.A.1.f.iii.)

associated portions of the annual report, that third party may report on the education and outreach activities within MCM 1 of the annual report and not within the MCMs that the education and outreach activities are required by;

iv. report on effectiveness of program, *BMP* and *measurable goal* assessment; and

v. maintain records of all training activities

g. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

i. **program *development* deadlines and reporting**:
Complete in Year 1 (report changes in Year 2 and 3 as needed):
- list (and describe if necessary) POCs;
- *development* of education and outreach program and activities for the public that address *POCs*, geographic areas of concern, and / or *discharges* to *303(d)* / *TMDL* waterbodies;
- *covered entities* developing education and outreach programs required by other MCMs (listed below), may report on development (and implementation of
those activities, if occurring during the three year development period) in MCM 1 and provide the following information applicable to their program:
  - IDDE education *activities* planned or completed for the public, as required by Part VIII.A.3;
  - construction site *stormwater* control training planned or completed, as required by Part VIII.A.4; and
  - employee pollution prevention / good housekeeping training planned or completed, as required by Part VIII.A.6.

To facilitate shared annual reporting, if the education and outreach activities above are implemented by a third party, and the third party is completing the associated portions of the annual report, that third party may report on the education and outreach activities within MCM 1 of the annual report and not within the MCMs that the education and outreach activities are required by.

ii. **Program *implementation* reporting** as set forth in Part VIII.A.1(f) above. Commence *implementation* reporting after three year *development* period. *Implementation* reporting may begin earlier if *implementation* begins during *development* period.

2. Public Involvement/Participation - SWMP Development / Implementation
At a minimum, all *covered entities* must:

(Part VIII.A.2.)

a. Comply with *State* and local public notice requirements identified below when implementing a public involvement / participation program:
   i. *traditional non-land use control MS4s* shall comply with the *State Open Meetings Law* and local public notice requirements, such as *Open Meetings Law*; and

   ii. *traditional non-land use control MS4s* and *non-traditional MS4s* may comply with this requirement by determining who their public is (staff, visitors, contractors, etc.) and posting notifications (as needed) in areas viewable by the public. Such areas include common areas, bulletin boards, agency/office web pages, etc. For *small MS4s* whose public are in multiple locations, notifications shall be made available to the public in all locations within the urbanized or additionally designated areas;

b. Provide the opportunity for the public to participate in the *development*, *implementation,* review, and revision of the *SWMP*;

c. **Local stormwater public contact.**
   Identify a local point of contact for public concerns regarding *stormwater* management and compliance with this *SPDES general permit*. The name or title of this contact and the telephone number must be published in public outreach and public participation materials and kept updated with the *Department* on the MCC form;

d. **Annual report presentation.**
   Below are the requirements for the annual report presentation:

   i. prior to submitting the final annual report to the *Department*, by June 1 of each reporting year (see Part V.C.), present the draft annual report in a format that is open to the public, where the public can ask questions and make comments on the report. This can be done:
      - at a meeting that is open to the public, where the public attendees are able to ask questions about and make comments on the report. This may be a regular meeting of an existing board. It may also be a separate meeting, specifically for *stormwater*. If multiple *covered entities* are working together, they may have a group meeting (refer to Part V.C.2); or
      - on the internet by:
        - making the annual report available to the public on a website:
        - providing the public the opportunity to provide comments on the internet or otherwise; and

(Part VIII.A.2.d.i.)

- making available the opportunity for the public to request an open public meeting to ask questions about and make comments on the report;

ii. *traditional non-land use control MS4s* must comply with Part VIII.A.2.(d)(i) above. If they choose to present the draft annual report at a meeting, it may be presented at an existing meeting (e.g. a meeting of the Environmental Management Council , Water Quality Coordinating Committee, other agencies, or a meeting specifically for stormwater), or made available for review on the internet. The *covered entity* must make public the following information when noticing the presentation in accordance with *Open Meetings Law* or other local public notice requirements:
- the placement of the annual report on the agenda of this meeting or location on the internet;
- the opportunity for public comment. This *SPDES general permit* does not require a specified time frame for public comments, although it is recommended that *covered entities* provide the public an opportunity to comment for a period after the meeting. Comments received after the final annual report is submitted shall be reported with the following year's annual report. *Covered entities* must take into account those comments in the following year;
- the date and time of the meeting or date annual report becomes available on the internet; and
- the availability of the draft report for review prior to the public meeting or duration of availability of the annual report on the internet;

iii. *non-traditional MS4s* typically do not have regular meetings during which a presentation on the annual report can be made. Those *covered entities* may comply with this requirement by either:
- noticing the availability of the report for public comment by posting a sign, posting on web site, or other methods with information about the availability and location where the public can view it and contact information for those that read the report to submit comments; or
- following the internet presentation as explained in Part VIII.A.2(d)(i) above;

iv. the *Department* recommends that announcements be sent directly to individuals (public and private interested parties) known to have a specific interest in the covered entity's *SWMP*;

(Part VIII.A.2.d.)

v. include a summary of comments and intended responses with the final annual report. Changes made to the *SWMP* in response to comments should be described in the annual report; and

vi. ensure that a copy of the final report and, beginning in 2009, the SWMP plan are available for public inspection;

e. *Develop (for newly authorized MS4s)*, record, periodically assess and modify as needed *measurable goals*; and

f. Select and implement appropriate public involvement / participation *activities* and *measurable goals* to ensure the reduction of all of the *POCs* in *stormwater discharges* to the *MEP*.

Required SWMP Reporting

g. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:
   i. annual report presentation information (date, time, attendees) or information about how the annual report was made available for comment;
   ii. comments received and intended responses (as an attachment); and
   iii. report on effectiveness of program, *BMP* and *measurable goal* assessment;

h. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:
   i. **program *development* deadlines and reporting**:
      Complete for Year 1, 2, and 3:
      - annual report presentation information (date, time, attendees) or information about how the annual report was made available for comment; and
      - comments received and intended responses (as an attachment).

   ii. **program *implementation* reporting** as set forth in Part VIII.A.2.g above. Commence *implementation* reporting after three year *development* period. *Implementation* reporting may begin earlier if *implementation* begins during development period.

3. Illicit Discharge Detection and Elimination (IDDE) - SWMP Development / Implementation

At a minimum, all *covered entities* must:

(Part VIII.A.3.)

a. *Develop (for newly authorized MS4s)*, *implement* and enforce a program to detect and eliminate *illicit discharges* (as defined at 40CFR 122.26(b)(2)) into the *small MS4;*

b. *Develop (for newly authorized MS4s)* and maintain a map, at a minimum within the *covered entity's* jurisdiction in the *urbanized area and additionally designated area*, showing:

   i. the location of all *outfalls* and the names and location of all *surface waters of the State* that receive *discharges* from those *outfalls*;
   ii. by March 9, 2010, the preliminary boundaries of the *covered entity's storm sewersheds* determined using GIS or other tools, even if they extend outside of the *urbanized area* (to facilitate trackdown), and *additionally designated* area within the *covered entity's* jurisdiction; and
   iii. when grant funds are made available or for sewer lines surveyed during an illicit discharge trackdown, the *covered entity's* storm sewer system in accordance with available *State* and EPA guidance;

c. Field verify *outfall* locations;

d. Conduct an outfall reconnaissance inventory, as described in the EPA publication entitled Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment, addressing every *outfall* within the *urbanized area* and *additionally designated area* within the *covered entity's* jurisdiction at least once every five years, with reasonable progress each year;

e. Map new *outfalls* as they are constructed or discovered within the *urbanized area* or *additionally designated* area;

f. Prohibit *illicit discharges* into the *small MS4* and *implement* appropriate enforcement procedures and actions below, as applicable:

   i. for *traditional non-land use control MS4s*:
      - effectively prohibit, through a law, ordinance, or other regulatory mechanism, *illicit discharges* into the *small MS4* and *implement* appropriate enforcement procedures and actions; and
      - the law, ordinance, or other regulatory mechanism must be equivalent to the *State*'s model *IDDE* local law "NYSDEC Model Local Law to Prohibit Illicit Discharges, Activities and Connections to Separate Storm Sewer Systems" developed by the *State*, as determined and certified to be equivalent by the attorney representing the *small MS4* ; and

(Part VIII.A.3.f.)

ii. for *non-traditional MS4s*:
- prohibit and enforce against *illicit discharges* through available mechanisms (ie. tenant lease agreements, bid specifications, requests for proposals, standard contract provisions, connection permits, maintenance directives / BMPS, access permits, consultant agreements, internal policies);
- procedures or policies must be developed for implementation and enforcement of the mechanisms;
- a written directive from the person authorized to sign the NOI stating that updated mechanisms must be used and who (position(s)) is responsible for ensuring compliance with and enforcing the mechanisms for the *covered entity's IDDE* program; and
- the mechanisms and directive must be equivalent to the *State*'s model illicit discharge local law;

g. *Develop (for newly authorized MS4s)* and *implement* a program to detect and address non-stormwater *discharges*, including illegal dumping, to the *small MS4* . The program must include: procedures for identifying priority areas of concern (geographic, audiences, or otherwise) for IDDE program; description of priority areas of concern, available equipment, staff,
funding, etc.; procedures for identifying and locating *illicit discharges* (trackdown); procedures for eliminating *illicit discharges*; and procedures for documenting actions;

h. Inform the public of the hazards associated with illegal *discharges* and the improper disposal of waste;

i. Address the categories of non-stormwater *discharges* or flows listed in Part I.A.2 as necessary and maintain records of notification;

j. *Develop (for newly authorized MS4s)*, record, periodically assess, and modify as needed, *measurable goals;* and

k. Select and implement appropriate IDDE *BMPs* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*

Required SWMP Reporting

l. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

i. number and percent of *outfalls* mapped;

(Part VIII.A.3.l.)

ii. number of *illicit discharges* detected and eliminated;
iii. percent of outfalls for which an outfall reconnaissance inventory has been performed. ;
iv. status of system mapping;
v. activities to and results from informing the public of hazards associated with illegal *discharges* and improper disposal of waste;
vi. for traditional non-land use control MS4s, regulatory mechanism status - certification that law is equivalent to the *State*'s model *IDDE* local law (if not already completed and submitted with a prior annual report); and
vii. report on effectiveness of program, *BMP* and *measurable goal* assessment.

m. Required reporting for **newly authorized *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

i. **program *development* deadlines and reporting**:
Initiate by end of Year 1; complete by end of Year 3:
- regulatory mechanism development and adoption - by end of Year 3 certify that regulatory mechanism is equivalent to the *State's* model *IDDE* local law (traditional non-land use control MS4s) or certification of equivalence may be accomplished as set forth in Part VIII.A.3(f)(ii).

Complete in Year 1 (revise in Year 2 and 3 if changes are made):
- describe procedures for identifying priority areas of concern (geographic, audiences, or otherwise) for IDDE program;
- describe priority areas of concern, available equipment, staff, funding, etc.;

Initiate by end of Year 1; complete by end of Year 2 (revise in Year 3 if changes are made):
- describe procedures for identifying and locating *illicit discharges* (trackdown);
- describe procedures for eliminating *illicit discharges*;
- describe procedures for enforcing against illicit dischargers;
- describe procedures for documenting actions;
- describe the program being developed for informing the public of hazards associated with illegal *discharges* and improper disposal of waste;

Initiate by end of Year 2; complete by end of Year 3:
- number and percent of *outfalls* mapped;

(Part VIII.A.3.m.i.)

Complete by Year 3:
- *outfall* map; and

ii. **program *implementation* reporting** as set forth in Part VIII.A.3(l) above. Commence *implementation* reporting after three year *development* period. *Implementation* reporting may begin earlier if *implementation* begins during development period.

4. Construction Site Stormwater Runoff Control - SWMP Development / Implementation
At a minimum, all *covered entities* must:

a. *Develop (for newly authorized MS4s)*, *implement*, and enforce a program that:

i. provides equivalent protection to the NYS SPDES General Permit for Stormwater Discharges from Construction Activities, unless more stringent requirements are contained within this *SPDES general permit* ;

ii. addresses *stormwater* runoff to the *small MS4* from *construction activities* that result in a land disturbance of greater than or equal to one acre. Control of *stormwater discharges* from *construction activity* disturbing less than one acre must be included in the program if:
- that *construction activity* is part of a *larger common plan of development or sale* that would disturb one acre or more; or
- if controlling such activities in a particular watershed is required by the *Department;*

iii. incorporates mechanisms for construction runoff requirements from new development and redevelopment projects to the extent allowable under *State* and local law that meet the *State*'s most current technical standards:
- through available mechanisms (ie. tenant lease agreements, bid specifications, requests for proposals, standard contract provisions, connection permits, maintenance directives / BMPS, access permits, consultant agreements, internal policies);
- procedures or policies must be developed for implementation and enforcement of the mechanisms;
- a written directive from the person authorized to sign the NOI stating that updated mechanisms must be used and who (position(s)) is responsible for ensuring compliance with and enforcing the mechanisms for construction projects that occur on property owned, under easement to, within the

(Part VIII.A.4.a.iii.)

right-of-way of, or under the maintenance jurisdiction by the *covered entity* or within the maintenance jurisdiction of the MS4; and

- the mechanisms and directive must be equivalent to the to the requirements of the NYS SPDES General Permit for Stormwater Discharges from Construction Activities.

iv. allows for sanctions to ensure compliance to the extent allowable by *State* law;

v. describes procedures for receipt and follow up on complaints or other information submitted by the public regarding construction site stormwater runoff;

vi. educates construction site operators, design engineers, *municipal* staff and other individuals to whom these regulations apply about the construction requirements in the *covered entity's* jurisdiction, including the procedures for submission of *SWPPPs*, construction site inspections, and other procedures associated with control of construction stormwater;

vii. Ensures that construction site contractors have received erosion and sediment control training, including the *trained contractors* as defined in the SPDES general permit for construction, before they do work within the *covered entity's* jurisdiction:

- training may be provided by the *Department* or other qualified entities (such as Soil and Water Conservation Districts);
- the *covered entity* is not expected to perform such training, but they may co-sponsor training for construction site operators in their area;
- the *covered entity* may ask for a certificate of completion or other such proof of training; and
- the *covered entity* may provide notice of upcoming sediment and erosion control training by posting in the building department or distribute with building permit application.

viii. establishes and maintains an inventory of active construction sites, including the location of the site, owner / operator contact information;

ix. develop *(for newly authorized MS4s)*, record, periodically assess and modify as needed *measurable goals*; and

(Part VIII.A.4.a.)

x. select and implement appropriate construction stormwater *BMPs* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*.

Required SWMP Reporting

b. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:
   i. number and type of sanctions employed;
   ii. status of regulatory mechanism - certify that mechanisms will assure compliance with the NYS SPDES General Permit for Stormwater Discharges from Construction Activities;
   iii. number of construction sites authorized for disturbances of one acre or more; and
   iv. report on effectiveness of program, *BMP* and *measurable goal* assessment.

c. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:
   i. **Program *development* deadlines and reporting**:
      Initiate by end of Year 1:
      - procedures, activities and identify personnel to educate and train construction site operators about requirements to develop and implement a SWPPP and any other requirements that must be met within the MS4's jurisdiction;

      Initiate by the end of Year 1; complete by the end of Year 3:
      - status of mechanism for construction runoff requirements - by end of Year 3 certify that mechanisms will assure compliance with the NYS SPDES General Permit for Stormwater Discharges from Construction Activities; and

      Complete in Year 1 (revise in Year 2 and 3 if changes are made):
      - describe procedures for the receipt and consideration of information submitted by the public. Identify the responsible personnel.

   ii. Program implementation reporting as set forth in Part VIII.A.4(b) above. Commence *implementation* reporting after three year development period. *Implementation* reporting may begin earlier if *implementation* begins during development period.

(Part VIII.A.)

5. **Post-Construction Stormwater Management SWMP Development / Implementation**
   At a minimum, all *covered entities* must:
   a. *Develop (for newly authorized MS4s)*, *implement*, and enforce a program that:
      i. provides equivalent protection to the NYS SPDES General Permit for Stormwater Discharges from Construction Activities, unless more stringent requirements are contained within this *SPDES general permit*;

      ii. addresses *stormwater* runoff from new development and redevelopment projects to the *small MS4* from projects that result in a land disturbance of greater than or equal to one acre. Control of *stormwater discharges* from projects of less than one acre must be included in the program if:
         - that project is part of a *larger common plan of development or sale*;
         - if controlling such activities in a particular watershed is required by the *Department*;

      iii. incorporates enforceable mechanisms for post-construction runoff control from new development and re-development projects to the extent allowable under *State* or local law that meet the *State*'s most current technical standards:
         - through available mechanisms (i.e. tenant lease agreements, bid specifications, requests for proposals, standard contract provisions, connection permits, maintenance directives / BMPS, access permits, consultant agreements, internal policies);
         - procedures or policies must be developed for implementation and enforcement of the mechanisms;
         - a written directive from the person authorized to sign the NOI stating that updated mechanisms must be used and who (position(s)) is responsible for ensuring compliance with and enforcing the mechanisms for construction projects that occur on property owned by the *covered entity* or within the maintenance jurisdiction of the MS4; and
         - the mechanisms and directive must assure compliance with the requirements of the NYS SPDES General Permit for Stormwater Discharges from Construction Activities;

      iv. includes a combination of structural or non-structural management practices (according to standards defined in the most current version of the NYS Stormwater management Design Manual) that will reduce the *discharge* of pollutants to the MEP. In the development of environmental plans such as watershed plans, open space preservation programs, local laws, and ordinances covered entities must incorporate principles of *Low Impact Development* (LID), *Better Site Design* (BSD) and other *Green Infrastructure* practices to the MEP.

(Part VIII.A.5.a.iv.)

Covered entities must consider natural resource protection, impervious area reduction, maintaining natural hydrologic condition in developments, buffers or set back distances for protection of environmentally sensitive areas such as streams, wetlands, and erodible soils in the development of environmental plans.

- if a *stormwater* management practice is designed and installed in accordance with the New York State Stormwater Management Design Manual or has been demonstrated to be equivalent and is properly operated and maintained, then *MEP* will be assumed to be met for the post construction *stormwater* discharged by the practice;

v. establish and maintain an inventory of post-construction stormwater management practices to include at a minimum practices discharging to the *small MS4* that have been installed since March 10, 2003, those owned by the small MS4, and those found to cause water quality standard violations.
   - the inventory shall include, at a minimum: location of practice (street address or coordinates); type of practice; maintenance needed per the NYS Stormwater Management Design Manual, *SWPPP*, or other provided documentation; and dates and type of maintenance performed; and

vi. ensures adequate long-term operation and maintenance of management practices by trained staff, including assessment to ensure that the practices are performing properly.
   - The assessment shall include the inspection items identified in the maintenance requirements (NYS Stormwater Management Design Manual, *SWPPP*, or other maintenance information) for the practice. *Covered entities* are not required to collect *stormwater* samples and perform specific chemical analysis;

vii. Covered entities may include in the SWMP Plan provisions for development of a banking and credit system. MS4s must have an existing watershed plan based on which offsite alternative stormwater management in lieu of or in addition to on-site stormwater management practices are evaluated. Redevelopment projects must be evaluated for pollutant reduction greater than required treatment by the state standards. The individual project must be reviewed and approved by the *Department*. Use of a banking and credit system for new development is only acceptable in the impaired watersheds to achieve the no net increase requirement and watershed improvement strategy areas to achieve pollutant reductions in accordance with watershed plan load reduction goals. A banking and credit system must at minimum include:

(Part VIII.A.5.a.vii.)

- Ensures offset exceeds standard reduction by factor of at least 2
- Offset is implemented within the same watershed
- Proposed offset addresses the POC of the watershed
- Tracking system is established for the watershed
- Mitigation is applied for retrofit or redevelopment
- Offset project is completed prior to beginning the proposed construction
- A legal mechanism is established to implement the banking and credit system

b. *Develop (for newly authorized MS4s)*, *implement*, and provide adequate resources for a program to inspect development and re-development sites by trained staff and to enforce and employ sanctions;

c. *Develop (for newly authorized MS4s)*, record, annually assess and modify as needed *measurable goals*; and

d. Select and implement appropriate post-construction *stormwater BMPs* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*.

Required SWMP Reporting

e. Program *implementation* reporting for continuing *covered entities* (MS4s covered for 3 or more years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

i. number and type of sanctions;
ii. number and type of post-construction stormwater management practices;
iii. number and type of post-construction stormwater management practices inspected;
iv. number and type of post-construction stormwater management practices maintained;
v. status of regulatory mechanism, equivalent mechanism,that regulatory mechanism is equivalent ; and
vi. report on effectiveness of program, *BMP* and *measurable goal* assessment, and implementation of a banking and credit system, if applicable.

f. Program reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). At a minimum, the *covered entity* shall report on the items below:

(Part VIII.A.5.f.)

i. **program *development* deadlines and reporting**:
Initiate by end of Year 1; complete by end of Year 3:
- mechanism of post-construction stormwater management - by end of Year 3 certify that mechanisms will assure compliance with the NYS Construction General Permit (GP-0-10-001);

Initiate by end of Year 2; complete by end of Year 3:
- procedures for inspection and maintenance of post-construction management practices; and
- procedures for enforcement and penalization of violators;

ii. **program *implementation* reporting** as set forth in Part VIII.A.5(e). Commence *implementation* reporting after three year development period. *Implementation* reporting may begin earlier if *implementation* begins during *development* period.

6. Pollution Prevention/Good Housekeeping For Municipal Operations
SWMP Development / Implementation
At a minimum, all *covered entities* must:

a. *Develop (for newly authorized MS4s)* and *implement* a pollution prevention / good housekeeping program for *municipal* operations and facilities that:

i. addresses *municipal* operations and facilities that contribute or potentially contribute *POCs* to the *small MS4* system. The operations and facilities may include, but are not limited to: street and bridge maintenance; winter road maintenance; stormwater system maintenance; vehicle and fleet maintenance; park and open space maintenance; municipal building maintenance; solid waste management; new construction and land disturbances; right-of-way maintenance; marine operations; hydrologic habitat modification, or other;

ii. includes the performance and documentation of a self assessment of all municipal operations to:
- determine the sources of pollutants potentially generated by the *covered entity*'s operations and facilities; and
- identify the *municipal* operations and facilities that will be addressed by the pollution prevention and good housekeeping program, if it is not done already;

iii. determines *management practices*, policies, procedures, etc. that will be *developed* and *implemented* to reduce or prevent the discharge of (potential)

(Part VIII.A.6.a.iii.)

pollutants. Refer to *management practices* identified in the "NYS Pollution Prevention and Good Housekeeping Assistance Document" or other guidance materials available from the EPA, the *State,* or other organizations;

iv. prioritizes pollution prevention and good housekeeping efforts based on geographic area, potential to improve water quality, facilities or operations most in need of modification or improvement, and *covered entity*'s capabilities;

v. addresses pollution prevention and good housekeeping priorities;

vi. includes an employee pollution prevention and good housekeeping training program and ensure that staff receive and utilize training;

vii. requires third party entities performing contracted services, including but not limited to, street sweeping, snow removal, lawn / grounds care, etc., to make the necessary certification in Part IV.G; and

viii. requires *municipal* operations and facilities that would otherwise be subject to the NYS Multisector General Permit (MSGP, GP-0-06-002) for industrial stormwater discharges to prepare and *implement* provisions in the SWMP that comply with Parts III. A, C, D, J, K and L of the MSGP. The covered entity must also perform monitoring and record keeping in accordance with Part IV. of the MSGP. Discharge monitoring reports must be attached to MS4 annual report. Those operations or facilities are not required to gain coverage under the MSGP. *Implementation* the above noted provisions of the SWMP will ensure that MEP is met for discharges from those facilities;

b. Consider and incorporate cost effective runoff reduction techniques and green infrastructure in the routine upgrade of the existing stormwater conveyance systems and municipal properties to the MEP. Some examples include replacement of closed drainage with grass swales, replacement of the existing islands in parking lots with rain garden, or curb cuts to route the flow through below grade infiltration areas or other low cost improvements that provide runoff treatment or reduction.

c. *Develop (for newly authorized MS4s)*, record, periodically assess and modify as needed *measurable goals* ; and

(Part VIII.A.6.)

d. Select and implement appropriate pollution prevention and good housekeeping *BMPs* and *measurable goals* to ensure the reduction of all *POCs* in *stormwater discharges* to the *MEP*.

e. Adopt techniques to reduce the use of fertilizers, pesticides, and herbicides, as well as potential impact to surface water.

Required SWMP Reporting

f. **Program *implementation* reporting** for **continuing *covered entities*** (MS4s covered for 3 or more years on the *reporting date*). *Covered entities* are required to report on all *municipal* operations and facilities within their jurisdiction (*urbanized area* and *additionally designated area*) that their program is addressing. The *covered entity* shall report at a minimum on the items below:

   i. indicate the *municipal* operations and facilities that the pollution prevention and good housekeeping program assessed;
   ii. describe, if not done so already, the management practices, policies and procedures that have been developed, modified, and / or implemented and report, at a minimum, on the items below that the *covered entity's* pollution prevention and good housekeeping program addresses during the reporting year:

      – acres of parking lot swept;
      – miles of street swept;
      – number of catch basins inspected and, where necessary, cleaned;
      – post-construction control stormwater management practices inspected and, where necessary, cleaned;
      – pounds of phosphorus applied in chemical fertilizer
      – pounds of nitrogen applied in chemical fertilizer; and
      – acres of pesticides / herbicides applied.

   iii. staff training events and number of staff trained; and
   iv. report on effectiveness of program, *BMP* and *measurable goal* assessment. If the pollution prevention and good housekeeping program addresses other operations than what is listed above in Part VIII.A.6.a(ii), the *covered entity* shall report on items that will demonstrate program effectiveness.

g. Reporting for **newly regulated *covered entities*** (MS4s covered for less than 3 years on the *reporting date*). *Covered entities* are required to report on all *municipal* operations and facilities within their jurisdiction (*urbanized area* and *additionally*

(Part VIII.A.6.g.)

designated area) that their program is addressing. The *covered entity* shall report at a minimum on the items below:

i. **program *development* deadlines and reporting**:

Complete by end of Year 1:

- identify the municipal operations and facilities that will be considered for inclusion in the pollution prevention and good housekeeping program;
- describe the pollution prevention and good housekeeping program priorities (geographic area, potential to improve water quality; facilities or operations most in need of modification or improvement);
- describe management practices, policies, procedures, etc. that will be developed or modified;
- identify the staff and equipment available;

Initiate by Year 2; complete Year 3:

- describe employee pollution prevention and good housekeeping program training program and begin training, report on number of staff trained;

Complete by end of Year 3:

- description of developed management practices.

ii. **program *implementation* reporting** as set forth in Part VIII.A.6(d) above. Commence *implementation* reporting after three year *development* permit. *Implementation* reporting may begin earlier if *implementation* begins during *development* period.

Part IX. WATERSHED IMPROVEMENT STRATEGY REQUIREMENTS

The covered entities in the watershed improvement strategy areas must develop or modify their SWMP to address the watershed specific additional requirements to achieve the pollutant load reduction by the deadline as defined in the Tables in Part IX of this general SPDES permit. The Pollutant Load Reductions are the reductions necessary from the discharge loads associated with MS4s that, when combined with reductions in the discharge loads from non-MS4s to the waterbody, will meet water quality standards. The calculated reductions are based on TMDL models and may be recalculated according to 40CFR Part 130.

The MS4 portion of the pollutant load reduction shall be achieved by implementation of BMPs required of all MS4s, reductions from implementation of additional BMPS for watershed improvement strategy areas including any retrofits required by this permit. These reductions are intended to be targeted and credited using models, loading factors and load reductions predicted based on the best scientific information available.

The Pollutant Load Reduction Deadlines are deadlines by which the MS4 portion of the pollutant load reduction must be met. Watershed Improvement Strategy Deadlines are the deadlines by which the watershed improvement strategy requirements for addressing the POC are to be completed and implemented. Retrofit Plan Submission Deadlines are the deadlines by which the retrofit plan component of the watershed improvement strategies are submitted to the *Department* for review and approval.

Ultimately, the effectiveness of the load reductions in meeting water quality standards will be verified by ambient monitoring of the affected waterbody. Where ambient monitoring demonstrates consistent compliance with water quality standards, the covered entity may request that the *Department* suspend the additional BMP requirements to install stormwater retrofits.

(Part IX.)

A. New York City East of Hudson Watershed MS4s - (Mapped in Appendix 3)

Table IX.A - Pollutant Load Reduction and Timetable for New York City East of Hudson Phosphorus Watershed Improvement Strategy Area

Watershed	Watershed Improvement Strategy Deadline	Retrofit Plan Submission Deadline	Pollutant Load Reduction (Load Allocation)	Pollutant Load Reduction Deadline
New York City East of Hudson Watershed	05/01/2011	03/09/ 2009 (single) and 12/ 31/2009 (RSE)	In accordance with the TMDL Implementation Plan	03/09/2019 (single) 12/31/2019 (RSE)

By the deadline defined in the Table IX. A, covered entities in these watersheds shall, in addition to the requirements in Part VII or VIII, depending on the type of the MS4, develop and implement the following minimum control measures for areas within their jurisdiction and their storm sewersheds:

1. Public Education and Outreach on Stormwater Impacts- applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.

a. Plan and conduct an ongoing public education and outreach program designed to describe the impacts of phosphorus (the *POC*) on waterbodies. The program must identify potential sources of phosphorus in *stormwater* runoff and describe steps that contributors can take to reduce the concentration of this *POC* in *stormwater* runoff. The program must also describe steps that contributors of non-*stormwater* discharges (Part I.A.2) can take to reduce phosphorus.

b. Develop, or acquire if currently available, specific educational material dealing with sources of phosphorus in *stormwater* and pollutant reduction practices. At a minimum, the educational material should address the following topics:

i. understanding the phosphorus issue;

ii. septic systems as a source of phosphorus;

iii. phosphorus concerns with fertilizer use;

iv. phosphorus concerns with grass clippings and leaves entering streets and storm sewers;

v. construction sites as a source of phosphorus; and

(Part IX.A.1.b.)

vi. phosphorus concerns with detergent use.

2. Public Involvement/ Participation
No additional requirements proposed for this permit term.

3. Illicit Discharge Detection and Elimination

a. Mapping - applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.
Develop and maintain a map showing the entire *small MS4* conveyance system. The *covered entity* shall complete the mapping of approximately 20% of the system every year, with the entire system being mapped by January 8, 2013.

At a minimum, the map and/or supportive documentation for the conveyance system should include the following information:

i. type of conveyance system - closed pipe or open drainage;

ii. for closed pipe systems - pipe material, shape, and size;

iii. for open drainage systems - channel/ditch lining material, shape, and dimensions; location and dimensions of any culvert crossings;

iv. drop inlet, catch basin, and manhole locations; and

v. number and size of connections (inlets/outlets) to catch basins and manholes, direction of flow.

All information shall be prepared in digital format suitable for use in GIS software and in accordance with the *Department's* guidance on Illicit Discharge Detection and Elimination. The scale shall be 1:24,000 or better.

b. On-site wastewater systems - applicable to *traditional land use control* and *traditional non-land use control MS4s*.

- *Develop*, *implement* and enforce a program that ensures that on-site sanitary systems designed for less than 1000 gallons per day (septic systems, cesspools, including any installed absorption fields) are inspected at a minimum frequency of once every five years and, where necessary, maintained or rehabilitated. Regular field investigations/inspections should be done in accordance with the most current

(Part IX.A.3.b.)

version of the EPA publication entitled Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment, to detect the presence of ongoing and/or intermittent on-site sanitary discharges to the storm sewer system. An advanced system inspection requiring completion by a certified professional is not required by this permit, but may be used where site specific conditions warrant. Program development shall include the establishment of the necessary legal authority to implement the program.

4. Construction Site Stormwater Runoff Control- applicable to *traditional land use control MS4s*.

a. *Develop*, *implement* and enforce a program to reduce pollutants in *stormwater* runoff to the *small MS4* from construction activities that result in a land disturbance of greater than or equal to five thousand (5000) square feet. At a minimum, the program must provide equivalent protection to the NYS DEC SPDES General Permit for Stormwater Discharges from Construction Activity and must include the development and implementation of:

   i. by December 31, 2009, an ordinance or other regulatory mechanism that requires erosion and sediment controls designed in accordance with the most current version of the technical standard New York State Standards and Specifications for Erosion and Sediment Control for all construction activities that disturb between five thousand (5000) square feet and one acre of land. For construction activities that disturb between five thousand (5000) square feet and one (1) acre of land, one of the standard erosion and sediment control plans included in Appendix E (Erosion & Sediment Control Plan For Small Homesite Construction) of the New York Standards and Specifications for Erosion and Sediment Control may be used as the Stormwater Pollution Prevention Plan (SWPPP);

   ii. policy and procedures for the *covered entity* to perform, or cause to be performed, compliance inspections at all sites with a disturbance of one (1) or more acres. By December 31, 2009, the *covered entity* shall have started performing, or cause to be performed, compliance inspections at all sites with a disturbance between five thousand (5000) square feet and one (1) acre of land;

5. Post-Construction Stormwater Management

a. Construction stormwater program - applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.

(Part IX.A.5.a.)

Develop, *implement* and enforce a program to address post-construction *stormwater* runoff from new development and redevelopment projects that disturb greater than or equal to one (1) acre. This includes projects of less than one acre that are part of a larger common plan of development or sale. At a minimum, the program must provide equivalent protection to the NYS DEC SPDES General Permit for Stormwater Discharges from Construction Activity and must include the *development* and *implementation* of:

i. a law or other mechanism that requires post-construction stormwater management controls designed in accordance with the most current version of the technical standards the New York State Stormwater Management Design Manual including the Enhanced Phosphorus Removal Design Standards. An MS4 must ensure that their ordinance or other mechanism requires post-construction stormwater management controls to be designed in accordance with the final version of the Enhanced Phosphorus Removal Design Standards by September 30, 2008 .

b. Retrofit program - applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.

Develop and commence implementation of a Retrofit Program that addresses runoff from sites to correct or reduce existing erosion and/or pollutant loading problems, with a particular emphasis placed on the pollutant phosphorus. At a minimum, the MS4 shall:

i. establish procedures to identify sites with erosion and/or pollutant loading problems;

ii. establish policy and procedures for project selection. Project selection should be based on the phosphorus reduction potential of the specific retrofit being constructed/installed; the ability to use standard, proven technologies; and the economic feasibility of constructing/installing the retrofit. As part of the project selection process, the *covered entity* should participate in locally based watershed planning efforts which involve the *Department*, other *covered entities*, stakeholders and other interested parties;

iii. establish policy and procedures for project permitting, design, funding, construction and maintenance.

(Part IX.A.5.b.)

iv. for covered entities that develop their own retrofit program, by March 9, 2009 develop and submit approvable plans with schedules for completing retrofit projects, including identification of funding sources. Upon DEC approval of those schedules, the plans and schedules shall become enforceable requirements of this permit.

v. pursuant to Part IV. B (Cooperation Between Covered entities Encouraged), retrofit projects can be completed in cooperation with other covered entities in the East of Hudson Watershed through the formation of a cooperative entity with other MS4s. Participating MS4s shall work with the Department and other members of the cooperative entity in implementing the requirements of i, ii and iii above. In addition, each covered entity that becomes a member of the cooperative entity shall work closely with the Department and other members of the cooperative entity to, by December 31, 2009, develop and submit approvable plans and schedules for completing retrofit projects, including identification of funding sources. Upon DEC approval of those plans and schedules, the plans and schedules shall become enforceable requirements of this permit.

6. Pollution Prevention/Good Housekeeping For Municipal Operations- applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.

a. By December 31, 2009, develop and implement a Stormwater Conveyance System inspection and maintenance program. At a minimum, the program shall include the following:

i. policy and procedures for the inspection and maintenance of catch basin and manhole sumps. Catch basin and manhole sumps should be inspected in the early spring and late fall for sediment and debris build-up. If sediment and debris fills greater than 50% of the sump volume, the sump should be cleaned. All sediment and debris removed from the catch basins and manholes shall be properly disposed of;

ii. policy and procedures for the inspection, maintenance and repair of conveyance system *outfalls*. Beginning June 30, 2008, the MS4 must inspect 20% of their *outfalls* each year and make repairs as necessary. All outfall protection and/or bank stability problems identified during the inspection shall be corrected in accordance with the New York Standards and Specifications for Erosion and Sediment Control;

(Part IX.A.6.a.)

iii. policy and procedures for the inspection, maintenance and repair of a *covered entity's* stormwater management practices. The inspection and maintenance schedule for all stormwater management practices shall assure continued operation of stormwater management practices; and

iv. develop a Corrective Action Plan for each Stormwater Conveyance System component that has been identified as needing repair. A file of all corrective actions implemented and *illicit discharges* detected and repaired should be maintained for a period of not less than five years.

b. By December 31, 2010, develop and implement a turf management practices and procedures policy. The policy shall address the following:

i. procedures for proper fertilizer application on municipally-owned lands. The application of any phosphorus-containing fertilizer (as labeled) shall only be allowed following a proper soil test and analysis documenting that soil phosphorus concentrations are inadequate;

ii. procedures for the proper disposal of grass clippings from municipally-owned lawns where grass clipping collection equipment is used. Grass clippings shall be disposed of in a compost pile or a proper containment device so that they cannot enter the *small MS4* or surface waters;

iii. procedures for the proper disposal of leaves from municipally-owned lands where leaves are collected. Leaves shall be disposed of in a compost pile or a proper containment device so that they cannot enter *small MS4s* or surface waters;

iv. for municipalities with lawn waste collection programs, the development of a curbside lawn waste management policy which ensures that lawn waste does not decay and release phosphorus to the storm sewer system; and

v. the planting of wildflowers and other native plant material to lessen the frequency of mowing and the use of chemicals to control vegetation.

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B. Other Phosphorus Watershed MS4s (Mapped in Appendices 4, 5, and 10)

Table IX.B - Pollutant Load Reduction and Timetable for Other Phosphorus Watershed Improvement Strategy Areas

Watershed	Watershed Improvement Strategy Deadline	Retrofit Plan Submission Deadline	Pollutant Load Reduction (Waste Load Allocation %*)	Pollutant Load Reduction Deadline
Greenwood Lake	05/01/2011	03/09/2011	43* (load allocation)	03/09/2011
Onondaga Lake	TMDL approval + 3 years	TMDL approval + 3 years	TBD	TMDL approval + 13 years
Oscawana Lake	05/01/2013	Not Applicable	18	2020

By the deadline defined in the Table IX.B, covered entities in these watersheds shall, in addition to the requirements in Part VII or VIII, depending on the type of the MS4, develop and implement the following minimum control measures for areas within the permitttee's jurisdiction and the covered entities's storm sewersheds:

1. Public Education and Outreach on Stormwater Impacts- applicable to *traditional land use* control, *traditional non-land use control* and *non-traditional MS4s*.

a. Plan and conduct an ongoing public education and outreach program designed to describe the impacts of phosphorus (the POC) on waterbodies. The program must identify potential sources of Phosphorus in stormwater runoff and describe steps that contributors can take to reduce Phosphorus in stormwater runoff.

b. develop, or acquire if currently available, specific educational material dealing with sources of Phosphorus in stormwater and pollutant reduction practices. At a minimum, the educational material should address the following topics:
   i. understanding the phosphorus issue;
   ii. septic systems as a source of phosphorus; and
   iii. phosphorus concerns with fertilizer use.

2. Public Involvement/ Participation

No additional requirements proposed for at this time.

3. Illicit Discharge Detection and Elimination applicable to *traditional land use control* and *traditional non-land use control* MS4s, except within the Onondaga Lake Watershed.

a. *Develop*, *implement* and enforce a program that ensures that on-site sanitary systems designed for less than 1000 gallons per day (septic systems, cesspools, including any installed absorption fields) are inspected at a minimum frequency of once every five

(Part IX.B.3.a.)

years and, where necessary, maintained or rehabilitated. Conduct of regular field investigations/inspections should be done in accordance with the most current version of the EPA publication entitled Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment, to detect the presence of ongoing and/or intermittent on-site sanitary discharges to the storm sewer system. An advanced system inspection requiring completion by a certified professional is not required by this permit, but may be used where site specific conditions warrant. Program development shall include the establishment of the necessary legal authority to implement the program.

4. Construction Site Stormwater Runoff Control

No additional requirements at this time.

5. Post-Construction Stormwater Management, - applicable to *traditional land use*, *traditional non-land use control* and *non-traditional MS4s*.

a. The *covered entity* must require the use of the "Enhanced Phosphorus Removal Design Standards"in accordance with NYS Stormwater Design Manual;

b. *Develop* and commence implementation of a Retrofit Program that addresses runoff from sites to correct or reduce existing erosion and/or pollutant loading problems, with a particular emphasis placed on the pollutant Phosphorus. At a minimum, the MS4 shall:

   i. establish procedures to identify sites with erosion and/or pollutant loading problems;

   ii. establish policy and procedures for project selection. Project selection should be based on the Phosphorus reduction potential of the specific retrofit being constructed/installed; the ability to use standard, proven technologies; and the economic feasibility of constructing/installing the retrofit. As part of the project selection process, the *covered entity* should participate in locally based watershed planning efforts which involve the *Department*, other *covered entities*, stakeholders and other interested parties;

   iii. establish policy and procedures for project permitting, design, funding, construction and maintenance

(Part IX.B.5.)

iv. by the date specified for each watershed in the appropriate Watershed Improvement Strategy Requirement Table develop and submit approvable plans and schedules for completing retrofit projects, including identification of funding sources. Upon DEC approval of those plans and schedules, the plans and schedules shall become enforceable requirements of this permit.

6. Pollution Prevention/Good Housekeeping For Municipal Operations applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.

a. Develop a turf management practices and procedures policy. The policy should address the following:

i. procedures for proper fertilizer application on municipally-owned lands. The application of any phosphorus-containing fertilizer (as labeled) shall only be allowed following a proper soil test and analysis documenting that soil phosphorus concentrations are inadequate; and

ii. the planting of native plant material to lessen the frequency of mowing and the use of chemicals to control vegetation.

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C. Pathogen Impaired Watershed MS4s (Mapped in Appendix 6, 7 and 9)

Table IX.C - Pollutant Load Reduction and Timetable for Pathogen Impaired Watershed Improvement Strategy Areas

Watershed	Watershed Improvement Strategy Deadline	Retrofit Plan Submission Deadline	Pollutant Load Reduction (Waste Load Allocation %)	Pollutant Load Reduction Deadline
Budds Pond*	05/01/2013	09/30/2012	61	09/30/2022
Stirling Creek*	05/01/2013	09/30/2012	28	09/30/2022
Town & Jockey Creeks*	05/01/2013	09/30/2012	76	09/30/2022
Goose Creek*	05/01/2013	09/30/2012	70	09/30/2022
Hashamomuck Pond, Zone HP-1*	05/01/2013	09/30/2012	77	09/30/2022
Hashamomuck Pond , Zone HP-2*	05/01/2013	09/30/2012	43	09/30/2022
Richmond Creek*	05/01/2013	09/30/2012	71	09/30/2022
Deep Hole Creek*	05/01/2013	09/30/2012	29	09/30/2022
James Creek*	05/01/2013	09/30/2012	51	09/30/2022
Flanders Bay	05/01/2012	03/09/2012	98	03/09/2021
Reeves Bay	05/01/2012	03/09/2012	97	03/09/2021
Sebonac Creek	05/01/2012	03/09/2012	58	03/09/2021
North Sea Harbor, Zone NSH-1	05/01/2012	03/09/2012	97	03/09/2021
North Sea Harbor, Zone NSH-2	05/01/2012	03/09/2012	62	03/09/2021
North Sea Harbor, Zone NSH-3	05/01/2012	03/09/2012	99	03/09/2021
North Sea Harbor, Zone NSH-5	05/01/2012	03/09/2012	74	03/09/2021
Wooley Pond	05/01/2012	03/09/2012	97	03/09/2021
Noyac Creek, Zone NC-1	05/01/2012	03/09/2012	64	03/09/2021
Sag Harbor, Zone SH-2*	05/01/2013	09/30/2012	50	09/30/2022
Northwest Creek*	05/01/2013	09/30/2012	76	09/30/2022
Acabonac Harbor, Zone AH-2*	05/01/2013	09/30/2012	42	09/30/2022
Acabonac Harbor, Zone AH-3*	05/01/2013	09/30/2012	85	09/30/2022
Acabonac Harbor, Zone AH-4*	05/01/2013	09/30/2012	81	09/30/2022
Acabonac Harbor, Zone AH-5*	05/01/2013	09/30/2012	87	09/30/2022
Montauk Lake, Zone LM-1*	05/01/2013	09/30/2012	52	09/30/2022
Montauk Lake, Zone LM-2*	05/01/2013	09/30/2012	52	09/30/2022
Montauk Lake, Zone LM-3*	05/01/2013	09/30/2012	48	09/30/2022
Little Sebonac Creek	05/01/2012	03/09/2012	70	03/09/2021
Oyster Bay (Harbor 2)	05/01/2012	03/09/2012	20	03/09/2021
Oyster Bay (Harbor 3)	05/01/2012	03/09/2012	90	03/09/2021

*Additionally Designated Area

Watershed	Watershed Improvement Strategy Deadline	First Retrofit Plan Submission Deadline	Pollutant Reduction (Waste Load Allocation %)	Pollutant Load Reduction Deadline
Hempstead Harbor, north, and tidal tributaries	05/01/2013	09/30/2012	95	09/30/2022
Cold Spring Harbor, and tidal tributaries, Inner	05/01/2013	09/30/2012	95	09/30/2022
Cold Spring Harbor, Eel Creek	05/01/2013	09/30/2012	90	09/30/2022
Huntington Harbor	05/01/2013	09/30/2012	89	09/30/2022
Centerport Harbor	05/01/2013	09/30/2012	91	09/30/2022
Northport Harbor	05/01/2013	09/30/2012	92	09/30/2022
Stony Brook Harbor and West Meadow Creek	05/01/2013	09/30/2012	99	09/30/2022
Stony Brook Creek	05/01/2013	09/30/2012	99	09/30/2022
Stony Brook Yacht Club	05/01/2013	09/30/2012	48	09/30/2022
Port Jefferson Harbor, North and tribs	05/01/2013	09/30/2012	94	09/30/2022
Conscience Bay and tidal tribs	05/01/2013	09/30/2012	99	09/30/2022
Setaukut Harbor, Little Bay	05/01/2013	09/30/2012	84	09/30/2022
Setauket Harbor, East Setauket	05/01/2013	09/30/2012	79	09/30/2022
Setauket Harbor, Poquot	05/01/2013	09/30/2012	100	09/30/2022
Mt. Sinai Harbor, Crystal Brook	05/01/2013	09/30/2012	88	09/30/2022
Mt. Sinai Harbor, Inner Harbor	05/01/2013	09/30/2012	96	09/30/2022
Mt. Sinai Harbor, Pipe Stave Hollow	05/01/2013	09/30/2012	93	09/30/2022
Mattituck Inlet/Creek, Low, and tidal tributaries	05/01/2013	09/30/2012	64	09/30/2022
Goldsmith Inlet	05/01/2013	09/30/2012	91	09/30/2022
West Harbor - Darby Cove	05/01/2013	09/30/2012	41	09/30/2022

Georgica Pond, Upper	05/01/2013	09/30/2012	93	09/30/2022
Georgica Pond, Lower	05/01/2013	09/30/2012	93	09/30/2022
Georgica Pond Cove	05/01/2013	09/30/2012	92	09/30/2022
Sagaponack Pond	05/01/2013	09/30/2012	88	09/30/2022
Mecox Bay and tributaries	05/01/2013	09/30/2012	89	09/30/2022
Heady Creek and tributaries	05/01/2013	09/30/2012	88	09/30/2022
Taylor Creek and tributaries	05/01/2013	09/30/2012	52	09/30/2022
Penny Pond	05/01/2013	09/30/2012	31	09/30/2022
Weesuck Creek and tidal tributaries	05/01/2013	09/30/2012	37	09/30/2022
Penniman Creek and tidal tributaries	05/01/2013	09/30/2012	32	09/30/2022
Ogden Pond	05/01/2013	09/30/2012	28	09/30/2022
Quantuck Bay-Quantuck Creek	05/01/2013	09/30/2012	91	09/30/2022
Quantuck Canal/Moneybogue Bay	05/01/2013	09/30/2012	62	09/30/2022
Seatuck Cove	05/01/2013	09/30/2012	94	09/30/2022
Harts Cove	05/01/2013	09/30/2012	12	09/30/2022
Narrow Bay	05/01/2013	09/30/2012	16	09/30/2022
Bellport Bay, Beaver Dam Creek	05/01/2013	09/30/2012	94	09/30/2022
Bellport Bay, West Cove	05/01/2013	09/30/2012	94	09/30/2022
Patchogue Bay, Swan River	05/01/2013	09/30/2012	90	09/30/2022
Patchogue Bay, Mud Creek	05/01/2013	09/30/2012	71	09/30/2022

By the deadline defined in the Table IX.C, *covered entities* in these watersheds shall, in addition to the requirements in Part VII. or VIII., depending on the type of the MS4, develop and implement the following MCMs for areas within the *covered entity*'s jurisdiction and the covered entities's storm sewersheds:

(Part IX.C.)

1. Public Education and Outreach on Stormwater Impacts- applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*

a. Plan and conduct an ongoing public education and outreach program designed to describe the impacts of Pathogens (the *POC*) on waterbodies. The program must identify potential sources of Pathogens in *stormwater* runoff and describe steps that contributors can take to reduce the Pathogens in *stormwater* runoff. The program must also describe steps that contributors of non-*stormwater discharges* can take to reduce Pathogens.

b. *Develop*, or acquire if currently available, specific educational material dealing with sources of Pathogens in *stormwater* and pollutant reduction practices. At a minimum, the educational material should address the following topics:

i. where, why, and how Pathogens pose threats to the environment and to the community;

ii. septic systems, geese and pets as a source of pathogens;

iii. dissemination of educational materials / surveys to households/businesses in proximity to Pathogen *TMDL* waterbodies; and

iv. education for livestock / horse boarders regarding manure *BMP*s.

2. Public Involvement / Participation

No additional requirements proposed at this time.

3. Illicit Discharge Detection and Elimination, **SWMP Development / Implementation**- Mapping applicable to *traditional land use* control and *traditional non-land use control MS4s*.

a. Develop, implement, and enforce a program to detect and eliminate discharges to the municipal separate storm sewer system from on-site sanitary systems in areas where factors such as shallow groundwater, low infiltrative soils, historical on-site sanitary system failures, or proximity to pathogen-impaired waterbodies, indicate a reasonable likelihood of system discharge.

In such areas, ensure that on-site sanitary systems designed for less than 1000 gallons per day (septic systems, cesspools, including any installed absorption fields) are inspected at a minimum frequency of once every five years and, where necessary, maintained or rehabilitated. Conduct regular field investigations/inspections in accordance with the most current version of the EPA publication entitled Illicit Discharge

(Part IX.C.3.a.)

Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment, to detect the presence of ongoing and/or intermittent on-site sanitary discharges to the storm sewer system. An advanced system inspection requiring completion by a certified professional is not required by this permit, but may be used where site specific conditions warrant.

On-site sanitary system IDDE program development shall include the establishment of the necessary legal authority (such as new or revised local laws) for implementation and enforcement.

b. Develop and maintain a map showing the entire *small MS4* conveyance system. The *covered entity* shall complete the mapping of approximately 20% of the system every year, with the entire system being mapped by May 1, 2015. At a minimum, the map and/or supportive documentation for the conveyance system shall include the following information:

i. type of conveyance system - closed pipe or open drainage;
ii. for closed pipe systems - pipe material, shape, and size;
iii. for open drainage systems - channel/ditch lining material, shape, and dimensions; location and dimensions of any culvert crossings;
iv. drop inlet, catch basin, and manhole locations; and
v. number and size of connections (inlets/outlets) to catch basins and manholes, direction of flow.

All information shall be prepared in digital format suitable for use in GIS software and in accordance with the *Department's* guidance on Illicit Discharge Detection and Elimination. The scale shall be 1:24000 or better.

4. Construction Site Stormwater Runoff Control

No additional requirements at this time.

5. Post-Construction Stormwater Management- applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.

Develop and commence implementation of a Retrofit Program that addresses runoff from sites to correct or reduce pollutant loading problems, with a particular emphasis placed on the pollutant Pathogens. At a minimum, the MS4 shall:

a. establish procedures to identify sites with erosion and/or pollutant loading problems;

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b. establish policy and procedures for project selection. Project selection should be based on the Pathogen reduction potential of the specific retrofit being constructed/installed; the ability to use standard, proven technologies; and the economic feasibility of constructing/installing the retrofit. As part of the project selection process, the *covered entity* should participate in locally based watershed planning efforts which involve the *Department*, other *covered entities*, stakeholders and other interested parties;

c. establish policy and procedures for project permitting, design, funding, construction and maintenance

d. by the deadlines specified in Table IX.C, develop and submit approvable plans and schedules for completing retrofit projects. Upon DEC approval of those plans and schedules and identification of funding sources, the plans and schedules shall become enforceable requirements of this permit.

6. Pollution Prevention/Good Housekeeping For Municipal Operations, - applicable to *traditional land use control* and traditional non-land use control MS4s.

a. *Develop*, enact and enforce a local law prohibiting pet waste on municipal properties and prohibiting goose feeding.

b. *Develop* and *implement* a pet waste bag program for collection and proper disposal of pet waste.

c. *Develop* a program to manage goose populations.

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D. Nitrogen Watershed MS4s (Mapped in Appendix 8)

Table IX.D - Pollutant Load Reduction and Timetable for Nitrogen Watershed Improvement Strategy Area

Watershed	Watershed Improvement Strategy Deadline	Retrofit Plan Submission Deadline	Pollutant Reduction (Load Allocation %)	Pollutant Load Reduction Deadline
Peconic Bay	05/01/2011	03/09/2011	15	03/09/2021

By the deadline defined in the Table IX.D, covered entities in these watersheds shall, in addition to the requirements in Part VII or VIII, depending on the type of the MS4, develop and implement the following minimum control measures for areas within the covered entity's jurisdiction and the covered entities' storm sewersheds:

1. Public Education and Outreach on Stormwater Impacts - applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.

a. Plan and conduct an ongoing public education and outreach program designed to describe the impacts of Nitrogen (the POC) on waterbodies. The program must identify potential sources of Nitrogen in stormwater runoff and describe steps that contributors can take to reduce the Nitrogen in stormwater runoff.

b. develop, or acquire if currently available, specific educational material dealing with sources of Nitrogen in stormwater and pollutant reduction practices. At a minimum, the educational material should address the following topics:

i. understanding the Nitrogen issue;
ii. septic systems as a source of Nitrogen; and
iii. Nitrogen concerns with fertilizer use.

2. Public Involvement/ Participation

No additional requirements proposed for at this time.

3. Illicit Discharge Detection and Elimination - applicable to *traditional land use control* and *traditional non-land use control MS4s*

(Part IX.D.3.)

a. Develop and maintain a map showing the entire small MS4 conveyance system. The covered entity shall complete the mapping of approximately 20% of the system every year, with the entire system being mapped by May 1, 2015. At a minimum, the map and/or supportive documentation for the conveyance system shall include the following information:

i. type of conveyance system - closed pipe or open drainage;
ii. for closed pipe systems - pipe material, shape, and size;
iii. for open drainage systems - channel/ditch lining material, shape, and dimensions; location and dimensions of any culvert crossings;
iv. drop inlet, catch basin, and manhole locations; and
v. number and size of connections (inlets/outlets) to catch basins and manholes, direction of flow.

All information shall be prepared in digital format suitable for use in GIS software and in accordance with the *Department's* guidance on Illicit Discharge Detection and Elimination. The scale shall be 1:24000 or better.

4. Construction Site Stormwater Runoff Control

No additional requirements at this time.

5. Post-Construction Stormwater Management - applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.
Develop and commence implementation of a Retrofit Program that addresses runoff from sites to correct or reduce existing erosion and/or pollutant loading problems, with a particular emphasis placed on the pollutant Nitrogen. At a minimum, the MS4 shall:

a. establish procedures to identify sites with erosion and/or pollutant loading problems;

b. establish policy and procedures for project selection. Project selection should be based on the Nitrogen reduction potential of the specific retrofit being constructed/installed; the ability to use standard, proven technologies; and the economic feasibility of constructing/installing the retrofit. As part of the project selection process, the *covered entity* should participate in locally based watershed planning efforts which involve the *Department*, other *covered entities*, stakeholders and other interested parties;

c. establish policy and procedures for project permitting, design, funding, construction and maintenance; and

(Part IX.D.5.)

d. by March 9, 2011, develop and submit approvable plans and schedules for completing retrofit projects, including identification of funding sources. Upon DEC approval of those plans and schedules, the plans and schedules shall become enforceable requirements of this permit.

6. Pollution Prevention/Good Housekeeping For Municipal Operations - applicable to *traditional land use control*, *traditional non-land use control* and *non-traditional MS4s*.

a. Develop a turf management practices and procedures policy. The policy should address the following:

i. procedures for proper fertilizer application on municipally-owned lands. The application of any Nitrogen-containing fertilizer shall only be allowed under the supervision of a Certified Crop Advisor or Certified Landscape Architect; and

ii. the planting of native plant material to lessen the frequency of mowing and reduce the use of chemicals to control vegetation.

Part X. ACRONYMS AND DEFINITIONS

A. Acronym List

BMP - Best Management Practice
CFR - Code of Federal Regulations
CWA - Clean Water Act
ECL - Environmental Conservation Law
MCC - Municipal Compliance Certification
MCM - Minimum Control Measure
MEP - Maximum Extent Practicable
MS4 - Municipal Separate Storm Sewer System
NPDES - National Pollutant Discharge Elimination System
POC - Pollutant of Concern
SPDES - State Pollutant Discharge Elimination System
SWMP - Stormwater Management Program
SWMP Plan - Stormwater Management Program Plan
SWPPP - Stormwater Pollution Prevention Plan
TMDL - Total Maximum Daily Load
UA - Urbanized Area

B. Definitions

Activities - See best management practice

Additionally Designated Areas - EPA required the Department to develop a set of criteria for designating additional MS4 areas as subject to these regulations. The following criteria have been adopted to designate additional MS4s in New York State:

Criteria 1: MS4s discharging to waters for which and EPA-approved TMDL required reduction of a pollutant associated with stormwater beyond what can be achieved with existing programs (and the area is not already covered under automatic designation as UA).

Criteria 2: MS4s contiguous to automatically designated urbanized areas (town lines) that discharge to sensitive waters classified as AA Special (fresh surface waters), AA (fresh surface waters) with filtration avoidance determination or SA (saline surface waters).

Criterion 3: Automatically designated MS4 areas are extended to Town, Village or City boundaries, but only for Town, Village or City implementation of Minimum Control Measures (4) Construction Site Stormwater Runoff Control and (5) Post Construction Stormwater Management in Development and Redevelopment. This additional designation may be waived, by written request to the Department, where the automatically designated area is a small portion of the total area of the Town, Village or City (less than 15 %) and where there is

little or no construction activity in the area outside of the automatically designated area (less than 5 disturbed acres per year).

Best Management Practice - means schedules activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the state. BMPs also include treatment requirements (if determined necessary by the covered entity), operating procedures, and practices to control runoff, spillage and leaks, sludge or waste disposal, or drainage from areas that could contribute pollutants to stormwater discharges. BMP is referred to in EPA's fact sheets and other materials. BMPs are also referred to as "activities" or "management practices" throughout this *SPDES general permit*.

Better Site Design (BSD) - Better Site Design incorporates non-structural and natural approaches to new and redevelopment projects to reduce impacts on watersheds by conserving natural areas, reducing impervious cover and better integrating stormwater treatment. Better site design is a form of Green Infrastructure and is similar to Low Impact Development (LID). See also Green Infrastructure and Low Impact Development.

Construction Activity(ies) - means any clearing, grading, excavation, demolition or stockpiling activities that result in soil disturbance. Clearing activities can include but are not limited to logging equipment operation, the cutting and skidding of trees, stump removal and/or brush root removal Construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of a facility.

Covered entity - means the holder of this *SPDES general permit* or an entity required to gain coverage under this *SPDES general permit*. The owner / operator of the small MS4.

Department - means the New York State Department of Environmental Conservation as well as meaning the Department 's designated agent.

Development - period after initial authorization under this *SPDES general permit* when the covered entity creates, designs or develops activities, BMPs, tasks or other measures to include in their SWMP

Discharge(s) - any addition of any pollutant to waters of the State through an outlet or point source.

Discharge Authorized by a SPDES Permit - means discharges of wastewater or stormwater from sources listed in the permit, that do not violate ECL Section 17-0501, that are through outfalls listed in the permit, and that are:

1. discharges within permit limitations of pollutants limited in the SPDES permit;

2. discharges within permit limitations of pollutants limited by an indicator limit in the SPDES permit;
3. discharges of pollutants subject to action level requirements in the SPDES permit;
4. discharges of pollutants not explicitly listed in the SPDES permit, but reported in the SPDES permit application record as detected in the discharge or as something the covered entity knows or has reason to believe to be present in the discharge, provided the special conditions section of the applicable SPDES permit does not otherwise forbid such a discharge and provided that such discharge does not exceed, by an amount in excess of normal effluent variability, the level of discharge that may reasonably be expected for that pollutant from information provided in the SPDES permit application record;
5. discharges of pollutants not required to be reported on the appropriate and current New York State SPDES permit application; provided the special conditions section of the permit does not otherwise forbid such a discharge. The Department may, in accordance with law and regulation, modify the permit to include limits for any pollutant even if that pollutant is not required to be reported on the SPDES permit application; or
6. discharges from fire fighting activities; fire hydrant flushings; testing of fire fighting equipment, provided that such equipment is for water only fire suppression; potable water sources including waterline flushings; irrigation drainage; lawn watering; uncontaminated infiltration and inflow; leakage from raw water conveyance systems; routine external building washdown and vehicle washing which does not use detergents or other compounds; pavement washwaters where spills or leaks of toxic or hazardous materials, other than minor and routine releases from motor vehicles, have not occurred (unless such material has been removed) and where detergents are not used; air conditioning and steam condensate; springs; uncontaminated groundwater; and foundation or footing drains where flows are not contaminated with process materials such as solvents provided that the covered entity has implemented an effective plan for minimizing the discharge of pollutants from all of the sources listed in this subparagraph.

Environmental Conservation Law - means chapter 43-B of the Consolidated Laws of the State of New York, entitled the Environmental Conservation Law.

Green Infrastructure - Green infrastructure approaches essentially infiltrate, evapotranspirate or reuse stormwater, with significant utilization of soils and vegetation rather than traditional hardscape collection, conveyance and storage structures . Common green infrastructure approaches include green roofs, trees and tree boxes, rain gardens, vegetated swales, pocket wetlands, infiltration planters, vegetated median strips, reforestation, and protection and enhancement of riparian buffers and floodplains. See also Low Impact Development and Better Site Design.

Groundwater - means waters in the saturated zone. The saturated zone is a subsurface zone in which all the interstices are filled with water under pressure greater than that of the

atmosphere. Although the zone may contain gas-filled interstices or interstices filled with fluids other than water, it is still considered saturated.

Illicit Discharges - discharges not entirely composed of stormwater into the small MS4, except those identified in Part I.A.2. Examples of illicit discharges are non-permitted sanitary sewage, garage drain effluent, and waste motor oil. However, an illicit discharge could be any other non-permitted discharge which the covered entity or Department has determined to be a substantial contributor of pollutants to the small MS4.

Impaired Water - a water is impaired if it does not meet its designated use(s). For purposes of this permit 'impaired' refers to impaired waters for which TMDLs have been established, for which existing controls such as permits are expected to resolve the impairment, and those needing a TMDL. Impaired waters compilations are also sometimes referred to as 303(d) lists; 303(d) lists generally include only waters for which TMDLs have not yet been developed. States will generally have associated, but separate lists of impaired waters for which TMDLs have already been established.

Implementation - period after development of SWMP, where the covered entity puts into effect the practices, tasks and other activities in their SWMP.

Individual SPDES Permit - means a SPDES permit issued to a single facility in one location in accordance with this Part (as distinguished from a *SPDES general permit*).

Industrial Activity - as defined by the SPDES Multi-Sector General Permit (GP-0-06-002).

Larger Common Plan of Development or Sale - means a contiguous area where multiple separate and distinct construction activities are occurring, or will occur, under one plan. The term "plan" in "larger common plan of development or sale" is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, State Environmental Quality Review Act Application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating that construction activities may occur on a specific plot.

For discrete construction projects that are located within a larger common plan of development or sale that are at least 1/4 mile apart, each project can be treated as a separate plan of development or sale provided any interconnecting road, pipeline or utility project that is part of the same "common plan" is not concurrently being disturbed.

Low Impact Development - is a site design strategy with a goal of maintaining or replicating the predevelopment hydrologic regime through the use of design techniques to create a functionally equivalent hydrologic landscape. Hydrologic functions of storage, infiltration,

and ground water recharge, as well as the volume and frequency of discharges are maintained through the use of integrated and distributed micro scale stormwater retention and detention areas, reduction of impervious surfaces, and the lengthening of flow paths and runoff time. Other strategies include the preservation/protection of environmentally sensitive site features such as riparian buffers, wetlands, steep slopes, valuable (mature) trees, flood plains, woodlands and highly permeable soils. LID principles are based on controlling stormwater at the source by the use of micro scale controls that are distributed throughout the site. This is unlike conventional approaches that typically convey and manage runoff in large facilities located at the base of drainage areas. See also Green Infrastructure and Better Site Design.

Management Practices - See best management practices

Maximum Extent Practicable - is a technology-based standard established by Congress in the Clean Water Act §402(p)(3)(B)(iii). Since no precise definition of MEP exists, it allows for maximum flexibility on the part of MS4 operators as they develop their programs. (40CFR 122.2 See also: Stormwater Phase II Compliance Assistance Guide EPA 833-R-00-002, March 2000). When trying to reduce pollutants to the MEP, there must be a serious attempt to comply, and practical solutions may not be lightly rejected. If a covered entity chooses only a few of the least expensive methods, it is likely that MEP has not been met. On the other hand, if a covered entity employs all applicable BMPs except those where it can be shown that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the statndard. MEP required covered entities to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive.

Measurable Goals - are the goals of the SWMP that should reflect the needs and characteristics of the covered entity and the areas served by its small MS4. Furthermore, the goals should be chosen using an integrated approach that fully addresses the requirements and intent of the MCM. The assumption is that the program schedules would be created over a 5 year period and goals would be integrated into that time frame. For example, a larger MS4 could do an outfall reconnaissance inventory for 20% of the collection system every year so that every outfall is inspected once within the permit cycle

Municipal / Municipalities - referred to in the federal rule that describes the Phase II stormwater program includes not only the State's municipal governments (cities, towns, villages and counties), but any publicly funded entity that owns or operates a separate storm sewer system. Examples of other public entities that are included in this program include the State Department of Transportation, State University Campuses, federal and State prisons, State and federal hospitals, Thruway and Dormitory Authorities, public housing authorities, school and other special districts.

Municipal Separate Storm Sewer System - a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
1. owned or operated by a State, city, town, village, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA, that discharges to surface waters of the State;
2. designed or used for collecting or conveying stormwater;
3. which is not a combined sewer; and
4. which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

National Pollutant Discharge Elimination System - means the national system for the issuance of wastewater and stormwater permits under the Federal Water Pollution Control Act (Clean Water Act).

Non-traditional MS4s - state and federal prisons, office complexes, hospitals; state: transportation agencies; university campuses, public housing authorities, schools, other special districts.

Open Meetings Law - per Public Officers Law, Article 7, Open Meetings Law, Section 104, Public notice:
1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy two hours before such meeting.
2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

Operator - the person, persons or legal entity that is responsible for the small MS4, as indicated by signing the NOI to gain coverage for the MS4 under this *SPDES general permit*.

Outfall - is defined as any point where a municipally owned and operated separate storm sewer system discharges to either surface waters of the State or to another MS4. Outfalls include discharges from pipes, ditches, swales, and other points of concentrated flow. However, areas of non-concentrated (sheet) flow which drain to surface waters of the State or to another MS4's system are not considered outfalls and should not be identified as such on the system map.

Pollutants of Concern - there are POCs that are primary (comprise the majority) sources of stormwater pollutants and others that are secondary (less likely).

- The POCs that are primarily of concern are: nitrogen, phosphorus, silt and sediment, pathogens, flow, and floatables impacting impaired waterbodies listed on the Priority Waterbody List known to come in contact with stormwater that could be discharged to that water body.

- The POCs that are secondarily of concern include but are not limited to petroleum hydrocarbons, heavy metals, and polycyclic aromatic hydrocarbons (PAHs), where stormwater or runoff is listed as the source of this impairment.

- The primary and secondary POCs can also impair waters not on the 303(d) list. Thus, it is important for the covered entity to assess known and potential POCs within the area served by their small MS4. This will allow the covered entity to address POCs appropriate to their MS4.

Qualified Professional - means a person that is knowledgeable in the principles and practices of stormwater management and treatment, such as a licensed Professional Engineer, Registered Landscape Architect or other Department endorsed individual(s). Individuals preparing SWPPPs that require the post-construction stormwater management practice component must have an understanding of the principles of hydrology, water quality management practice design, water quantity control design, and, in many cases, the principles of hydraulics in order to prepare a SWPPP that conforms to the Department's technical standard. All components of the SWPPP that involve the practice of engineering, as defined by the NYS Education Law (see Article 145), shall be prepared by, or under the direct supervision of, a professional engineer licensed to practice in the State of New York.

Reporting Date – means the end of the annual reporting period, March 9, as indicated in Part V.C.1.

Retrofit - means modifying or adding to existing infrastructure for the purpose of reducing pollutant loadings. Examples, some of which may not be effective for all pollutants, include:

Better site design approaches such as roof top disconnection, diversion of runoff to infiltration areas, soil de-compaction, riparian buffers, rain gardens, cisterns

Rehabilitation of existing storm sewer system by installation of standard stormwater treatment systems (ponds, wetlands, filtering, infiltration) or proprietary practices

Stabilize dirt roads (gravel, stone, water bar, check dam, diversion)

Conversion of dirt parking lots to pervious pavement, grassed or stone cover

Conversion of dry detention ponds to extended detention or wetland treatment systems

Retrofit by converting abandoned buildings to stormwater treatment systems

Retrofit of abandoned building to open space

Retrofit road ditches to enhance open channel design

Control the downstream effects of runoff from existing paved surfaces resulting in flooding and erosion in receiving waters

Control stream erosion by plunge pool, velocity dissipaters, and flow control devices for discharges from conveyance systems

Upgrade of an existing conveyance system to provide water quality and /or quantity control within the drainage structure

Section 303(d) Listed Waters - Section 303(d) is part of the federal CWA that requires the Department to periodically to prepare a list of all surface waters in the State for which beneficial uses of the water – such as for drinking, recreation, aquatic habitat, and industrial use – are impaired by pollutants. These are water quality-limited estuaries, lakes, and streams that fall short of state surface water quality standards, and are not expected to improve within the next two years. Refer to impaired waters for more information.

Single entity - An entity, formed in accordance with the applicable state and/or local legislation, with a legal authority and capacity (financial, resources, etc...) that gains coverage under the MS4 general permit to implement all or parts of the MS4 program within a jurisdiction on behalf of multiple MS4s in that geographic area.

Small MS4 - MS4 system within an urbanized area or other areas designated by the State.

SPDES general permit - means a SPDES permit issued pursuant to 6 NYCRR Part 750-1.21 authorizing a category of discharges.

Staff - actual employees of the covered entity or contracted entity.

State - means the State of New York.

State Pollutant Discharge Elimination System - means the system established pursuant to Article 17 of the ECL and 6 NYCRR Part 750 for issuance of permits authorizing discharges to the waters of the state.

Stormwater - means that portion of precipitation that, once having fallen to the ground, is in excess of the evaporative or infiltrative capacity of soils, or the retentive capacity of surface features, which flows or will flow off the land by surface runoff to waters of the state.

Stormwater Management Program - the program implemented by the covered entity. Covered entities are required at a minimum to develop, implement and enforce a SWMP designed to address POCs and reduce the discharge of pollutants from the small MS4 to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the *ECL* and Clean Water Act. The SWMP must address the MCM described in Part VIII.

The *SWMP* needs to include *measurable goals* for each of the *BMP*s. The measurable goals will help the covered entities assess the status and progress of their program. The SWMP should:

1. describe the BMP / measureable goal;
2. identify time lines / schedules and milestones for development and implementation;
3. include quantifiable goals to assess progress over time; and
4. describe how the covered entity will address POCs.

Guidance on developing SWMPs is available from the Department on its website. Examples of successful SWMPs and suggested measurable goals are also provided in EPA's Menu of BMPs available from its website. Note that this information is for guidance purposes only. An MS4 may choose to develop or implement equivalent methods equivalent to those made available by the Department and EPA to demonstrate compliance with the MCMs.

When creating the *SWMP*, the *covered entities* should assess activities already being performed that could help meet, or be modified to meet, permit requirements and be included in the *SWMP*. *Covered entities* can create their *SWMP* individually, with a group of other individual *covered entities* or a coalition of *covered entities*, or through the work of a third party entity.

Stormwater Management Program Plan- used by the covered entity to document developed, planned and implemented SWMP elements. The *SWMP plan* must describe how pollutants in stormwater runoff will be controlled. For previously unauthorized *small MS4s* seeking coverage, information included in the NOI should be obtained from the *SWMP plan*. The *SWMP plan* is a separate document from the NOI and should not be submitted with the NOI or any annual reports unless requested.

The *SWMP plan* should include a detailed written explanation of all management practices, activities and other techniques the covered entity has developed, planned and implemented for their SWMP to address POCs and reduce pollutant discharges from their small MS4 to the MEP. The *SWMP plan* shall be revised to incorporate any new or modified *BMP*s or *measurable goals*.

Covered entities can create their *SWMP plan* individually, with a group of other individual *covered entities* or a coalition of *covered entities*, or through the work of a third party entity.

Documents to include are: applicable local laws, inter-municipal agreements and other legal authorities; staffing and staff development programs and organization charts; program budget; policy, procedures, and materials for each minimum measure; outfall and small MS4 system maps; stormwater management practice selection and measurable goals; operation and maintenance schedules; documentation of public outreach efforts and public comments; submitted construction site SWPPPs and review letters and construction site inspection reports.

The *SWMP plan* shall be made readily available to the covered entity's staff and to the public and regulators, such as *Department* and EPA staff. Portions of the *SWMP plan*, primarily policies and procedures, must be available to the management and staff of a *covered entity* that will be called upon to use them. For example, the technical standards and associated technical assistance documents and manuals for stormwater controls should be available to code enforcement officers, review engineers and planning boards. The local laws should be readily available to the town board and planning board. An integrated pest management program would have to be available to the the parks department and the stormwater outfall and available sewer system mapping and catch basin cleaning schedule would have to be available to the department of public works.

Storm sewershed - the catchment area that drains into the storm sewer system based on the surface topography in the area served by the stormsewer. Adjacent catchment areas that drain to adjacent outfalls are not separate storm sewersheds.

Surface Waters of the State - shall be construed to include lakes, bays, sounds, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial seas of the state of New York and all other bodies of

surface water, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters that do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction. Waters of the state are further defined in 6 NYCRR Parts 800 to 941.

Storm sewers are not waters of the state unless they are classified in 6 NYCRR Parts 800 to 941. Nonetheless, a discharge to a storm sewer shall be regulated as a discharge at the point where the storm sewer discharges to waters of the state. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act and Environmental Conservation Law (other than cooling ponds as defined in 40 CFR 423.11(m)(see section 750 - 1.24) which also meet the criteria of this definition are not waters of the state. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the State (such as a disposal area in wetlands) nor resulted from impoundment of waters of the state.

SWPPP - as defined per the NYS DEC SPDES General Permit for Stormwater Discharges from Construction Activity or NYS DEC SPDES Multi-Sector General Permit for Stormwater Associated with Industrial Activity .

Total Maximum Daily Load - A TMDL is the sum of the allowable loads of a single pollutant from all contributing point and nonpoint sources. It is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. A TMDL stipulates wasteload allocations for point source discharges, load allocations for nonpoint sources, and a margin of safety.

Traditional Land Use Control MS4s - means a city, town or village with land use control authority.

Traditional Non-land Use Control MS4s - means any county agency without land use control.

Urbanized Area - is a land area comprising one or more places (central place(s)) and the adjacent densely settled surrounding area (urban fringe) that together have a residential population of at least 50,000 and an overall population density of at least 1,000 people per square mile, as defined by the US Bureau of Census. Outlines the extent of automatically regulated areas, often do not extend to the political boundaries of a city, town, or village. SWMPs are only required within the UA. However, the Department encourages covered entities to voluntarily extend their SWMP programs at least to the extent of the storm sewershed that flows into the UA or extend further to their entire jurisdiction. For ease of creation and administration of local laws, ordinances or other regulatory mechanisms, these should be created to apply to the full jurisdictional boundary of municipalities.

Water Quality Standard - means such measures of purity or quality for any waters in relation to their reasonable and necessary use as promulgated in 6 NYCRR Part 700 et seq.

Part XI. RE-OPENER CLAUSE

If there is evidence indicating that the stormwater discharges authorized by this permit cause or have the reasonable potential to cause or contribute to a violation of a water quality standard, the covered entity may be required at the Department 's sole discretion to obtain an individual SPDES permit or an alternative *SPDES general permit* or the permit may be modified. In addition, coverage under this permit could terminate, meaning the discharge must cease.

APPENDICES

APPENDIX 1: LIST OF NYS DEC REGIONAL OFFICES

Region	Covering the following counties:	Division of Environmental Permits (DEP) Permit Administrators	Division of Water (DOW) Water (SPDES) Program
1	Nassau and Suffolk	50 Circle Road Stony Brook, Ny 11790 Tel. (631) 444-0365	50 Circle Road Stony Brook, Ny 11790-3409 Tel. (631) 444-0405
2	Bronx, Kings, New York, Queens and Richmond	1 Hunters Point Plaza, 47-40 21st St. Long Island City, Ny 11101-5407 Tel. (718) 482-4997	1 Hunters Point Plaza, 47-40 21st St. Long Island City, Ny 11101-5407 Tel. (718) 482-4933
3	Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester	21 South Putt Corners Road New Paltz, Ny 12561-1696 Tel. (845) 256-3059	100 Hillside Avenue, Suite 1w White Plains, Ny 10603 Tel. (914) 428 - 2505
4	Albany, Columbia, Delaware, Greene, Montgomery, Otsego, Rensselaer, Schenectady and Schoharie	1150 North Westcott Road Schenectady, Ny 12306-2014 Tel. (518) 357-2069	1130 North Westcott Road Schenectady, Ny 12306-2014 Tel. (518) 357-2045
5	Clinton, Essex, Franklin, Fulton, Hamilton, Saratoga, Warren and Washington	1115 State Route 86, Po Box 296 Ray Brook, Ny 12977-0296 Tel. (518) 897-1234	232 Golf Course Road, Po Box 220 Warrensburg, Ny 12885-0220 Tel. (518) 623-1200
6	HERKIMER, JEFFERSON, LEWIS, ONEIDA AND ST. LAWRENCE	STATE OFFICE BUILDING 317 WASHINGTON STREET WATERTOWN, NY 13601-3787 TEL. (315) 785-2245	STATE OFFICE BUILDING 207 GENESEE STREET UTICA, NY 13501-2885 TEL. (315) 793-2554
7	BROOME, CAYUGA, CHENANGO, CORTLAND, MADISON, ONONDAGA, OSWEGO, TIOGA AND TOMPKINS	615 ERIE BLVD. WEST SYRACUSE, NY 13204-2400 TEL. (315) 426-7438	615 ERIE BLVD. WEST SYRACUSE, NY 13204-2400 TEL. (315) 426-7500
8	CHEMUNG, GENESEE, LIVINGSTON, MONROE, ONTARIO, ORLEANS, SCHUYLER, SENECA, STEUBEN, WAYNE AND YATES	6274 EAST AVON-LIMA ROAD AVON, NY 14414-9519 TEL. (585) 226-2466	6274 EAST AVON-LIMA RD. AVON, NY 14414-9519 TEL. (585) 226-2466
9	ALLEGANY, CATTARAUGUS, CHAUTAUQUA, ERIE, NIAGARA AND WYOMING	270 MICHIGAN AVENUE BUFFALO, NY 14203-2999 TEL. (716) 851-7165	270 MICHIGAN AVE. BUFFALO, NY 14203-2999 TEL. (716) 851-7070

APPENDIX 2: IMPAIRED SEGMENTS AND PRIMARY POLLUTANTS OF CONCERN

COUNTY	WATERBODY NAME	POLLUTANT
Albany	Ann Lee (Shakers) Pond, Stump Pond	phosphorus
Albany	Basic Creek Reservoir	phosphorus
Bronx	Van Cortlandt Lake	phosphorus
Bronx	Bronx River, Lower	pathogens
Bronx	Bronx River, Lower	floatables
Bronx	Bronx River, Middle, and tribs	pathogens
Bronx	Bronx River, Middle, and tribs	floatables
Bronx	Westchester Creek	floatables
Bronx	Hutchinson River, Lower, and tribs	floatables
Broome	Susquehanna River, Lower, Main Stem	pathogens
Broome	Whitney Point Lake/Reservoir	phosphorus
Broome	Park Creek and tribs	pathogens
Broome	Beaver Lake	phosphorus
Broome	White Birch Lake	phosphorus
Cayuga	Little Sodus Bay	phosphorus
Cayuga	Owasco Lake	pathogens
Cayuga, Tompkins	Owasco Inlet, Upper, and tribs	phosphorus
Chautauqua	Lake Erie (Dunkirk Harbor)	pathogens
Chautauqua	Chadakoin River and tribs	phosphorus
Chautauqua	Chautauqua Lake, South	phosphorus
Chautauqua	Chautauqua Lake, North	phosphorus
Chautauqua	Bear Lake	phosphorus
Chautauqua	Lower Cassadaga Lake	phosphorus
Chautauqua	Middle Cassadaga Lake	phosphorus
Chautauqua	Findley Lake	phosphorus
Chenango	Unadilla River, Lower, Main Stem	pathogens
Clinton	Lake Champlain, Main Lake, North	phosphorus
Clinton	Lake Champlain, Main Lake, Middle	phosphorus
Clinton	Great Chazy River, Lower, Main Stem	silt/sediment
Columbia	Robinson Pond	phosphorus
Columbia	Kinderhook Lake	phosphorus
Delaware	Cannonsville Reservoir	phosphorus
Dutchess	Hillside Lake	phosphorus
Dutchess	Wappinger Lakes	phosphorus
Dutchess	Wappinger Lakes	silt/sediment
Dutchess	Fall Kill and tribs	phosphorus
Dutchess	Rudd Pond	phosphorus
Erie	Ellicott Creek, Lower, and tribs	phosphorus
Erie	Ellicott Creek, Lower, and tribs	silt/sediment

COUNTY	WATERBODY NAME	POLLUTANT
Erie	Ransom Creek, Lower, and tribs	pathogens
Erie	Ransom Creek, Upper, and tribs	pathogens
Erie	Beeman Creek and tribs	phosphorus
Erie	Beeman Creek and tribs	pathogens
Erie	Murder Creek, Lower, and tribs	phosphorus
Erie	Murder Creek, Lower, and tribs	pathogens
Erie	Two Mile Creek and tribs	pathogens
Erie	Two Mile Creek and tribs	floatables
Erie	Scajaquada Creek, Lower, and tribs	floatables
Erie	Scajaquada Creek, Lower, and tribs	pathogens
Erie	South Branch Smoke Cr, Lower, and tribs	phosphorus
Erie	South Branch Smoke Cr, Lower, and tribs	silt/sediment
Erie	Rush Creek and tribs	pathogens
Erie	Rush Creek and tribs	phosphorus
Erie	Little Sister Creek, Lower, and tribs	phosphorus
Erie	Little Sister Creek, Lower, and tribs	pathogens
Essex	Lake Champlain, Main Lake, South	phosphorus
Essex	Lake Champlain, South Lake	phosphorus
Genesee	Tonawanda Creek, Middle, Main Stem	phosphorus
Genesee	Tonawanda Creek, Middle, Main Stem	silt/sediment
Genesee	Tonawanda Creek, Upper, and minor tribs	silt/sediment
Genesee	Bowen Brook and tribs	phosphorus
Genesee	Little Tonawanda Creek, Lower, and tribs	silt/sediment
Genesee	Oak Orchard Cr, Upper, and tribs	phosphorus
Genesee	Black Creek, Upper, and minor tribs	phosphorus
Genesee	Bigelow Creek and tribs	phosphorus
Greene	Schoharie Reservoir	silt/sediment
Greene	Shingle Kill and tribs	pathogens
Greene	Sleepy Hollow Lake	silt/sediment
Herkimer	Unadilla River, Middle, and minor tribs	pathogens
Herkimer	Mohawk River, Main Stem	pathogens
Herkimer	Mohawk River, Main Stem	floatables
Herkimer	Steele Creek tribs	phosphorus
Herkimer	Steele Creek tribs	silt/sediment
Jefferson	Moon Lake	phosphorus
Kings	Coney Island Creek	pathogens
Kings	Coney Island Creek	floatables
Kings	Gowanus Canal	floatables
Kings	Hendrix Creek	nitrogen
Kings	Hendrix Creek	pathogens
Kings	Hendrix Creek	floatables
Kings	Paerdegat Basin	floatables

COUNTY	WATERBODY NAME	POLLUTANT
Kings	Mill Basin and tidal tribs	floatables
Lewis	Beaver River, Lower, and tribs	pathogens
Lewis	Beaver River, Lower, and tribs	floatables
Lewis	Mill Creek/South Branch, and tribs	phosphorus
Lewis	Mill Creek/South Branch, and tribs	pathogens
Livingston	Conesus Lake	phosphorus
Livingston	Jaycox Creek and tribs	phosphorus
Livingston	Jaycox Creek and tribs	silt/sediment
Livingston	Mill Creek and minor tribs	silt/sediment
Madison	Canastota Creek, Lower, and tribs	pathogens
Monroe	Rochester Embayment - West	pathogens
Monroe	Mill Creek and tribs	phosphorus
Monroe	Mill Creek and tribs	pathogens
Monroe	Shipbuilders Creek and tribs	phosphorus
Monroe	Shipbuilders Creek and tribs	pathogens
Monroe	Minor Tribs to Irondequoit Bay	phosphorus
Monroe	Minor Tribs to Irondequoit Bay	pathogens
Monroe	Thomas Creek/White Brook and tribs	phosphorus
Monroe	Buck Pond	phosphorus
Monroe	Long Pond	phosphorus
Monroe	Cranberry Pond	phosphorus
Monroe	Genesee River, Lower, Main Stem	phosphorus
Monroe	Genesee River, Lower, Main Stem	pathogens
Monroe	Genesee River, Lower, Main Stem	silt/sediment
Monroe	Genesee River, Middle, Main Stem	phosphorus
Monroe	Black Creek, Lower, and minor tribs	phosphorus
Nassau	Long Island Sound, Nassau County	pathogens
Nassau	Long Island Sound, Nassau County	nitrogen
Nassau	Manhasset Bay, and tidal tribs	pathogens
Nassau	Manhasset Bay, and tidal tribs	pathogens
Nassau	Hempstead Harbor, south, and tidal tribs	pathogens
Nassau	Glen Cove Creek, Lower, and tribs	pathogens
Nassau	Glen Cove Creek, Lower, and tribs	silt/sediment
Nassau	Dosoris Pond	pathogens
Nassau	Mill Neck Creek and tidal tribs	pathogens
Nassau	South Oyster Bay	pathogens
Nassau	East Bay	pathogens
Nassau	LI Tribs (fresh) to East Bay	phosphorus
Nassau	LI Tribs (fresh) to East Bay	silt/sediment
Nassau	Middle Bay	pathogens
Nassau	East Rockaway Inlet	pathogens
Nassau	Reynolds Channel, east	pathogens

COUNTY	WATERBODY NAME	POLLUTANT
Nassau	East Meadow Brook, Upper, and tribs	silt/sediment
Nassau	Hempstead Bay	Nitrogen
Nassau	Hempstead Bay	pathogens
Nassau	Hempstead Lake	phosphorus
Nassau	Grant Park Pond	phosphorus
Nassau	Woodmere Channel	pathogens
New York	East River, Lower	floatables
New York	Harlem River	floatables
Niagara	Bergholtz Creek and tribs	phosphorus
Niagara	Bergholtz Creek and tribs	pathogens
Oneida	Utica Harbor	pathogens
Oneida	Utica Harbor	floatables
Oneida	Mohawk River, Main Stem	pathogens
Oneida	Mohawk River, Main Stem	floatables
Oneida	Mohawk River, Main Stem	pathogens
Oneida	Mohawk River, Main Stem	floatables
Oneida	Ballou, Nail Creeks and tribs	phosphorus
Oneida	Ninemile Creek, Lower, and tribs	pathogens
Onondaga	Limestone Creek, Lower, and minor tribs	pathogens
Onondaga	Seneca River, Lower, Main Stem	pathogens
Onondaga	Onondaga Lake, northern end	phosphorus
Onondaga	Onondaga Lake, southern end	pathogens
Onondaga	Onondaga Lake, southern end	phosphorus
Onondaga	Minor Tribs to Onondaga Lake	phosphorus
Onondaga	Minor Tribs to Onondaga Lake	pathogens
Onondaga	Bloody Brook and tribs	pathogens
Onondaga	Ley Creek and tribs	pathogens
Onondaga	Ley Creek and tribs	phosphorus
Onondaga	Onondaga Creek, Lower, and tribs	phosphorus
Onondaga	Onondaga Creek, Lower, and tribs	pathogens
Onondaga	Onondaga Creek, Middle, and tribs	silt/sediment
Onondaga	Onondaga Creek, Middle, and tribs	phosphorus
Onondaga	Onondaga Creek, Middle, and tribs	pathogens
Onondaga	Onondaga Creek, Upper, and minor tribs	silt/sediment
Onondaga	Harbor Brook, Lower, and tribs	phosphorus
Onondaga	Harbor Brook, Lower, and tribs	pathogens
Onondaga	Ninemile Creek, Lower, and tribs	phosphorus
Onondaga	Ninemile Creek, Lower, and tribs	pathogens
Ontario	Hemlock Lake Outlet and minor tribs	phosphorus
Ontario	Hemlock Lake Outlet and minor tribs	pathogens
Ontario	Honeoye Lake	phosphorus
Ontario	Great Brook and minor tribs	phosphorus

COUNTY	WATERBODY NAME	POLLUTANT
Ontario	Great Brook and minor tribs	silt/sediment
Orange	Greenwood Lake	phosphorus
Oswego	Lake Neatahwanta	phosphorus
Otsego	Susquehanna River, Main Stem	pathogens
Putnam	Croton Falls Reservoir	phosphorus
Putnam	West Branch Reservoir	phosphorus
Putnam	Boyd Corners Reservoir	phosphorus
Putnam	Middle Branch Reservoir	phosphorus
Putnam	Lake Carmel	phosphorus
Putnam	Diverting Reservoir	phosphorus
Putnam	East Branch Reservoir	phosphorus
Putnam	Bog Brook Reservoir	phosphorus
Putnam	Oscawana Lake	phosphorus
Queens	Newtown Creek and tidal tribs	floatables
Queens	East River, Upper	floatables
Queens	East River, Upper	floatables
Queens	Flushing Creek/Bay	nitrogen
Queens	Flushing Creek/Bay	floatables
Queens	Little Neck Bay	pathogens
Queens	Alley Creek/Little Neck Bay Trib	floatables
Queens	Jamaica Bay, Eastern, and tribs	nitrogen
Queens	Jamaica Bay, Eastern, and tribs	pathogens
Queens	Jamaica Bay, Eastern, and tribs	floatables
Queens	Thurston Basin	floatables
Queens	Bergen Basin	Nitrogen
Queens	Bergen Basin	pathogens
Queens	Bergen Basin	floatables
Queens	Shellbank Basin	nitrogen
Queens	Spring Creek and tribs	pathogens
Queens	Spring Creek and tribs	floatables
Rensselaer	Snyders Lake	phosphorus
Richmond	Raritan Bay (Class SA)	pathogens
Richmond	Arthur Kill (Class I) and minor tribs	floatables
Richmond	Newark Bay	floatables
Richmond	Kill Van Kull	floatables
Richmond	Grasmere, Arbutus and Wolfes Lakes	phosphorus
Saratoga	Dwaas Kill and tribs	Phosphorus
Saratoga	Dwaas Kill and tribs	silt/sediment
Saratoga	Schuyler Creek and tribs	phosphorus
Saratoga	Schuyler Creek and tribs	pathogens
Saratoga	Lake Lonely	phosphorus
Saratoga	Tribs to Lake Lonely	Phosphorus

COUNTY	WATERBODY NAME	POLLUTANT
Saratoga	Tribs to Lake Lonely	pathogens
Schenectady	Collins Lake	phosphorus
Schoharie	Cobleskill Creek, Lower, and tribs	pathogens
Schoharie	Engleville Pond	phosphorus
Schoharie	Summit Lake	phosphorus
St.Lawrence	Black Lake Outlet/Black Lake	phosphorus
Steuben	Lake Salubria	phosphorus
Steuben	Smith Pond	phosphorus
Suffolk	Millers Pond	phosphorus
Suffolk	Beach/Island Ponds, Fishers Island	pathogens
Suffolk	Dering Harbor	pathogens
Suffolk	Tidal Tribs to Gr Peconic Bay, Northshr	pathogens
Suffolk	Mattituck (Marratooka) Pond	phosphorus
Suffolk	Mattituck (Marratooka) Pond	pathogens
Suffolk	Flanders Bay, West/Lower Sawmill	nitrogen
Suffolk	Meetinghouse/Terrys Creeks and tribs	nitrogen
Suffolk	Meetinghouse/Terrys Creeks and tribs	pathogens
Suffolk	Peconic River, Lower, and tidal tribs	nitrogen
Suffolk	Peconic River, Lower, and tidal tribs	pathogens
Suffolk	Scallop Pond	pathogens
Suffolk	Oyster Pond/Lake Munchogue	pathogens
Suffolk	Phillips Creek, Lower, and tidal tribs	pathogens
Suffolk	Quogue Canal	pathogens
Suffolk	Forge River, Lower and Cove	pathogens
Suffolk	Tidal tribs to West Moriches Bay	Nitrogen
Suffolk	Tidal tribs to West Moriches Bay	pathogens
Suffolk	Canaan Lake	silt/sediment
Suffolk	Canaan Lake	phosphorus
Suffolk	Nicoll Bay	pathogens
Suffolk	Lake Ronkonkoma	phosphorus
Suffolk	Lake Ronkonkoma	pathogens
Suffolk	Great Cove	pathogens
Tompkins	Cayuga Lake, Southern End	phosphorus
Tompkins	Cayuga Lake, Southern End	silt/sediment
Tompkins	Cayuga Lake, Southern End	pathogens
Ulster	Ashokan Reservoir	silt/sediment
Ulster	Esopus Creek, Upper, and minor tribs	silt/sediment
Warren	Lake George	silt/sediment
Warren	Tribs to L.George, Village of L George	silt/sediment
Warren	Huddle/Finkle Brooks and tribs	silt/sediment
Warren	Indian Brook and tribs	silt/sediment
Warren	Hague Brook and tribs	silt/sediment

COUNTY	WATERBODY NAME	POLLUTANT
Warren	Huddle/Finkle Brooks and tribs	silt/sediment
Warren	Indian Brook and tribs	silt/sediment
Warren	Hague Brook and tribs	silt/sediment
Washington	Lake Champlain, South Bay	phosphorus
Washington	Tribs to L.George, East Shore	silt/sediment
Washington	Cossayuna Lake	phosphorus
Wayne	Blind Sodus Bay	phosphorus
Wayne	Port Bay	phosphorus
Westchester	Saw Mill River, Lower, and tribs	floatables
Westchester	New Croton Reservoir	phosphorus
Westchester	Upper New Croton/Muscoot Reservoir	phosphorus
Westchester	Amawalk Reservoir	phosphorus
Westchester	Lake Lincolndale	phosphorus
Westchester	Peach Lake	pathogens
Westchester	Peach Lake	phosphorus
Westchester	Titicus Reservoir	phosphorus
Westchester	Cross River Reservoir	phosphorus
Westchester	Lake Meahaugh	phosphorus
Westchester	Bronx River, Upper, and tribs	pathogens
Westchester	New Rochelle Harbor	pathogens
Westchester	New Rochelle Harbor	floatables
Westchester	Long Island Sound, Westchester Co	pathogens
Westchester	Long Island Sound, Westchester Co	nitrogen
Westchester	Larchmont Harbor	pathogens
Westchester	Larchmont Harbor	floatables
Westchester	Hutchinson River, Middle, and tribs	pathogens
Westchester	Mamaroneck Harbor	pathogens
Westchester	Mamaroneck Harbor	floatables
Westchester	Mamaroneck River, Lower	silt/sediment
Westchester	Mamaroneck River, Upper, and minor	silt/sediment
Westchester	Sheldrake River and tribs	phosphorus
Westchester	Sheldrake River and tribs	silt/sediment
Westchester	Milton Harbor	pathogens
Westchester	Milton Harbor	floatables
Westchester	Blind Brook, Lower	silt/sediment
Westchester	Blind Brook, Upper, and tribs	silt/sediment
Westchester	Port Chester Harbor	pathogens
Westchester	Port Chester Harbor	floatables
Westchester	Byram River, Lower	pathogens
Wyoming	Java Lake	phosphorus
Wyoming	Silver Lake	phosphorus

APPENDIX 2 (CONTINUED)
IMPAIRED SEGMENTS AND SECONDARY POLLUTANTS OF CONCERN

COUNTY	WATERBODY	POLLUTANT
Oneida	Mohawk River, Main Stem	Copper
Westchester	Hutchinson River, Middle and tribs	Oil and Grease

APPENDIX 3: NEW YORK CITY WATERSHED EAST OF THE HUDSON RIVER WATERSHED MAP

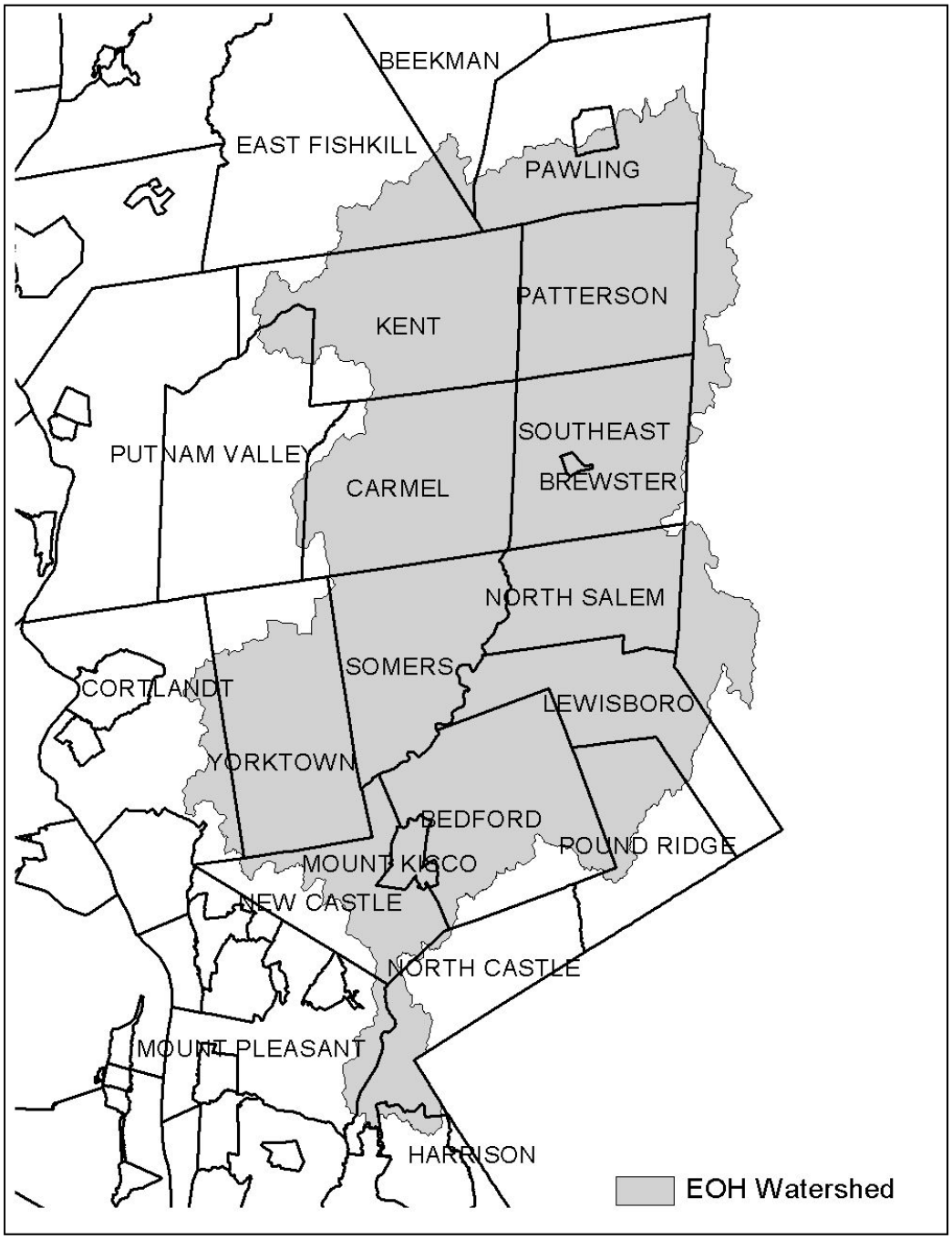

Figure 1. The requirements of watershed improvement strategies apply to the sewersheds within the shaded areas.

APPENDIX 4: ONONDAGA LAKE WATERSHED MAP

Figure 2. The requirements of watershed improvement strategies apply to the sewersheds within the shaded areas.

APPENDIX 5: GREENWOOD LAKE WATERSHED MAP

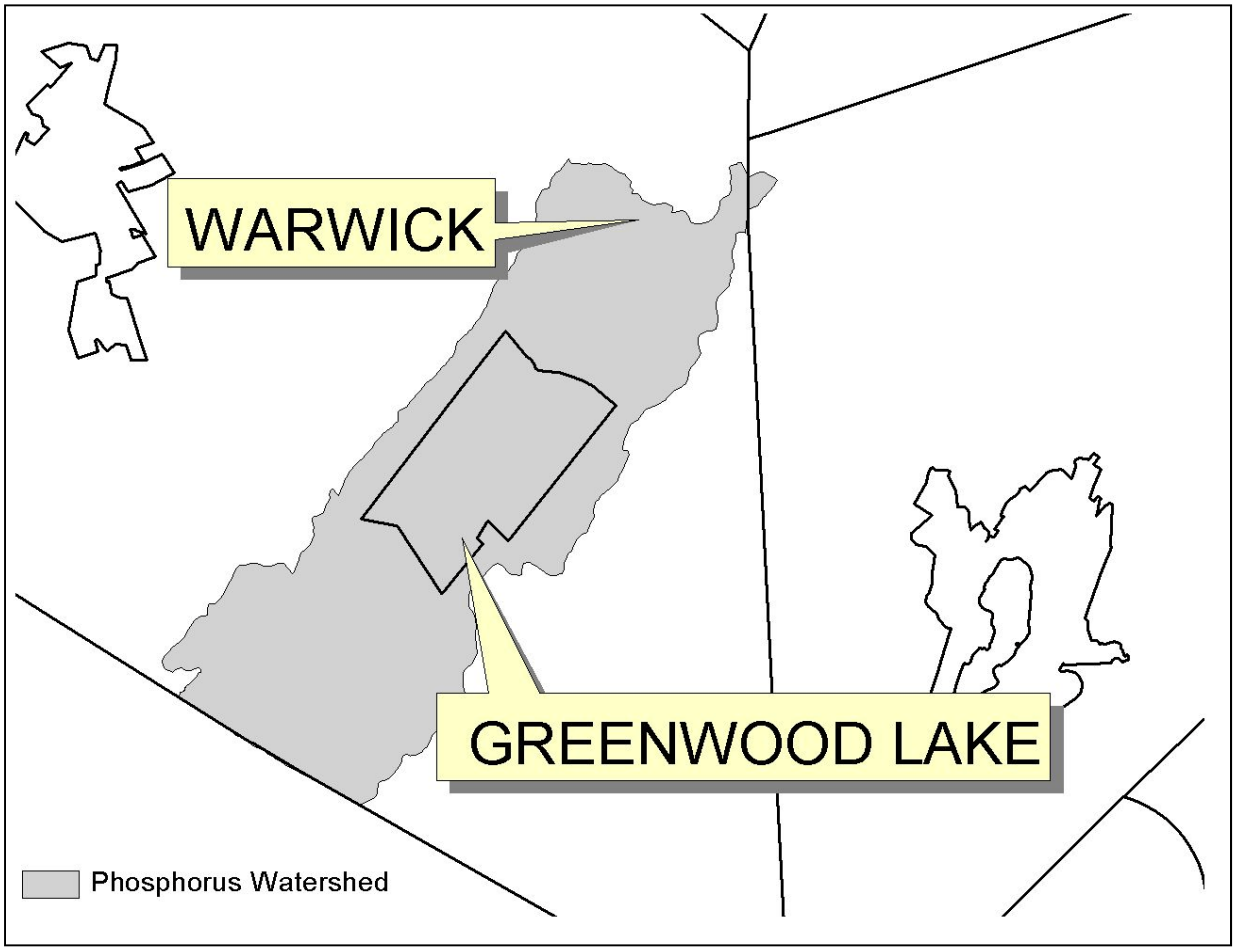

Figure 3. The requirements of watershed improvement strategies apply to the sewersheds within the shaded areas.

APPENDIX 6: OYSTER BAY WATERSHED MAP

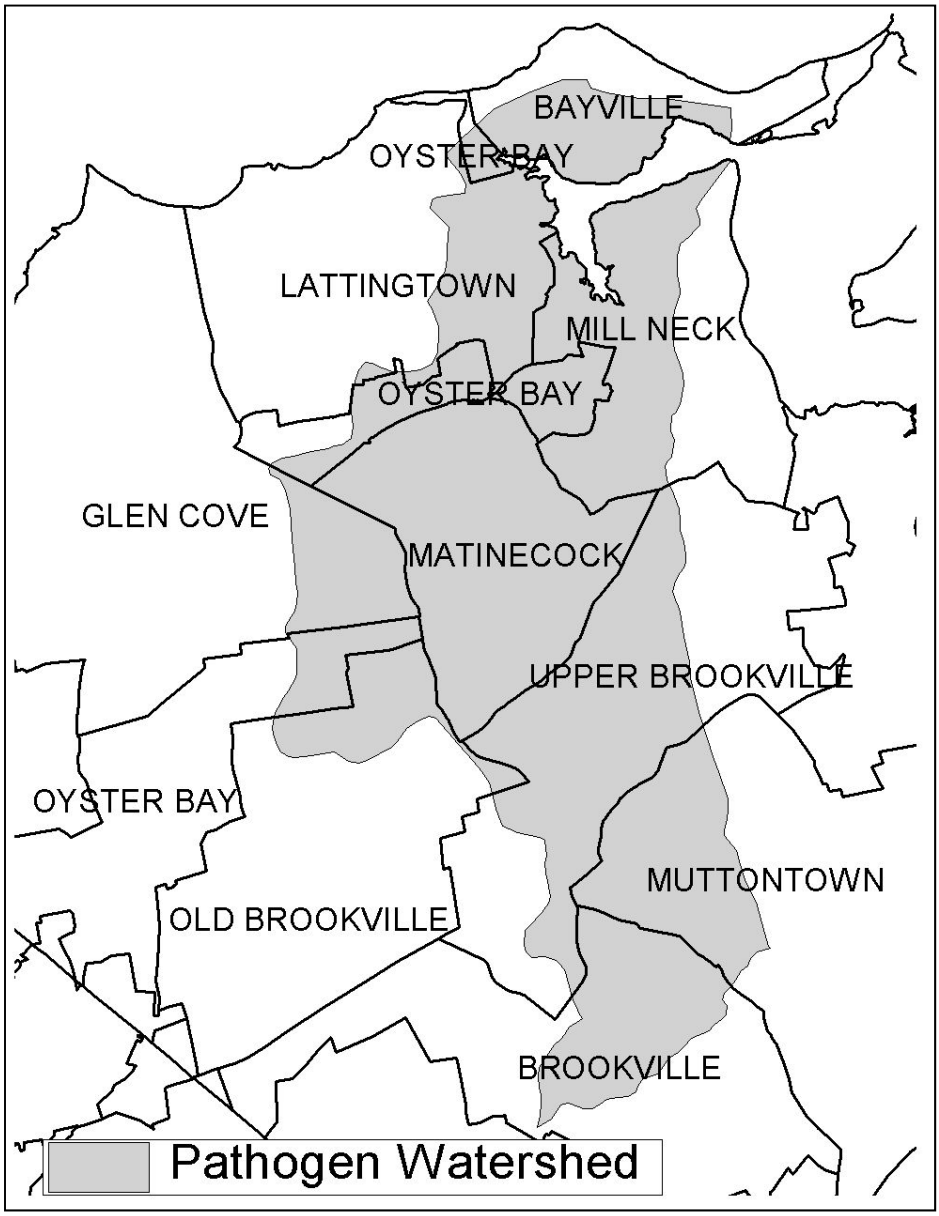

Figure 4. The requirements of watershed improvement strategies apply to the sewersheds within the shaded areas.

APPENDIX 7: PECONIC ESTUARY PATHOGEN WATERSHED MAP

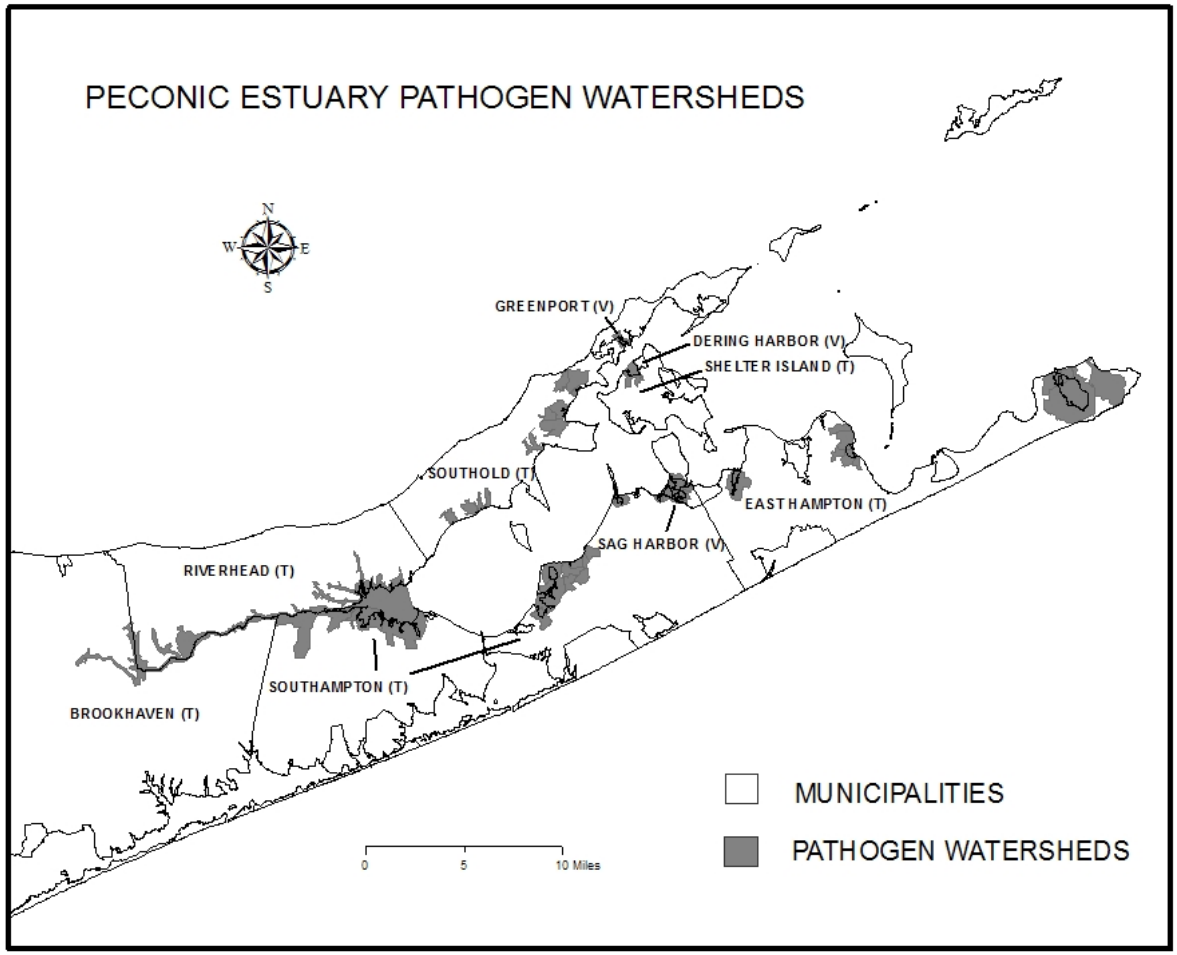

Figure 5. The requirements of watershed improvement strategies apply to the sewersheds within the shaded areas.

APPENDIX 8: PECONIC ESTUARY NITROGEN WATERSHED MAP

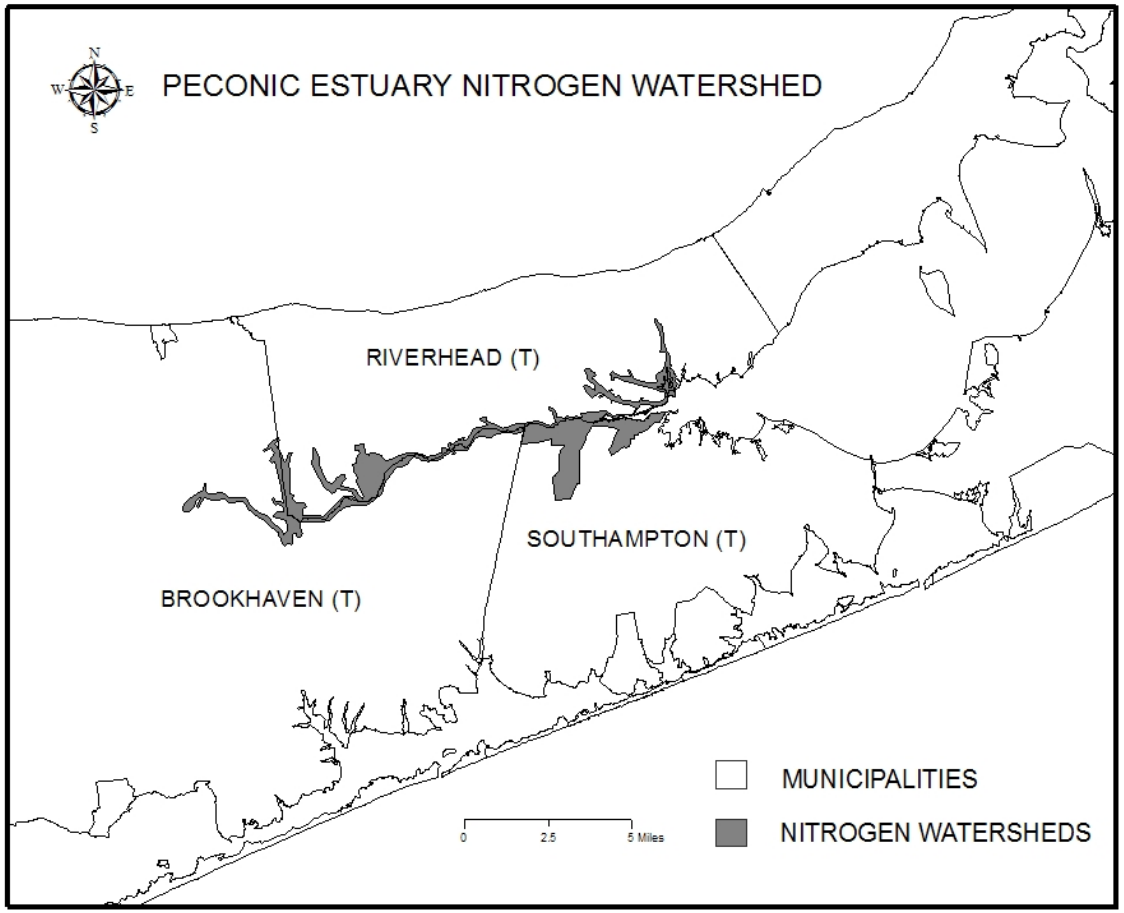

Figure 6. The requirements of watershed improvement strategies apply to the sewersheds within the shaded areas.

APPENDIX 9: THE 27 LONG ISLAND SHELLFISHING IMPAIRED EMBAYMENT MAP

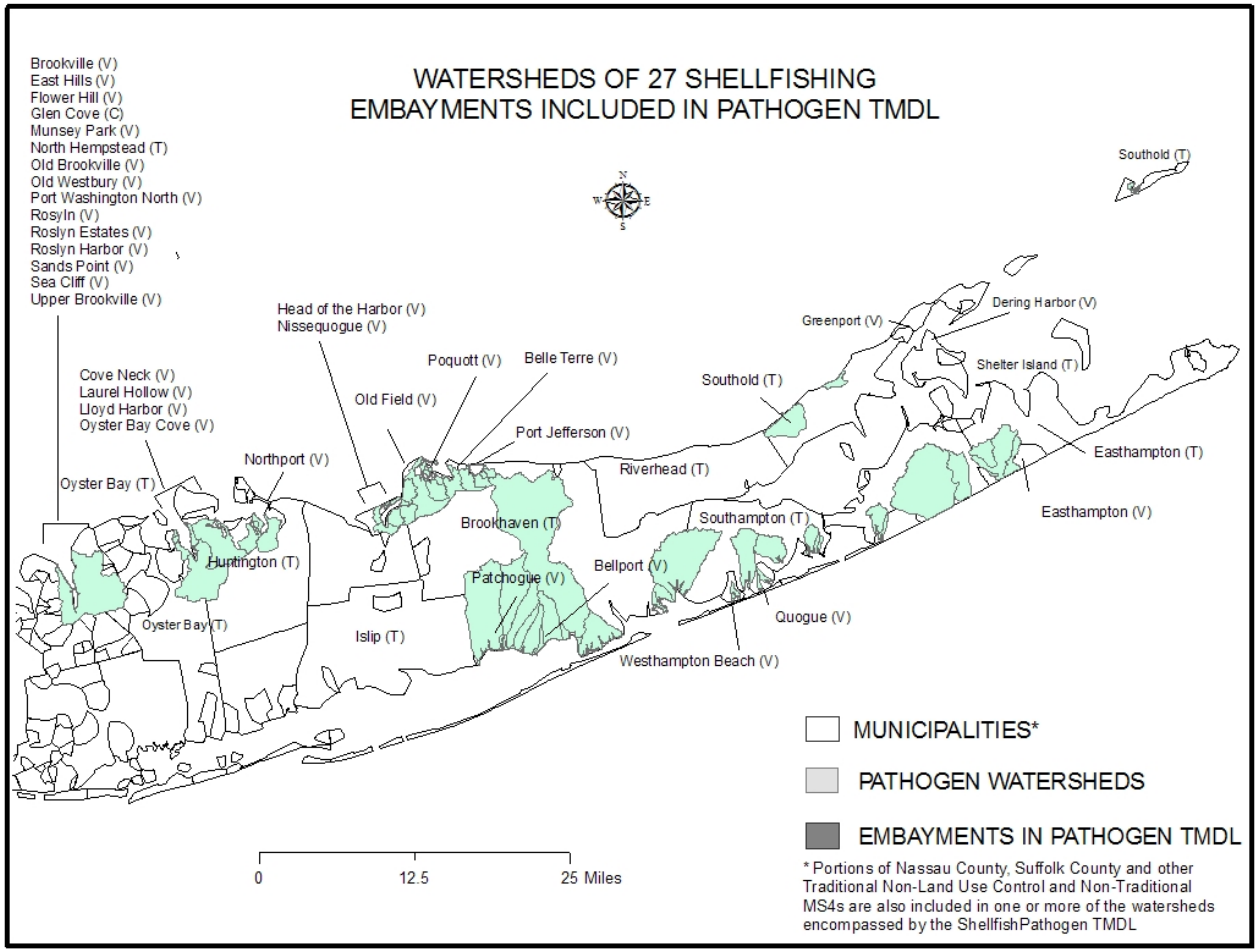

Figure 7. The requirements of watershed improvement strategies apply to the sewersheds within the shaded areas.

APPENDIX 10: LAKE OSCAWANA WATERSHED MAP

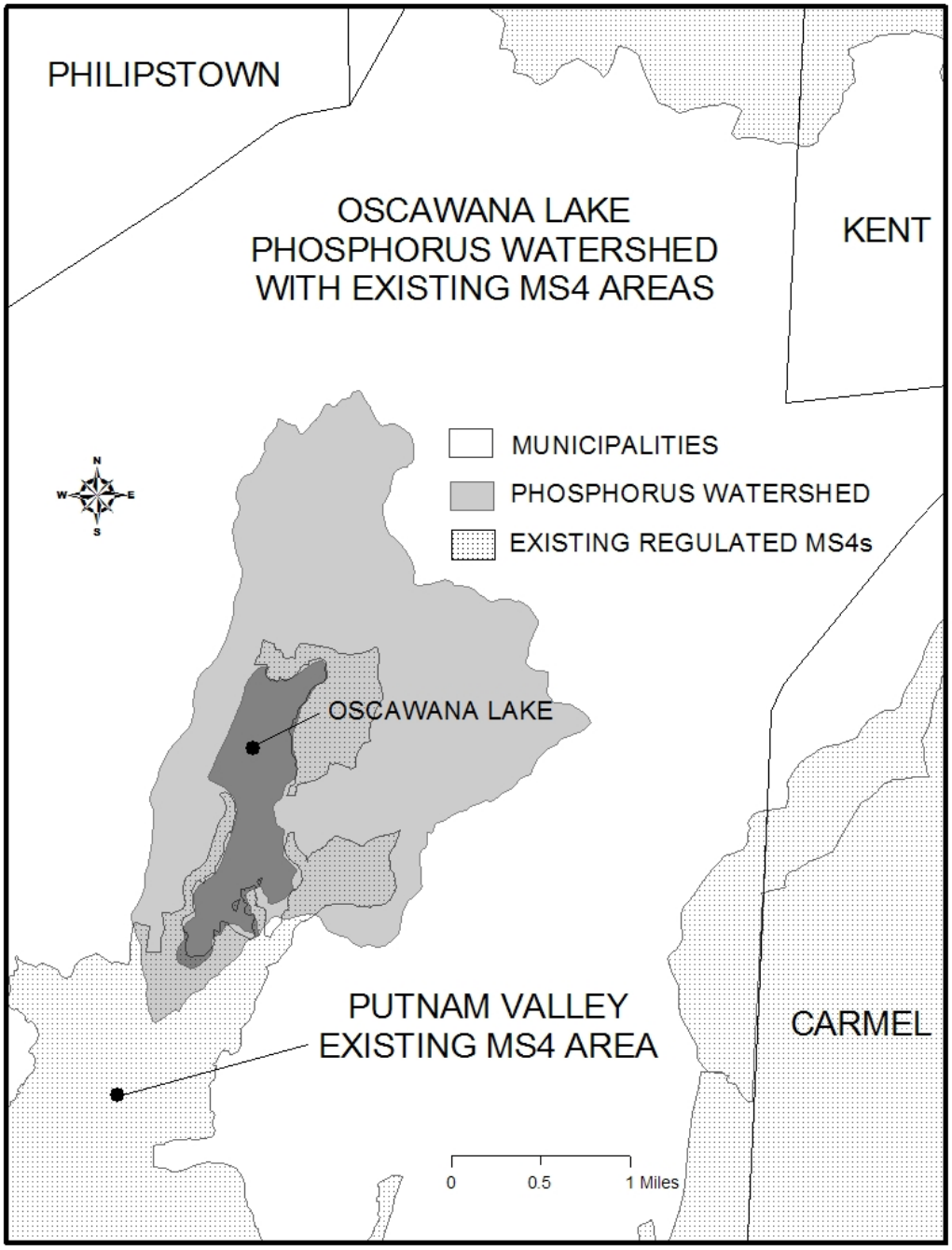

Figure 8. The requirements of watershed improvement strategies apply to the sewersheds within the shaded areas.

EXHIBIT D

TO THE DECLARATION OF LAWRENCE M. LEVINE

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of

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

Petitioners-Movants,

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

Supreme Court,
Westchester County
Index No. 16132/2010

-against-

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Dated: January 16, 2014

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PRELIMINARY STATEMENT

The federal Clean Water Act regulates stormwater runoff from municipal sewer systems. Stormwater runoff is unique among regulated discharges: when it rains, the resulting runoff passes over roofs, roads, driveways, and other surfaces—picking up chemicals, sediment, trash, and other debris. The runoff then passes through municipal storm sewer systems designed to handle stormwater, and eventually flows into rivers and lakes, potentially contaminating those bodies of water.

Stormwater discharges are particularly difficult to regulate for three reasons: (1) rain is naturally occurring and cannot be stopped or controlled like other regulated discharges; (2) although local municipalities operate sewer systems, the underlying cause of the contamination is largely based on the choices of individual residents and businesses (for example, to let litter accumulate, or to use certain chemical fertilizers), as well as choices made long ago involving the design of roads, parking lots, and buildings; and (3) unlike other discharges, stormwater runoff contains a wide variety of often unforeseen contamination and debris that flows

into public waters through tens of thousands of discharge points—making each municipality's contribution to water pollution difficult to ascertain or allocate through numerical limitations.

Since 2003, New York has regulated discharges of stormwater from small municipalities' sewer systems through a general permit that requires municipalities to develop a stormwater management program as mandated by EPA regulations. In 2010, petitioners brought this hybrid proceeding pursuant to article 78 of the C.P.L.R. and an action for declaratory judgment, claiming that the general permit impermissibly authorized a "self-regulatory scheme" for municipalities in violation of state and federal law. The Appellate Division, Second Department unanimously rejected petitioners' claims, concluding that the challenged general permit (the "General Permit") is fully consistent with applicable law.

This Court should deny leave to appeal. The question of how best to regulate stormwater runoff is undeniably important. In fact, EPA is currently in the process of reevaluating its regulations for permitting of municipal storm sewer systems. But

petitioners' administrative challenge is not the proper vehicle for addressing broad policy debates. EPA could require a system of individualized stormwater permits with numerical discharge limitations for each covered municipality, but current EPA regulations expressly encourage general permitting and a flexible system of stormwater management practices. Indeed, New York's regulation of stormwater discharges is consistent with regulation of stormwater discharges throughout the nation. No existing regulatory scheme operates according to the rules of individualized, municipality-by-municipality preclearance that petitioners advocate, and as the Appellate Division noted, petitioners' challenge is wholly abstract. They claim that the General Permit is flawed, but fail to demonstrate a single instance in which the General Permit has authorized discharges of pollutants in contravention of applicable legal standards.

Review by this Court is not necessary to clarify "[t]he ground rules" for stormwater permitting, as petitioners claim. Mem. of Law in Support of Mot. for Leave to Appeal ("Petitioners' Mem.") at 3. The ground rules are stated in detailed EPA

regulations that authorize DEC's General Permit, and petitioners' policy arguments are best addressed to EPA and legislative bodies rather than this Court.

BACKGROUND

A. Stormwater regulation

This case concerns stormwater discharges from small municipalities (those operating storm sewer systems serving 100,000 or fewer residents).[1] In light of the unique nature of stormwater discharges, Congress imposed flexible standards for permitting in this area.

While stormwater discharges associated with industrial activity must meet specific effluent limitations, *see* 33 U.S.C. § 1311, municipal stormwater discharges are not subject to these restrictions. Instead, Congress provided that permits for

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[1] The vast majority of storm sewer system operators are municipalities. The General Permit also covers other "non-traditional" entities such as state and federal prisons, hospitals, and state universities. (J.A. 345). For convenience, we refer to entities that operate small municipal storm sewer systems as "municipalities."

discharges from large municipalities' storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable," and further, that permits could be issued on a "system- or jurisdiction-wide basis," rather than individually for each covered municipality. *Id.* § 1342(p)(3)(B)(i) & (iii).

Congress granted even more flexibility to EPA to regulate small municipal storm sewer systems. While Congress required large municipalities to reduce discharges to the "maximum extent practicable" by statute, it left the terms of stormwater permitting for smaller municipalities to EPA's discretion, so long as EPA established "priorities," "requirements," and "expeditious deadlines." *Id.* § 1342(p)(6). Congress authorized EPA to select the standards, guidelines, and requirements governing the stormwater program for small municipalities that EPA deemed "appropriate." *Id.*

EPA designed a program for regulation of small municipal storm sewers based on best management practices to be developed and implemented by municipalities (*e.g.*, activities for detecting and eliminating illicit discharges, supervising construction sites,

and requiring new development to include structural and non-structural features for reducing stormwater runoff).[2] EPA expressly "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.[3] Thus, EPA regulations provide that a municipality that implements EPA's required best management practices has complied with the applicable standard of reducing pollutants to the "maximum extent practicable."[4]

EPA's program specifies a phased and iterative approach to developing and implementing the required best management practices. The approach is phased because it allocates time—up to five years—for planning and implementing after the municipality

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[2] *See* 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, 68,736, 68,753 (Dec. 8, 1999).

[3] *Id.* at 68,753.

[4] 40 C.F.R. § 122.34(a); 64 Fed. Reg. at 68,754.

obtains coverage under a general permit.[5] The approach is iterative because EPA, the States, and municipalities can and should review and revise best management practices as they obtain data and feedback about existing controls.[6] The program builds in flexibility so that municipalities can optimize their plans based on local factors such as storm sewer size, municipal finances and capabilities, climate, hydrology, and geology.[7] "EPA believes . . . [that its] approach strikes a balance between the competing goals of providing certainty as to what constitutes an adequate program and providing flexibility" to covered municipalities.[8]

EPA recommended, encouraged, and expected state permitting authorities to issue a general permit to cover

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[5] 40 C.F.R. § 123.35(e).

[6] 64 Fed. Reg. at 68,754. EPA intends to reevaluate its regulations based on data and research after December 10, 2012. 40 C.F.R. § 122.37. EPA's permitting approach "provides time, where necessary, to more fully assess the range of issues and possible options for control of storm water discharges." 64 Fed. Reg. at 68,788 (quotation marks omitted).

[7] 64 Fed. Reg. at 68,754.

[8] *Id.* at 68,764.

designated small municipal storm sewers.[9] It anticipated that most municipalities would initially "obtain coverage" under a general permit by submission of a Notice of Intent to discharge to a state regulator.[10] The Notice-of-Intent 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."[11] A Notice of Intent does not set out permit conditions; those are stated in the general permit.[12] Indeed, EPA expressly rejected proposals to require permitting authorities to approve or disapprove the best management practices and goals set out in a municipality's Notice of Intent.[13]

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[9] 40 C.F.R. § 123.35(h)(2)(i); 64 Fed. Reg. at 68,737, 68,762.

[10] 64 Fed. Reg. at 68,763-64

[11] *Id.* at 68,739.

[12] *See id.* at 68,764.

[13] *Id.*; *see* 40 C.F.R. § 122.28(b)(2)(iv) (providing that coverage may be effective "upon receipt" of Notice of Intent); *see also* 6 N.Y.C.R.R. § 750-1.21(d)(3) (permittees retain coverage after modification of general permit unless otherwise notified by DEC).

DEC issued its first general permit authorizing small municipal storm sewer system operators to discharge stormwater in 2003. It revised and reissued the permit in 2008, and again in 2010. The 2010 General Permit covered 513 municipal storm sewer systems as of December 2010 (J.A. 156 [¶ 13]), only five of which obtained coverage by filing a Notice of Intent to discharge. The other 508 municipalities had already obtained coverage under the 2003 or 2008 general permits, and renewed coverage under the 2010 General Permit by submitting an annual report (*see* J.A. 261). Petitioners here challenged only the validity of the 2010 General Permit, which expires in 2015 (J.A. 254).

DEC's General Permit implements EPA's regulations. DEC submitted each of its general permits to EPA for review, and EPA had the opportunity to disapprove DEC's permits as inconsistent with the Clean Water Act or EPA's stormwater permitting program (J.A. 861-864). Following review, EPA allowed each general permit to go into effect. Similarly, EPA has not stopped other States from issuing general permits; to the best of our knowledge, every permitting authority nationwide (including EPA

itself, where applicable) regulates municipal stormwater discharges through general permits comparable to the General Permit at issue here.

B. Procedural History

Petitioners brought this hybrid proceeding in 2010, asserting four basic claims—each of which is premised on the notion that permitting for small municipalities should mirror and have the same attributes as permitting for other entities, such as industrial dischargers covered by the Clean Water Act. Petitioners alleged that the General Permit fails:

1) To ensure that small municipalities reduce discharges to the "maximum extent practicable" because DEC does not review each individual municipality's stormwater management program plan;

2) To ensure that municipalities comply with water quality standards-based statutes and regulations (*i.e.*, requirements based on the quality and designated uses of the receiving water);

3) To ensure that municipalities meet their obligations to monitor stormwater discharges; and

4) To ensure that members of the public have opportunities to participate in the permitting process.

See Matter of Natural Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conserv., 111 A.D.3d 737, 740-41 (2d Dep't 2013).

Supreme Court, Westchester County (Lefkowitz, J.) granted the petition in part and denied it part, ruling in favor of DEC with respect to petitioners' water-quality-standards and monitoring claims and against DEC with respect to petitioners' other claims (J.A. 19-34). The court held that DEC's General Permit had created an "impermissible self-regulatory system" (J.A. 19) that failed to require municipalities to reduce their discharges to the "maximum extent practicable." The trial court also concluded that Notice-of-Intent forms, which municipalities submit to obtain initial coverage under the General Permit, "are functionally equivalent to detailed applications for individual . . . permits" and, based on this misunderstanding, held that DEC should have afforded the public an opportunity to request a hearing on each and every Notice (J.A. 33). The Appellate Division, Second Department unanimously reversed. *See Matter of NRDC*, 111 A.D.3d at 737-39.

1. Maximum extent practicable. Following a detailed review of EPA's regulations governing stormwater permitting for small municipalities, the Appellate Division held that "[t]he General Permit at issue on this appeal is consistent with the scheme for general permits envisioned by the EPA, and is designed to meet the maximum extent practicable standard" by imposing enforceable terms on covered municipalities. *Id.* at 743; *see id.* at 742-44.

2. Water quality standards. The Appellate Division affirmed the trial court's ruling that "the General Permit does not fail to ensure compliance with State water quality standards." *Id.* at 748. The court observed that the Clean Water Act treats stormwater discharges differently from industrial discharges and that EPA and the States therefore have flexibility to adopt or impose best management practices instead of numeric discharge limitations. *See id.*

3. Monitoring. The court rejected petitioners' contention that the General Permit fails to impose adequate monitoring requirements without discussion. *See id.* at 739.

4. Public participation. The court also held that DEC had not failed to offer the public an opportunity to request a hearing on a "permit application"[14] by declining to convene public hearings on Notices of Intent (or annual reports) submitted by municipalities seeking to obtain or continue coverage under the General Permit. *See Matter of NRDC*, 111 A.D.3d at 747-48. The court recognized that DEC provides an opportunity for a public hearing on general permits, and concluded that DEC's determination that the term "permit application" does not include a Notice of Intent or other documents submitted to invoke coverage under a general permit was reasonable. *See id.* at 747.

The Appellate Division also reversed the trial court's ruling that the General Permit's compliance schedules were inconsistent with a DEC regulation—a ruling that DEC had not challenged on appeal. Petitioners have filed a motion in the Appellate Division for reargument of that portion of the court's ruling, and DEC does

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[14] ECL § 17-0805(1)(a); 6 N.Y.C.R.R. § 621.8(a); *see also* 33 U.S.C. § 1342(b)(3).

not oppose the motion in substance.[15] Therefore, the compliance schedule issue should be resolved without review by this Court.

Petitioners now seek leave to appeal.

REASONS THAT LEAVE SHOULD BE DENIED

A. Petitioners' "Self-Regulatory" Challenge Is an Attempt to Relitigate Their Underlying Dispute with EPA in an Alternative Forum.

Leave should be denied because this case is an inappropriate vehicle for petitioners to relitigate their policy dispute with EPA. Petitioners believe that EPA's first round of stormwater regulations for small municipalities gave too much flexibility to municipalities. And they fear that, given the chance, small municipalities will do as little as possible to reduce contaminated stormwater runoff, and thus case-by-case preclearance review of municipalities' stormwater management practices is needed to make meaningful progress in this area. Even if petitioners' concerns were well founded, this case would not be a suitable

[15] DEC's response to petitioners' motion for reargument is attached to this memorandum as Exhibit A.

vehicle for reviewing those policy concerns. DEC appropriately followed EPA's stormwater program regulations, which are binding on DEC.

Petitioners have not asserted that New York law imposes substantive stormwater discharge controls that go beyond what EPA and the Clean Water Act require. Nor do they contend that the General Permit is inconsistent with current EPA regulations. Instead, petitioners argue that the General Permit is inconsistent with *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), a case in which the lead petitioner here, NRDC, intervened as a petitioner to challenge EPA's stormwater permitting regulations.[16]

The panel majority in *Environmental Defense Center* concluded that some aspects of EPA's regulations were invalid and remanded to the agency for revision. *See* 344 F.3d at 879. As of this date, however, EPA has not issued revised regulations,

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[16] *See* Reply Br. of Pet'r & Pet'r-Intervenor, 2001 U.S. 9th Cir. Briefs LEXIS 110 (July 20, 2001) (No. 00-70014).

although it has said that it likely will do so.[17] Therefore, EPA's current regulations remain binding, and remain the framework for which stormwater permitting occurs throughout the nation, including for the general permits that EPA itself issues. For example, EPA recently proposed to issue a general permit to discharge stormwater from small municipal storm sewer systems in New Hampshire, which does not have its own permitting authority, to replace the general permit that EPA previously issued for that State.[18] Like DEC's General Permit, the EPA's permit provides that EPA may authorize a municipality to discharge following review of its Notice of Intent, without requiring preclearance review of the municipality's stormwater management program plan.

Petitioners may take issue with EPA's actions and policies, but the validity of EPA's regulations are not properly before *this* Court. The only claims at issue in this case turn on whether DEC

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[17] *See* 40 C.F.R. § 122.37; Stakeholder Input, 74 Fed. Reg. 68,617, 68,620 (Dec. 28, 2009).

[18] *See* 2013 NH Small MS4 Draft General Permit, http://www.epa.gov/region1/npdes/stormwater/nh/2013/NHMS4-NewDraftPermit-2013.pdf.

has satisfied its obligations under federal and state law. And the controlling source of federal law for evaluating those claims is current EPA stormwater regulations, by which the State has explicitly agreed to abide as part of its implementation of the Clean Water Act in cooperation with the federal government (J.A. 861).[19] *See Matter of NRDC*, 111 A.D.3d at 739-40.

Petitioners argue that EPA itself "has deemed the *Environmental Defense Center* ruling to be binding nationwide, and has advised the states as such." Petitioners' Mem. at 22. But the "interim guidance" document that petitioners rely upon is not binding on the States (unlike EPA's regulations). Moreover, the challenged General Permit is largely consistent with EPA's interim guidance.[20] And EPA reviewed the General Permit here,

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[19] And as we explained in our brief to the Appellate Division, there is no sound basis for concluding that the Ninth Circuit *vacated* EPA's stormwater regulations. See Reply and Opp'n Br. for Appellant-Cross-Resp. DEC at 12 n.13 (Oct. 25, 2012). After all, if the Ninth Circuit had vacated the regulations, the federal stormwater management program would effectively cease to exist.

[20] There is one exception: DEC allows public *comment*, but does not afford an opportunity to request a public *hearing* on individual Notices of Intent to discharge (J.A. 261). The last federal court of appeals to address this topic—after EPA issued its

issued seven years after the Ninth Circuit's remand in *Environmental Defense Center*, but did not block the Permit. To the extent that petitioners believe that EPA is not complying with the Ninth Circuit's mandate in *Environmental Defense Center*, their remedy is against EPA in federal court—not relitigation of the dispute here.

B. Petitioners' Challenge Does Not Raise State Issues of Public Importance.

Because petitioners raise primarily a policy challenge—without identifying any specific flaws in the General Permit or specific instances of municipalities failing to meet applicable federal and state standards—further review cannot yield practically useful guidance. Petitioners mainly contend that the General Permit amounts to an "abdication of regulatory responsibility" (Mem. at 15, 16), which this Court should examine to determine whether DEC created "an impermissible self-

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guidance memorandum—vindicated EPA's and DEC's view that no public hearing is required in connection with a Notice of Intent to discharge. *See Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 978 (7th Cir. 2005).

regulatory system" (Mem. at 5). Again, petitioners largely challenge the underlying scheme that EPA has approved and encouraged for municipal stormwater permitting.

Petitioners' proffered analogy (Mem. at 16-17) as between the General Permit and an imagined process for admitting applicants to the bar provides no support for their leave motion. The analogy disregards the critical differences between stormwater runoff, which will occur with or without DEC's permission or a permit, and the practice of law, which people can stop or start as needed. Because rain does not wait for anyone, the General Permit necessarily allows stormwater discharges to continue while a municipality develops and then implements its stormwater management plan. No such accommodation is required for bar applicants. In any event, there is nothing unusual about asking municipal governments to certify that they have complied with generally applicable regulations or general permits, as the case may be, and enforcing compliance based on audits,

complaints or referrals, and investigations.[21] Indeed, there is nothing unusual about asking individuals to certify that they have met regulatory or licensing requirements, as when lawyers certify that they have satisfied their obligation to obtain continuing legal education.

Moreover, given the abstract nature of petitioners' challenge, it is doubtful that this Court could offer meaningful specific guidance:

- The terms of the challenged permit expire in 2015, and as noted (*supra*, at 16 & n.17), EPA is currently reevaluating and is likely to issue new regulations governing stormwater discharges, which would supersede the regulations at issue here, rendering a construction of them and assessment of specific permit terms obsolete. Any guidance the Court might issue in this area would likely be evanescent because of the rapidly evolving nature of stormwater regulation.

- To the extent that petitioners argue (Mem. at 12) that the general permit improperly allows municipalities to obtain coverage under the Permit by submitting a Notice of Intent to discharge, providing guidance on this subject would have little practical effect. The vast majority of municipalities

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[21] DEC demonstrated below that it enforces the terms of the General Permit through a variety of mechanisms. See Br. for Resp.-Appellant-Cross-Resp. DEC, at 49-52 (Aug. 22, 2012).

have already obtained coverage and the Notice form has no further relevance for them.

- Petitioners contend that the General Permit allows municipalities to violate federal law, but fail to identify a "*single instance*" in which a municipality's particular stormwater management program plan has inadequate controls or permits unauthorized discharges. *Matter of NRDC*, 111 A.D.3d at 746 (emphasis added).

Moreover, if the Court were to conclude, as petitioners request, that the General Permit creates an "impermissible self-regulatory system" (Mem. at 5), DEC would have few realistic options available to it for implementing such a holding. The trial court ordered DEC to treat each Notice of Intent and every annual report as a "permit application," and review and set discharge terms for each of 513 municipalities individually. But any such approach would obliterate the general permitting regime that state and federal law expressly authorize, and which has been universally adopted for stormwater permitting across the nation. The very breadth of the relief that logically flows from petitioners' claims demonstrates that they are not asking for workable "guidance" within an existing regulatory regime, but to replace it

entirely—a claim not properly adjudicated here since the validity of EPA's regulations are not before this Court.

C. The Decision Below Does Not Conflict with Any Prior Decision of this Court or Create a Conflict among the Departments of the Appellate Division.

Petitioners cite no case from this Court or the other departments of the Appellate Division that conflicts with the Second Department's decision here.[22] They concede that this Court "has never addressed DEC's use of a statewide general permit . . . or any of the other issues presented here." Petitioners' Mem. at 17-18. Given that this Court has never addressed the issues presented in this case, including the implementation of the statutes and regulations at issue here, the Appellate Division's resolution of those issues cannot present a conflict with a prior decision of this Court. Nor would one expect to observe a conflict in the state courts where a challenge rests on contesting the validity of federal regulations.

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[22] *See* 22 N.Y.C.R.R. § 500.22(b)(4).

In any event, petitioners specifically identify only one statutory phrase that, they allege, should be analyzed to determine whether it was the subject of "the incorrect standard of review" in the Appellate Division: the requirement that municipalities reduce discharges of stormwater pollution to the "maximum extent practicable." *See* Petitioners' Mem. at 19-20 (quotation marks omitted). But there is no real dispute about the meaning of this phrase. The question raised by petitioners' lawsuit is whether the General Permit contains specific and enforceable terms that require municipalities to implement best management practices within the meaning of 40 C.F.R. § 122.34. If it does, the "maximum extent practicable" standard is fully satisfied. *See id.* § 122.34(a). Petitioners' motion for leave does not even address that key question.

Petitioners also contend (Mem. at 20) that the Appellate Division's decision conflicts with the Third Department's decision in *Matter of Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, which held that a DEC permit improperly included "multiple exemptions" from water quality standards. 71 A.D.3d

235, 240 (3d Dep't 2010). But this case is not about exemptions from water quality standards; the General Permit at issue here does not purport to create any such exemptions; and the Second Department upheld Supreme Court's conclusion that "the General Permit does *not* fail to ensure compliance with water quality standards." *Matter of NRDC*, 111 A.D.3d at 748 (emphasis added). Accordingly, the decision below cannot be read as authorizing exemptions from water quality standards in conflict with *Matter of Catskill Mountains*.

Petitioners also contend that the decision below conflicts with the decisions of Maryland and Michigan courts. But petitioners have not served the record in those cases on DEC or this Court, frustrating any comparison between the general permit at issue in those cases and the General Permit challenged here. Moreover, the decision of the Maryland court attached as Exhibit D to petitioners' motion is considerably shorter than the Appellate Division's decision that petitioners criticize. Whatever the merits of these decisions, they shed no light on the question

whether DEC's General Permit contains sufficient terms to carry out the requirements of federal and New York law.

D. The Decision Below Is Correct, Except as to the Compliance Schedule Issue, Which Does Not Require This Court's Review to Rectify.

Finally, petitioners purport to identify three questions of law, in addition to their vague question as to whether the General Permit amounts to an "abdication of regulatory responsibility" (Mem. at 15), for which they seek review. *See* Mem. at 24-28. None is substantial enough to warrant review. The first such question—whether the Permit requires certain compliance schedules—does not require this Court's review. DEC has acknowledged in its response to petitioners' motion for reargument (attached as Exhibit A to this memorandum) that it did not appeal Supreme Court's ruling concerning compliance schedules.

Second, petitioners assert (Mem. at 26-27) that both Supreme Court and the Appellate Division incorrectly determined that the General Permit complies with applicable monitoring requirements. Petitioners are mistaken; state and federal law confer substantial discretion on permitting authorities to impose

monitoring requirements,[23] and DEC acted well within its discretion by imposing assessment and reporting requirements for those entities that do not discharge into "impaired" waters (*i.e.*, waters that do not meet designated water quality standards), and computer-modeling requirements for those that do.[24] Because end-of-pipe discharge monitoring is simply infeasible in the context of municipal storm sewer systems, which collectively have thousands of outfalls and highly variable flow rates, DEC reasonably requires municipalities to take other actions.

Third, petitioners argue (Mem. at 27-28) that both Supreme Court and the Appellate Division improperly concluded that the General Permit complies with water quality standards-based laws

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[23] *See* 64 Fed. Reg. at 68,769 ("EPA has intentionally written today's rule to provide flexibility to both [municipalities] and permitting authorities regarding appropriate evaluation and assessment. Permitting authorities can specify monitoring or other means of evaluation when writing permits."); 6 N.Y.C.R.R. § 750-1.13(a) (Discharges "shall be subject to such requirements for monitoring . . . as may be reasonably required by the department to determine compliance with effluent limitations and water quality standards that are or may be effected by the discharge . . . and *if* imposed shall be included as provisions of the . . . permit." (emphasis added)).

[24] *See* Reply & Opp'n Br. for Appellant-Cross-Resp. DEC at 30-31.

and regulations. But here again, petitioners' argument assumes that numeric discharge limitations are feasible for DEC to impose, when in fact, imposing such numeric limitations is not feasible for most small municipalities at the present time.[25] Therefore, as the Appellate Division recognized, permitting authorities such as DEC may require municipalities to adopt best management practices designed to attain water quality standards. *See Matter of NRDC*, 111 A.D.3d at 748.

Petitioners also contend that the Appellate Division's opinion creates confusion by "suggest[ing] that the Permit was not required to ensure compliance with water quality standards" (Mem. at 27), but the court's ruling does not make that suggestion. Petitioners draw attention (Mem. at 28 n.50) to the Appellate Division's statement that "Congress, rather than imposing specific effluent limitations, vested the EPA and the States with discretion

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[25] As discussed in the briefs below, numeric discharge limitations are not feasible at the present time in large part because New York, like many States, has not completed "total maximum daily load" analyses or waste load allocations for the affected bodies of water, which can take years (J.A. 163 [¶ 30]). *See* Reply & Opp'n Br. for Appellant-Cross-Resp. DEC at 22-24.

in imposing pollution controls sufficient to meet water quality standards." *Matter of NRDC*, 111 A.D.3d at 748. Read in context, however, this statement plainly was meant to explain that permitting authorities have discretion to impose numeric limitations *or* narrative best management practices in order to attain water quality standards (within a reasonable period of time), not to hold that meeting water quality standards is optional. In any event, as petitioners observe (Mem. at 27-28), DEC has never asserted that stormwater permits need not comply with water quality standards-based statutes and regulations, and accordingly this Court's review is not necessary to confirm that proposition.

CONCLUSION

Petitioners' motion for leave to appeal should be denied.

Dated: New York, NY
January 16, 2014

Respectfully submitted,

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EXHIBIT E

TO THE DECLARATION OF LAWRENCE M. LEVINE

Public Comment
Draft Phase II Small MS4 General Permit
Deadline: 7/23/12 by 12 noon

RECEIVED
7-23-12
SWRCB Clerk

July 23, 2012

Via electronic mail

Mr. Tom Howard, Executive Officer
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Comments on May 18, 2012 Draft Waste Discharge Requirements (WDRs) for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) (General Permit)

Dear Mr. Howard:

On behalf of Heal the Bay and the Natural Resources Defense Council ("NRDC"), we are writing with regard to the Draft Waste Discharge Requirements (WDRs) for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) (General Permit), NPDES General Permit No. CASXXXXXX dated May 18, 2012 ("Draft Permit"). We appreciate the opportunity to comment on the Draft Permit. We appreciate staff's inclusion of post-construction requirements in the Draft Permit. The Draft Permit makes important strides in this area from the current permit and previous drafts. However, some of the specific requirements should be clarified to ensure that the intent of the provisions is met. We are concerned that in several aspects the Draft Permit will not serve to adequately protect California's water resources, and falls short of the requirements of the Clean Water Act's "maximum extent practicable" ("MEP") standard. In multiple respects, the Draft Permit reflects a dramatic retreat from previous iterations of the draft permit. For instance, the previous draft permit's monitoring program dated June 7, 2011 was much stronger than is currently proposed. We see no justification for this weakening. Additionally, many of the concerns outlined in our September 8, 2011 letter remain unaddressed. We have focused our comments in particular here on the Draft Permit's Post Construction Storm Water Management, TMDL, Water Quality Monitoring and BMP Assessment provisions, and look forward to working further with Board staff to address critical shortcomings of the Draft Permit.

I. Stormwater is a Leading Source of Pollution to Surface Waters

The U.S. EPA considers urban runoff to be "one of the most significant reasons that water quality standards are not being met nationwide."[1] As the U.S. EPA has stated:

> Most stormwater runoff is the result of the man-made hydrologic modifications that normally accompany development. The addition of impervious surfaces, soil compaction, and tree and vegetation removal result in alterations to the movement of water through the environment. As interception, evapotranspiration, and infiltration are reduced and precipitation is converted to overland flow, these modifications affect not only the characteristics of the developed site but also the watershed in which the development is located. Stormwater has been identified as one of the leading sources of pollution for all waterbody types in the United States. Furthermore, the impacts of stormwater pollution are not static; they usually increase with more development and urbanization.[2]

The State Board has acknowledged these issues, finding that "the runoff leaving the developed urban area is greater in pollutant load than the pre-development runoff from the same area . . . [and] runoff leaving developed urban area is significantly greater in runoff volume, velocity, peak flow rate, and duration than pre-development runoff from the same area." (Draft Permit, at Finding 2.) The State Board notes that pollutants that can be found in urban runoff that is discharged to receiving waters include "sediments, non-sediment solids, nutrients, pathogens, oxygen demanding substances, petroleum hydrocarbons, heavy metals, floatables, polycyclis aromatic hydrocarbons (PAHs) trash, and pesticides and herbicides," (*id*. at Finding 3), and that "urban storm water is listed as the primary source of impairment for ten percent of all rivers, ten percent of all lakes and reservoirs, and 17 percent of all estuaries." (*Id*. at Finding 10.) Pollution in stormwater runoff further contributes to impairment in a substantially greater percentage of California's inland and coastal waters.

II. Stormwater Must be Reduced to the Maximum Extent Practicable

Consistent with the federal Clean Water Act, a fundamental goal of all municipal stormwater permits is to ensure that discharges from storm sewers do not cause or contribute to a violation of water quality standards. (33 U.S.C. § 1341.) Notably for MS4s covered under the National Pollutant Discharge Elimination System ("NPDES") program, a fundamental requirement is that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable." (33 U.S.C. § 1342(p)(3)(B)(iii).) These requirements apply to small MS4s such as those covered under the Draft Permit. (64 Fed. Reg. 68,722, 68754 ("EPA interprets this standard to apply to all MS4s, including . . . the small MS4s regulated under [the Phase II rule]").) As one state hearing board held:

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[1] U.S. General Accounting Office (June 2001) *Water Quality: Urban Runoff Programs*, Report No. GAO-01-679, available at, http://www.gao.gov/new.items/d01679.pdf. See also, Draft Permit at Findings 2-6, 8.

[2] U.S. Environmental Protection Agency (December 2007) *Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices*, at v, available at, http://www.epa.gov/owow/nps/lid/costs07/.

> [MEP] means to the fullest degree technologically feasible for the protection of water quality, except where costs are wholly disproportionate to the potential benefits…. This standard requires more of permittees than mere compliance with water quality standards or numeric effluent limitations designed to meet such standards…. The term "maximum extent practicable" in the stormwater context implies that the mitigation measures in a stormwater permit must be more than simply adopting standard practices. This definition applies particularly in areas where standard practices are already failing to protect water quality….

(*North Carolina Wildlife Fed. Central Piedmont Group of the NC Sierra Club v. N.C. Division of Water Quality* (N.C.O.A.H. October 13, 2006) 2006 WL 3890348, Conclusions of Law 21-22 (internal citations omitted).) The North Carolina board further found that the permits in question violated the MEP standard both because commenters highlighted measures that would reduce pollution more effectively than the permits' requirements and because other controls, such as infiltration measures, "would [also] reduce discharges more than the measures contained in the permits." (*Id.* at Conclusions of Law 19.)

Where the use of specific best management practices ("BMPs") and performance standards in stormwater permits is widespread across the state or country, it provides ample evidence as to their "practicability." Thus, as the MEP standard evolves, "general permits issued under Phase II will ordinarily contain numerous substantive requirements," which themselves evolve with each subsequent permit issued. (*Environmental Defense Center, Inc. v. EPA* (9th Cir. 2003) 344 F.3d 832, 854.)

III. The Draft Permit Must Require Compliance With the Core Requirements of its Post Construction Storm Water Management Program And Ensure Adequate Public Process For Any In-Lieu or Watershed Process Program

We are pleased to see that the Draft Permit requires that "All Permittees must implement post-construction and monitoring programs as specified in this Order." (Draft Permit, at E.1.b. (citing exceptions to provisions allowing for in-lieu program approvals by the Regional Boards).) However, we are concerned that the Draft Permit elsewhere creates the potential for approval or implementation of such in-lieu programs in place of the permit's Post Construction controls, including the Permit's low impact development ("LID") and hydromodification requirements, and in several provisions lacks clarity that could allow for regulated projects to escape requirements to implement the Draft Permit's otherwise applicable terms. These issues must be addressed in order for the permit to pass legal muster under the Clean Water Act's MEP standard.

a. The Draft Permit Properly Requires Retention of the 85th Percentile, 24-Hour Storm Event

The Draft Permit properly establishes requirements broadly for projects to retain, or "capture, infiltrate, and evapotranspire the runoff from the 85th percentile storm" to the MEP.

Regulatory bodies in a wide variety of jurisdictions, including in California, have already successfully implemented requirements to retain a specified volume of rainfall such as the 85th percentile storm onsite through LID practices such as infiltration, harvesting and reuse, or evapotranspiration, thus ensuring that pollutant loads do not reach receiving waters. These include, for example:

Ventura County: MS4 permit requires onsite retention of ninety-five percent of rainfall from the 85th percentile storm; offsite mitigation allowed if onsite retention is technically infeasible.[3]

North and South Orange County: MS4 Permit requires onsite retention of the 85th percentile storm.[4]

Central Coast, CA: MS4 permit limits impervious surfaces that generate runoff at development projects to between three and ten percent of total project area as a permanent criterion;[5]

West Virginia: Statewide Phase II MS4 permit requires on-site retention of "the first one inch of rainfall from a 24-hour storm" event unless infeasible;[6]

Philadelphia, PA: Infiltrate the first one inch of rainfall from all impervious surfaces; if onsite infiltration is infeasible, the same performance must be achieved offsite;[7] and,

These jurisdictions, among many others implementing similar requirements, have recognized the paramount importance of mandating onsite retention of a certain quantity of stormwater since onsite retention prevents *all* pollution in that volume of rainfall from being discharged to receiving waters.

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[3] Los Angeles Regional Water Quality Control Board (July 8, 2010) Ventura County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2009-0057; NPDES Permit No. CAS004002.

[4] Santa Ana Regional Water Quality Control Board, Order No. RB8-2009-0030, at ¶ XII.E.1; San Diego Regional Water Quality Control Board (December 16, 2009) Order No. R9-2009-0002 (South Orange County MS4 Permit).

[5] Central Coast Regional Water Quality Control Board, Letter from Roger Briggs re: Notification to Traditional, Small MS4s on Process for Enrolling under the State's General NPDES Permit for Storm Water Discharges (Feb. 15, 2008), available at, http://www.waterboards.ca.gov/centralcoast/water_issues/programs/stormwater/muni_phase2/ms4enrollment/docs/phasellnotifications021228.pdf.

[6] State of West Virginia Department of Environmental Protection, Division of Water and Waste Management, General National Pollution Discharge Elimination System Water Pollution Control Permit, NPDES Permit No. WV0116025 at 13-14 (June 22, 2009), available at, http://www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Documents/WV%20MS4%202009%20General%20Permit.pdf.

[7] City of Philadelphia (Jan. 29, 2008) Stormwater Management Guidance Manual 2.0, at 1.1, available at, http://www.phillyriverinfo.org/programs/subprogrammain.aspx?Id=StormwaterManual.

The requirement to retain runoff from the 85th percentile storm onsite is particularly necessary for smaller MS4s, including those with populations of 25,000 or less, which include areas that may not yet have seen large scale development and whose receiving waters are still pristine.[8] As detailed above, most runoff is the result of man-made development in the landscape. Regional Boards in California have repeatedly recognized that even small increases in impervious surface within an area can have significantly deleterious effects on surface waters. For example, the Los Angeles Regional Board recently noted that, "[s]tudies have demonstrated a direct correlation between the degree of imperviousness of an area and waterbody degradation . . . Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as 3-10 percent conversion from natural to impervious surfaces in a subwatershed."[9] Given the need to protect such watersheds, it is critical that the permit apply the requirement to retain the runoff produced by the 85th percentile storm to all small MS4s, not only those above a certain size threshold.

b. The Draft Permit Must Ensure that All Development is Covered By its Core Performance Criteria and Provisions.

While we fully support the Draft Permit's generally applicable standard requiring retention of the 85th percentile, 24-hour storm event, we are concerned that the Draft Permit's definitions for "Regulated Project Categories" under section E.12.d.1.a could be construed as unlawfully limiting the type of development that the permit's LID provisions are applied. For example, while the Draft Permit requires projects under specific commercial designations to comply with the Permit's LID controls, as well as broadly "industrial," "mixed-use," and "residential housing subdivisions," there is no catch-all category for commercial development generally. We suggest the Draft Permit include all commercial development under its categories of Regulated Projects, and that the Draft Permit additionally provide a catch-all for "all other development not specified under the category of Regulated Projects, with a threshold trigger of creating and/or replacing 10,000 square feet of impervious surface.

c. The Draft Permit's Numeric Sizing Criteria for Storm Water Retention and Treatment Should be Referenced in the Permit's Site Design Section.

While the Permit appropriately requires retention of the 85th percentile, 24-hour storm event, the Draft Permit's LID based Site Design Measures mention that the methods employed under E.12.d.2(ii)(2) "are based on the objective of achieving infiltration, evapotranspiration and/or harvesting/reuse of the 85th percentile rainfall event." It would clarify Draft Permit requirements if this section instead referred to use of the above practices, "to the extent feasible, to meet the Permit's "Numeric Sizing Criteria for Storm Water Retention and Treatment" under Section E.12.d.2(ii)(3)d.

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[8] Renewal MS4 Permittees in particular, which have been subject to discharge requirements under the existing Phase II General Permit since 2003, are already familiar with the permitting structure and requirements of the NPDES program and should not be exempted from critical terms such as the Draft Permit's Water Quality Runoff Standards.

[9] Los Angeles Regional Water Quality Control Board Order No. R4-2009-0057, at Finding B.16. See also, Center for Watershed Protection (March 2003) Impacts of Impervious Cover on Aquatic Systems, available at, http://www.cwp.org/documents/cat_view/78-other-center-publications.html.

d. The Draft Permit's Alternative Designs Criteria Must Specify That All Criteria Must Be Met To Be Allowed, and Must Specify that Alternative Designs are Not Permitted Where On-Site Retention is Technically Feasible.

The Draft Permit's Alternative Designs provisions list 4 categories of "effectiveness" that may allow for use of an alternative design to the Permit's Stormwater Treatment Measures requirements. (See E.12.d.2(ii)(3)(a). The Draft Permit should specify that all 4 criteria must be met in order for the Permit term to apply, and given the section's reference to biotreatment (i.e., filtration with discharge), must specify that BMPs resulting in discharge of runoff and/or pollutant loading are permitted only where on-site retention of the design volume is technically infeasible.

To this end, to the extent that the Draft Permit allows use of biofiltration in place of retention to meet a project's LID requirements, the Draft Permit must specify that biofiltration is available only in cases of technical infeasibility for on-site retention, and then must, in line with other permit's in California, require a performance multiplier to ensure that receiving waters are adequately protected.

In contrast to retention practices, which ensure that 100 percent of the pollutant load in the retained volume of runoff does not reach receiving waters, biofiltration practices that treat and then discharge runoff through an underdrain result in the release of pollutants to receiving waters. Indeed, in order to achieve equivalent pollutant load reduction benefits to the use of on-site retention, biofiltration practices would have to be 100 percent effective at filtering pollutants from runoff, which they are invariably not. As a result, we have previously commented that biofiltration practices are not a proper substitute for LID practices that retain water on-site.

This conclusion is borne out by data presented in the Draft Ventura County Technical Guidance Manual, which estimates pollutant removal efficiency for total suspended solids to be 54-89 percent, and for total zinc to be 48-96 percent.[10] Biofiltration has additionally been shown to be a particularly ineffective method of pollutant removal for addressing nitrogen or phosphorous, two common contaminants found in stormwater.[11] The Draft Ventura Technical Guidance, for

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[10] Ventura County Low Impact Development Technical Guidance Manual, July 13, 2011, at D-7.

[11] Lawn irrigation has been identified as a "hot spot" for nutrient contamination in urban watersheds—lawns "contribute greater concentrations of Total N, Total P and dissolved phosphorus than other urban source areas . . . source research suggests that nutrient concentrations in lawn runoff can be as much as four times greater than other urban sources such as streets, rooftops or driveways." Center for Watershed Protection (March 2003) *Impacts of Impervious Cover on Aquatic Systems* at 69; see also H.S. Garn (2002) *Effects of lawn fertilizer on nutrient concentration in runoff from lakeshore lawns, Lauderdale Lakes, Wisconsin*. U.S. Geological Survey Water- Resources Investigations Report 02-4130 (In an investigation of runoff from lawns in Wisconsin, runoff from fertilized lawns contained elevated concentrations of phosphorous and dissolved phosphorous).

example, indicates that biofiltration achieves pollutant removal efficiency for total nitrogen at between only 21-54 percent,[12] as compared with 100 percent for runoff retained on-site.

e. The Draft Permit unlawfully removes meaningful review by the agency in the Watershed Process provisions.

The Draft Permit appears to establish a scheme for the Permittee to develop their own strategy for Watershed Process:

> "Within the second year of the effective of the permit, The State and Regional Water Boards will determine whether the requirements in E.12.d and E.12.e. are protective of the watershed processes identified below or if modified criteria should apply. The Regional Boards may also, following evaluation of watershed processes, approve in-lieu programs allowing applicants to financially participate in projects that protect or enhance watershed processes as an alternative to on-site compliance. Permittees shall work collaboratively with the appropriate Regional Water Board to incorporate watershed process-based numeric criteria for new and redevelopment projects."[13]

However, the Draft Permit is unclear as far as what level of review will occur at the Regional Board. This raises significant concerns with respect to public process and agency review requirements. For example, by putting such review authority solely in the Executive Officer shields the development of these critical, core permit requirements from oversight and creates a self-regulatory scheme in violation of the Clean Water Act. In Environmental Defense Center, Inc. v. U.S. E.P.A, 344 F.3d 832, 854-56 (9th Cir. 2003), the court explained: "[S]tormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity. . . . Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy."

In bypassing the public review process, this provision instead has the potential to exempt development from participation in the Permit's core requirements to prevent the discharge of pollutants to the MS4 system. These requirements are necessarily reviewed in order to determine whether the permit meets the requirements of the Clean Water Act's MEP standard. This determination lies properly with the State Board and Regional Board, through the process of public review and hearing. Thus, this potential "off ramp" should be eliminated or revised to ensure proper review.

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[12] Ventura County Low Impact Development Technical Guidance Manual, July 13, 2011, at D-7. See also, BASMAA (December 1, 2010) *Draft Model Bioretention Soil Media Specifications-MRP Provision C.3.c.iii*, at Annotated Bibliography section 3.0 (noting nutrient removal from synthetic stormwater runoff demonstrated only 55 to 65 percent of total Kjeldahl nitrogen removal and that only 20 percent of nitrate is removed from the runoff).

[13] Draft Permit at 57.

f. The Draft Permit's Storm Water Treatment Measures and Baseline Hydromodification Management Measures provisions should be clarified.

The Draft Permit establishes provisions to addresses runoff from remaining impervious DMAs. The goal of directing runoff to one or more facilities designed to infiltrate and/or evapotranspire is appropriate.[14] However, the approach outlined is extremely convoluted and should be clarified and streamlined. Through these provisions, the State Board should ensure that each project retain the 85th percentile, 24-hour storm event. While use of DMAs to promote this result can be an appropriate means of addressing site runoff, the Permit must be clear that it is the overall project runoff volume that must be addressed, not isolated components of each project.

IV. The Draft Permit's Interim Hydromodification Management Provisions Should Require Compliance with Pre-Development, not Pre-Project, Conditions

As discussed above, requirements that a project meet pre-project conditions are not adequately protective of water quality, and will ensure that impervious surfaces that generate polluted runoff or high volumes of runoff persist in the built environment effectively indefinitely. This is of particular concern with regard to the effects of hydromodification. Recent studies conducted in California indicate that intermittent and ephemeral streams are even more susceptible to the effects of hydromodification than streams from other regions of the U.S. with stream degradation being recognized when the associated catchment's impervious cover is as little as 3-5%."[15] In order to address the presence of impervious surfaces that generate runoff contributing to flooding, erosion, and other volume related impacts to receiving waters, the Draft Permit should use the term "pre-development" in place of "pre-project" in its hydromodification criteria under section E.12.e. The Draft Permit should also clearly state that "pre-development" refers not to the condition of a site prior to construction of the particular project under review, but rather the condition of a site in its *undeveloped* state. (Draft Permit at ¶ E.12.e)

V. The Draft Permit Must Address Both Discharges to Areas of Special Biological Significance

a. The Draft Permit Must Include Specific Provisions to Eliminate Waste Discharges into Areas of Special Biological Significance

Environmental Groups have advocated for the implementation of the decades-old Ocean Plan discharge prohibition for years, and have been similarly active in the process to address the ongoing discharges to Areas of Special Biological Significance ("ASBSs"). ASBSs are home to the state's most unique and sensitive marine communities, each one encompassing a complex and fragile ecosystem.[16] To protect these communities, the State Board deliberately adopted a

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[14] As discussed above, biofiltration should only be allowed when technically infeasible to infiltrate.
[15] Los Angeles Regional Water Quality Control Board, Order No. R4-2009-0057, at Finding B.16.

[16] *See, e.g.*, State Water Resources Control Board (Jan. 18, 2011) Program Draft Environmental Impact Report, Exception to the California Ocean Plan for Areas of Special Biological Significance Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges, with Special Protections, at sections 5.1 and

prohibition in the Ocean Plan on waste being discharged into ASBSs, thereby recognizing that the discharge of waste affects the maintenance of natural water quality. The California Ocean Plan states that:

> Waste shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas.[17]

The ASBS Waste Discharge Prohibition is incorporated into, and is an enforceable requirement, of all NPDES Permits coastwide. Thus, unless an exception has been obtained, the Ocean Plan prohibits discharge of waste (including stormwater runoff) into ASBSs, and discharges near ASBSs must be located a sufficient distance away to ensure maintenance of natural water quality. The Board must incorporate discharge controls into the Draft Permit that eliminate Permittees' illegal discharges into ASBSs. Additionally, ASBS-specific monitoring requirements should be added to track the progress of waste discharge reductions into ASBSs.

VI. The Draft Permit Must Include All Applicable TMDL Waste Load Allocations

Section E.15 of the Draft Permit appropriately states that Permittees comply with all applicable TMDL waste load allocations, load allocations, effluent limitations, implementation requirements and monitoring requirements in the regional water board Basin Plans.[18] Further Attachment G of the Draft Permit outlines TMDL WLAs and specific implementation requirements. However, this Attachment is incomplete. For instance, there are no Region 4 TMDLs listed. The Draft Permit states that they are incorporated by reference and there will be a reopener. State Board staff should coordinate with Region 4 and all other regions to ensure that all applicable TMDL WLAs and implementation measures are reflected in Attachment G. At a minimum, the Permit should state that the reopener will occur within one year. The Draft Permit is the regulatory mechanism that makes the TMDL and its requirements enforceable, thus it is critical to include all these requirements to ensure that they are actually undertaken by the Permittee and that water quality standards are attained.

We support the inclusion of milestones that may be outside of the permit term, in the event that the General Permit is administratively extended which is frequent occurrence.

VII. Require All MS4s to Conduct Water Quality Monitoring to Ensure Stormwater Discharges Do Not Degrade Water Quality

While we appreciate the addition of monitoring requirements for Areas of Special Biological Significance (ASBS), the Draft Permit's remaining monitoring requirements are completely insufficient and illegal. We are disappointed to see that numerous monitoring elements that were in the June 7, 2011 Draft Permit have been eliminated. What is the reasoning for the major steps backward?

5.5, available at, http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/asbs/asbspeir_draft2011jan.pdf.

[17] 2009 California Ocean Plan, Sec. III.E.1.
[18] Draft Permit at 75.

The Clean Water Act and its implementing regulations explicitly require monitoring for NPDES permits.[19] NPDES permits must specify monitoring requirements necessary to determine compliance with effluent limitations.[20] The Clean Water Act mandates, "The Administrator shall require the owner or operator of any point source to . . . install, use and maintain such monitoring equipment and methods", which includes biological monitoring and sampling of effluent.[21] Likewise, the federal regulations direct: "All permits shall specify. . . [r]equired monitoring including type, intervals, and frequency." [22] Because these monitoring requirements dominate the Clean Water Act's permitting program, the Act clearly views monitoring as an integral part of all permits. Many elements of the draft Monitoring Program under section E.13 of the Draft Permit must be strengthened in order to meet this requirement. The Permit must contain minimum monitoring requirements, which are necessary to assess compliance and impacts from the MS4. Specifically, the monitoring program must be strengthened as discussed in detail below in order to ensure that discharges do not degrade water quality.

a. Applicability

The Draft Permit limits monitoring requirements to Permittees falling under specific categories. Water quality monitoring in the Draft Permit is only required if a Permittee: 1) discharges into an ASBS, 2) discharges into a waterbody with a Total Maximum Daily Load (TMDL) and is identified as a responsible party, 3) discharges into a § 303(d) listed waterbody, or 4) has a population greater than or equal to 50,000 and is listed in Attachment A. In the case of 303(d) monitoring, the permittee can "consult" with the regional water board Executive Officer to determine if monitoring is necessary at all. This narrow scope is inappropriate as all Permittees are obligated to determine if their discharge is impacting water quality regardless of their size or current requirements.

Further weakening the monitoring requirements, the Draft Permit requires receiving water monitoring only when no ASBS, TMDL or 303(d) monitoring is conducted. Also the Draft Permit appears to allow for special studies in place of receiving water monitoring.

> "Traditional Small MS4 Permittees with a population greater than 50,000 listed in Attachment A that are not already conducting ASBS, TMDL or 303(d) monitoring efforts shall participate in one of the following monitoring programs subject to Regional Water Board Executive Officer approval: a) Regional Monitoring; b) Receiving Water Monitoring; c) Special Studies." (Draft Permit at 65).

This is completely inappropriate and should be removed. In a hypothetical situation, a Permittee could monitor for a single waterbody-pollutant impairment and have no additional monitoring requirements. ASBS, TMDL and 303(d) monitoring is not necessarily sufficient to assess the condition of the waterbody any impacts from the discharge. These types of monitoring all serve different purposes. The Draft Permit should not focus solely on known impairments but instead should assess the overall water quality.

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[19] *See* 33 U.S.C. § 1318(a); 40 C.F.R. §§ 122.48, 122.41.
[20] See CWA section 402(a)(2); 40 C.F .R. I 22.44(i).
[21] See 33 U.S.C. § 1318(a).
[22] See 40 C.F.R. §§ 122.48; 122.41(j).

b. Receiving Water Monitoring

Receiving water monitoring is a critical component of any water quality monitoring program. We strongly support the bioassessment monitoring in the Draft Permit; however, we have some concerns with the program as proposed.

The Draft Permit provides as an objective of the urban/rural program:

> "…the Permittee shall develop and implement a receiving water monitoring program to determine if new development LID BMPs are effective at minimizing degradation in waterways."[23]

The objectives of a receiving water program should be much more far-reaching. For instance a receiving water monitoring program will determine if receiving water limits are being achieved, assess trends in pollutant concentrations over time and determine whether designated beneficial uses are fully supportive. While assessing LID is a good goal, it is hard to imagine with the slow pace of new and redevelopment projects that specific benefits will be measurable within two years of adoption of the permit, especially given the limited nature of the proposed monitoring scheme. Thus, the additional goals outlined above should be incorporated in the requirements and utilized to develop a sufficient receiving water monitoring program. Also additional guidance should be provided if a regional monitoring program is pursued. The Draft Permit should require that regional monitoring programs assess: 1) the condition of the receiving waters; 2) What are the sources of the stressors; and 3) Are the management decisions effective.

Further, the required receiving water monitoring parameters are insufficient to meet the goals of a receiving water program. This list should be greatly expanded. Pollutants such as nutrients, metals such as copper and zinc, and conventional pollutants (TSS, TDS, specific conductance, pH, turbidity, total hardness) are notably absent. Total coliform, fecal coliform and enterococcus should be specified instead of "bacteria." Also pyrethroid monitoring should contain reporting limits that are sufficiently low to be under the toxic levels. This inadequacy is compounded by the fact that there is only one monitoring location per HUC 12 watershed. An HUC 12 is very large watershed (up to 63 square miles). Thus, there will be extremely limited monitoring data collected under this scheme. We urge the State Board to enhance the monitoring program by expanding the parameters monitored and the number of monitoring locations.

c. End-of Pipe Monitoring

The Draft Permit does not include any monitoring at end-of-pipe outfalls. The State Board and regional boards must include this type of monitoring for compliance-assurance and source identification purposes. Drainages carrying stormwater from commercial, industrial, and high-use transportation should be prioritized for monitoring. In addition to outfall monitoring, there should be downstream receiving water monitoring for each outfall monitoring station to determine if MS4 discharges are causing or contributing to exceedances of water quality standards. Monitoring should occur at the first storm event of the wet season and two additional events. Ironically, the Program Effectiveness section of the permit states that the program assessment will be based in part of "MS4 discharge quality"[24] and requires municipal watershed pollutant load quantification of parameters such as nitrogen and metals[25]. How will the

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[23] Draft Permit at 67.

[24] Draft Permit at 71.
[25] Draft Permit at 73.

Permittee accomplish these tasks with no outfall data? The State Board should include this critical monitoring component.

d. TMDL Monitoring

We support the inclusion of TMDL monitoring requirements and other TMDL implementation milestones in Attachment G of the Draft Permit. "[O]nce a TMDL is developed, effluent limitations in NPDES permits must be consistent with the WLA's in the TMDL." (Communities for a Better Env't v. State Water Res. Control Bd. (2005) 132 Cal.App.4th 1313, 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B) (NPDES permits must be "consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the State and approved by the EPA")); see also, City of Arcadia v. State Water Resources Control Board (2006) 135 Cal.App.4th 1392, 1404.) As a result, TMDL requirements such as monitoring must be included in the Permit, as all requirements are vital steps in ensuring that dischargers are on-track for ultimate compliance with a TMDL's waste load allocations.

The Draft Permit requires that TMDL responsible parties consult with the regional boards within six months of adoption to create a monitoring plan for those TMDLs not specified in Attachment G. It is concerning that there are entire regions and associated TMDLs absent from Attachment G, especially given the lengthy stakeholder process for this Permit. At a minimum, we urge the State Board to require that approved TMDL monitoring begin within one year from the adoption date of the Permit. Many of these TMDLs have been in effect for numerous years. Monitoring should have already started, and in cases where it has not been implemented, it should start as soon as possible.

e. Toxicity Monitoring

As seen on the map of impaired waterbodies from the 2010 Integrated Report — 303(d) Listed Waters for Toxicity,[26] waterbodies throughout the state are impaired by toxicity. In fact, toxicity has been observed in all nine regions according to a recent report released by SWAMP entitled *Summary of Toxicity in California Waters: 2001-2009*.[27] Of the 992 sites assessed by the SWAMP program, 473 sites (48%) had at least one sample where toxicity was observed and 129 sites (13%) were classified as highly toxic.[28]

Storm water often contains metals, oils, pesticides, and other contaminants that can be extremely toxic to aquatic life. SCCWRP and numerous local government monitoring programs have demonstrated that MS4 discharges are frequently toxic. Notwithstanding the California Toxics Rule and narrative water quality standards that address toxicity and with which stormwater dischargers must comply, there are numerous California waterways listed as impaired for aquatic toxicity on the CWA §303(d) list, and MS4 discharges are often a source of this impairment. Toxicity monitoring is the "safety net" of the NPDES monitoring program, as it may identify toxicity from pollutants that are not monitored or the synergistic impacts of pollutants. Again, we are disappointed that the proposed toxicity monitoring in the previous draft has been eliminated in the Draft Permit. The Draft Permit should include toxicity monitoring in the receiving water and outfalls, in order to evaluate if stormwater is causing or contributing to toxic impacts of aquatic life. This monitoring should be conducted at all monitoring locations at least on a *quarterly* basis, as toxicity can often be intermittent.

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[26] Available at, http://www.swrcb.ca.gov/water_issues/programs/tmdl/integrated2010.shtml.
[27] State Water Resources Control Board, Surface Water Ambient Monitoring Program (November, 2010) *Summary of Toxicity in California Waters: 2001-2009*, available at http://www.swrcb.ca.gov/water_issues/programs/swamp/docs/reports/tox_rpt.pdf.
[28] *Id.*

f. Beach Monitoring

Stormwater runoff is a major source of beach bacteria pollution. The Permittees must be on hand to undertake beach water quality monitoring at stormwater impacted sites should the Health Department discontinue weekly monitoring, as this program is crucial to a major public health issue. We are disappointed to see the elimination of beach monitoring requirements in this current Draft Permit from the previous draft. Why was this eliminated? The Draft Permit should require that Permittees discharging to AB 411 beaches must comply with the Ocean Plan monitoring requirements. The monitoring program should include year-round monitoring at beach locations. Nuisance flows occur on a year-round basis and are a known source of bacteria to beaches. Specifically, the Ocean Plan requires weekly bacteria indicator samples from each site.[29] The Permit must additionally state clearly that monitoring be conducted in accordance with AB 411 procedures. Lastly, the Permit should specify that monitoring take place at the wave-wash directly in front of stormdrain and stream sources (point zero). This is necessary to ensure that the waters closest to the discharge are evaluated.

VIII. BMP Implementation Strategies Should Be Strengthened

One of the most significant shortcomings in previous stormwater permits is the lack of performance-based criteria for BMPs. As a result, BMPs are added as part of permit requirements or pollution abatement efforts without any focus on the quality of the water exiting the BMPs. An effective way to ensure the success of stormwater programs and the attainment of water quality standards is to assess BMPs based on performance. Flow-based design criteria are simply not adequate to ensure that water quality standards are consistently met because flow, and corresponding BMP size, is but one factor determining BMP effectiveness.

While we recognize that the Draft Permit includes "Program Effectiveness Assessment and Improvement" requirements[30], we believe that this section should be further strengthened. In order to ensure that BMPs are truly designed to the MEP and ensure that Permittees' discharges meets water quality standards, we recommend that the draft Permit require a performance evaluation for all structural (or engineered) best management practices used by the discharger to comply with the Permit, including retrofits and iterative requirements. Specifically, at least once per permit cycle, the Permittee should submit a report to the State Board or regional board that includes a BMP performance evaluation. The report should identify three selected structural BMPs for each targeted pollutant of concern, and then detail an analysis on the efficacy of those BMPs for removing the identified pollutants of concern, in terms of pollutant removal efficiency and effluent water quality. The Permittee would then select the best performing BMP of the three for each targeted pollutant. This evaluation will help determine the structural management practices that are truly the "best" management practices. This type of evaluation is also particularly necessary for discharges into impaired waters and ASBSs, for which BMP effectiveness is particularly critical. Finally, all BMPs installed should be designed to handle the 85th percentile storm, which is currently the mandate in SUSMP requirements. This process will help move Permittees further towards water quality standards attainment.

IX. The Draft Permit should Include Trash Reduction Requirements and Should be Consistent with the State Board's Pending Statewide Trash Policy

[29] California Ocean Plan, at Section III.D.1.
[30] Draft Permit at ¶ E.14.

The Draft Permit contains an extremely limited focus on trash pollution. Staff improperly removed the Trash Reduction Program that was proposed in the June 7, 2011 draft permit. At a minimum Staff should require a **mandatory** re-opener clause and trash reduction strategies in the Draft Permit. The Permit's first draft required "[a]ll Traditional Small MS4 Permittees with a population greater than 25,000 shall require at least 20 percent of the Permittee's jurisdiction zoned, commercial retail/wholesale, comply with a Trash Abatement Plan."[31] However, during recent Staff Workshops on the MS4 Phase II Permit, Staff indicated that the Trash Reduction Program will be removed from the current Draft Permit because of the development of a Trash Policy, expected to be adopted in the summer of 2013. Delaying Permittees' responsibility to reduce trash discharges into waters of the state does not meet MEP.

Trash is a ubiquitous pollution problem in California, and a delay in reducing the amount of trash in our waterways is unacceptable. The Draft Permit itself finds trash to be a "pervasive problem in California."[32] The Permit then goes on to state that "[c]ontrolling trash is one of the priorities in California not only because of trash discharge prohibitions required in certain Regional Water Board Basin Plans, but also because trash and litter cause particularly major impacts on our enjoyment of California waterways."[33] Thus, it is critical that the Permit address trash pollution in a comprehensive manner.

Further, it is inappropriate for Staff to rely on a Trash Policy to be adopted by mid-2013 as a reason for eliminating a Trash Reduction Program from the Draft Permit. Controversial State Water Board policies have been known to take years—even decades—to be enacted. For example, the Once-Through Cooling (OTC) Policy is stated to have begun in 2005, and was not adopted until 2010.

Thus, we request that Staff revisit the Trash Reduction Program, and insert minimum requirements to prevent the degradation of California's waterways due to trash pollution. Specifically, staff should re-insert a Trash Reduction Program that includes structural controls and baseline trash reduction requirements. Also, the Permit should explicitly provide a mandatory re-opener clause to insert the Trash Policy's requirements once enacted.

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For the aforementioned reasons, the Revised Draft Permit does not meet the legal standard of controlling pollutants to the MEP. We look forward to working with you and your staff to ensure the Final Permit will meet these requirements and serve to protect California's water resources.

Sincerely,

Kirsten James
Water Quality Director
Heal the Bay

Noah Garrison
Project Attorney
Natural Resources Defense Council

[31] Permit I, at 54.
[32] Draft Permit at 5.
[33] Draft Permit at 5.

EXHIBIT F

TO THE DECLARATION OF LAWRENCE M. LEVINE

February 4, 2014

Bob Martin, DEP Commissioner
Janis Hoagland, Director Office of Legal Affairs
Attention: Rulemaking Petitions
New Jersey Department of Environmental Protection
401 East State Street, P.O. Box 402
Trenton, NJ 08625-0402

Via Fed-Ex and email: Bob.Martin@dep.state.nj.us

Re: Petition Requesting the Modification (or Revocation and Reissuance) of New Jersey Pollutant Discharge Elimination System Permit Numbers NJ0141852, NJ0141861, NJ0141887, and NJ0141879 (Tier A Municipalities, Tier B Municipalities, Highway Agency, and Public Complex General Stormwater Permits)

Dear Commissioner Martin,

The American Littoral Society, Clean Ocean Action, Delaware Riverkeeper Network, Hackensack Riverkeeper, Natural Resources Defense Council, New Jersey Environmental Lobby, NY/NJ Baykeeper, Pinelands Preservation Alliance, and Stony Brook-Millstone Watershed Association (collectively "Petitioners") respectfully submit this petition requesting the modification (or revocation and reissuance) of the New Jersey Pollutant Discharge Elimination System Permit Numbers NJ0141852, NJ0141861, NJ0141887, and NJ0141879 (Tier A Municipalities, Tier B Municipalities, Highway Agency, and Public Complex General Stormwater Permits), pursuant to N.J.A.C. § 7:14A-16.3.

Urban stormwater runoff – generated by impervious surfaces like roads and rooftops – impairs more New Jersey waters than any other known pollution source.[1] This pollution fouls rivers, lakes, bays, estuaries, and coastal waters across the state, including iconic and beloved waters such as Barnegat Bay. Stormwater runoff is best managed with the use of green infrastructure techniques that use natural systems and processes, or engineered systems that mimic natural systems and process, to absorb water rather than convey it to a nearby water body. Municipal separate storm sewer system (MS4) permits are the most important vehicle for requiring the use of beneficial green infrastructure practices in those parts of New Jersey that are served by separate storm sewers (*i.e.*, the majority of the state).

The New Jersey Department of Environmental Protection (DEP) first issued permits to Tier A and B municipalities, transportation agencies, and large public complexes on February 2, 2004, authorizing them to discharge stormwater runoff from their separate sewer systems into New Jersey waters. The permits for Tier A municipalities, transportation agencies, and public complexes were National Pollutant Discharge Elimination System (NPDES) permits for "small MS4s," defined by federal regulations as systems with populations under 100,000 that are located within urbanized areas.[2] The permit for Tier B municipalities, on the other hand, was issued under state law authority only. DEP then renewed the permits on March 1, 2009. Based on DEP's own water quality data and reporting, these permits have proven insufficient to protect New Jersey waters from the harmful effects of polluted runoff.

Upon the filing of a petition that satisfies the requirements of N.J.A.C. § 7:14A-16.3, "An existing permit shall be modified, revoked and reissued, renewed, suspended, or revoked for cause as specified at N.J.A.C. 7:14A-16.4 through 16.6."[3] The four general stormwater permits listed above (collectively, the "Permits") must be modified – or, in the alternative, revoked and reissued with enhanced protections – because they qualify for at least the following grounds for modification, and/or revocation and reissuance, under DEP regulations:

1. The existence of new information, which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods), and which would have justified the application of different permit conditions at the time of issuance.[4] Specifically, new studies on the impacts of stormwater pollution in New Jersey, as well as new additions to the list of impaired waters, show that greater efforts to control stormwater are needed beyond the requirements of the Permits.

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[1] As of 2010, urban runoff was listed as a cause of impairment for 13,690.6 miles of rivers, 28,435.6 acres of lakes, reservoirs, and ponds, 195.1 square miles of bays and estuaries, and 445.6 square miles of ocean and near coastal waters. U.S. EPA, New Jersey Water Quality Assessment Report, http://ofmpub.epa.gov/waters10/attains_state.control?p_state=NJ.
[2] 40 C.F.R. §§ 122.26, 122.32.
[3] N.J.A.C. 7:14A-16.3(a).
[4] N.J.A.C. 7:14A-16.4(b)(2).

2. A need to include or modify an effluent limitation or parameter pursuant to a permit "reopener" condition, including limitations necessary to implement a Total Maximum Daily Load (TMDL) or watershed management plan.[5] Specifically, because TMDLs in New Jersey have wasteload allocations (WLAs) specifically for MS4s, the Permits must be modified to incorporate the numeric pollution reduction targets from the WLAs, as well as any pollution control measures necessary to meet those targets.

3. Noncompliance by the permittee with any condition of the permit.[6] Petitioners have documented widespread noncompliance with permit terms that justify inclusion of clearer, more specific requirements.

4. The permitted activity endangers human health or the environment.[7] The pervasive adverse effects of stormwater pollution throughout the state, coupled with the failure of existing permit terms to remedy these harms, obligate DEP to include stronger pollution reduction mandates in the Permits.

5. Inconsistency of the permit with any duly promulgated effluent limitation, permit, regulation, statute, or other applicable State or Federal law.[8] The Permits violate, *inter alia*, federal and state legal requirements to reduce discharges of pollutants to the "maximum extent practicable"; to ensure compliance with water quality standards and TMDL WLAs; and to provide for public participation in the development of permittee plans.

In sum, and as described in detail below, the General Permits at issue are inadequate to control stormwater pollution discharges and protect water quality in New Jersey. Not only are they legally deficient, but they also allow stormwater to expose humans and the environment to harmful levels of numerous pollutants. Accordingly, DEP must modify the Permits – or, in the alternative, revoke and reissue them with enhanced protections – to include provisions that meet the requirements of the federal and state law and the needs of New Jersey's waters and its citizens.

Specifically, DEP must include the following provisions in modified or new versions of the Permits:

i. A requirement for MS4 stormwater management plans to be reviewed and approved by DEP prior to discharge authorization.
ii. A stormwater retention standard requiring the on-site retention of the water quality design storm, using green infrastructure practices, that applies to both

[5] N.J.A.C. 7:14A-16.4(b)(7).
[6] N.J.A.C. 7:14A-16.6(a)(1).
[7] N.J.A.C. 7:14A-16.6(a)(3).
[8] N.J.A.C. 7:14A-16.6(a)(7).

small and large sites – including both new development and redevelopment, residential and non-residential sites.

iii. A prohibition on permittee discharges that cause or contribute to violations of water quality standards.

iv. Numeric pollutant reductions identified in TMDL wasteload allocations, and any control measures necessary to achieve those reductions.

v. Monitoring requirements as needed to ensure compliance with water quality standards.

vi. A requirement for municipalities to review and analyze development applications for compliance with state stormwater regulations, along with a requirement for municipal staff to undergo the necessary training.

The detailed grounds for modification (or revocation and reissuance) of the Permits follow below. Petitioners would welcome the opportunity to engage in a constructive dialogue with DEP, in order to address the issues raised in this petition, in a timely and expeditious manner.

I. Because the Permits' Deficiencies Trigger Several Regulatory Grounds for Permit Modification or Revocation, DEP Must Modify Them or Revoke and Reissue Them With Stronger Permit Terms.

A. New Information Which Was Not Available at the Time of Permit Issuance Justifies the Application of Different Permit Conditions

A permit shall be modified if a petition identifies "[n]ew information which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of different permit conditions at the time of issuance."[9] Since the current Permits were issued on March 1, 2009, new information has become available on the adverse effect of stormwater pollution on Barnegat Bay, as well as new water quality impairments statewide caused by urban runoff, and this information would have justified the inclusion of stronger pollution limits in the Permits.

In 2011, the Barnegat Bay Partnership ("the Partnership") released a report documenting the eutrophic conditions in the Bay.[10] This report found that eutrophication – an increase in the rate of supply of organic matter (nutrients) into an ecosystem, leading to low oxygen levels – is "one of the leading issues facing Barnegat Bay today."[11] According to the director of the Partnership, "Of the 19 various indicators used to portray the overall condition of the bay, the

[9] N.J.A.C. 7:14A-16.4(b)(2).
[10] Barnegat Bay Partnership, *State of the Bay Report 2011* (2011), *available at* http://bbp.ocean.edu/PDFFiles/BarnegatBay/State%20of%20the%20Bay%202011/BBP%202011%20State%20Of%20The%20Bay%20Report.pdf.
[11] *Id.* at 15.

overwhelming majority clearly show that the Barnegat Bay is in trouble. First and foremost, high nutrient loadings to the bay from past and present activities have contributed to excessive production of phytoplankton and benthic algae, which have led to high turbidity, low dissolved oxygen, and/or eelgrass decline in parts of the bay."[12]

The Partnership's report also found that eutrophication is "overwhelmingly" driven by increases in nitrogen from runoff pollution generated by development in the watershed.[13] This finding is confirmed by the National Oceanic and Atmospheric Administration (NOAA), which has stated, "Increasing watershed development and associated increases in non-point source nitrogen loads to Barnegat Bay have led to a higher eutrophic condition… High primary and secondary symptom levels indicate serious eutrophication problems."[14] Another ecological study from 2011 similarly concluded that "Barnegat Bay has shown increased development along with low freshwater inflow and flushing (i.e., high residence time of water) and high nutrient levels that result in eutrophic conditions."[15]

Since the Permits were issued in 2009, the Bay's eutrophic state has led to a decline of seagrass above-ground biomass to the lowest recorded level in history.[16] Phytoplankton blooms and sea nettle outbreaks in 2010 have provided further new evidence of the harm caused by nutrients in stormwater runoff.[17]

Not only is stormwater runoff pollution causing eutrophic conditions, but the Partnership's new report found that stormwater is contributing pathogens to the Bay that impair recreational uses like swimming.[18] After performing an original analysis of recent beach water monitoring, the report concluded, "Non-point source pollution delivered via stormwater is the primary source of contamination at [Bay] beaches."[19]

Additionally, since the existing MS4 Permits were issued in 2009, DEP has identified 120 additional water body segments as impaired by "urban runoff."[20] These newly identified

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[12] *Id.* at 4.
[13] *Id.* at 15.
[14] NOAA, *Barnegat Bay*, http://ccma.nos.noaa.gov/stressors/pollution/eutrophication/eutrocards/barnegat.pdf.
[15] David Velinsky et al., *Nutrient and Ecological Histories in Barnegat Bay, New Jersey* at 6 (2011), *available at* http://www.state.nj.us/dep/dsr/barnegat/barnegat-bay-final-report2010_05.pdf.
[16] Mike Kennish et al., *Seagrass Demographic Changes in Barnegat Bay-Little Egg Harbor in Response to Nitrogen Enrichment* at 4 (2011), *available at* http://bbp.ocean.edu/PDFFiles/BarnegatBay/State%20of%20the%20Bay%202011/presentations/Seagrass%20Demographic%20Changes%20in%20the%20Barnegat%20Bay-Little%20Egg%20Harbor%20Estuary%20in%20Response%20to%20Nitrogen%20Enrichment%20%E2%80%93%20Kennish.pdf.
[17] *Id.*
[18] Barnegat Bay Partnership at 32.
[19] *Id.* at 33.
[20] This is the number of water bodies with the initial listing date reflected as 2010 or 2012, and which have urban runoff listed as a source. NJDEP, 2012 303(d) List of Water Quality Limited Waters, *available at* http://www.state.nj.us/dep/wms/bwqsa/2012_draft_303d_list.pdf (also attached as Exhibit A with newly listed water body segments highlighted).

impairments – along with new documentation of the declining state of Barnegat Bay – indicate that the Permits' requirements have been insufficient to prevent further degradation of water quality throughout the state, much less to restore water quality in already-degraded waters.

Consequently, DEP must modify the Permits to incorporate effluent limitations that are adequate to redress the pollution problems affecting Barnegat Bay and other impaired water bodies throughout the state of New Jersey.

B. Water Quality-Based Effluent Limitations Must Be Included to Implement TMDLs

Clean Water Act permits must be consistent with the waste load allocations established by Total Maximum Daily Loads (TMDLs) required by §303 of the Act.[21] The purpose of a TMDL is to determine the total load of a pollutant that a water body can absorb while still meeting water quality standards. The TMDL then allocates that load between point sources and nonpoint sources, while maintaining a margin of safety to protect water quality. If discharge permits do not incorporate these waste load allocations, then the needed pollution reductions will not occur and the purpose of the Act will be frustrated.

Accordingly, to ensure that permits do include terms consistent with TMDL wasteload allocations, DEP regulations state that a permit shall be modified to include "an effluent limitation or parameter pursuant to a permit 'reopener' condition … including those limitations necessary to implement a TMDL …."[22]

Numerous TMDLs in New Jersey have waste load allocations specifically for MS4 discharges. In many cases, the wasteload allocations for MS4s call for greater reductions than the overall TMDL reduction requirements – pointing to the significance of regulated stormwater point source reductions in attaining water quality goals. Examples of TMDLs with MS4 wasteload allocations include, but are not limited to, the following:

- In September of 2005, DEP established TMDLs for phosphorus to address three stream segments in the Northeast Water Region: Coles Brook at Hackensack, Pascack Brook at Westwood, and Musquapsink Brook at River Vale. All three water bodies are tributaries to the Hackensack River. The TMDL limits total phosphorus to Coles Brook at Hackensack from medium and high density residential land uses to 1,044.4 KG/year (a 59.95% reduction), from low density and rural to 16.17 KG/year (a 0.93% reduction), from commercial to 216.62 (a 12.43% reduction), from industrial to 8.9 KG/year (a 0.51% reduction) and from mixed and other urban to 91.23 KG/year (a 5.24% reduction). The TMDL limits total phosphorus to Pascack Brook and Musquapsink Brook from medium and high density residential land uses to 886.95 KG/year (a 16.96% reduction), from

[21] 40 C.F.R. § 122.44(d)(1)(vii)(B); *see also* Section I.E, infra.
[22] N.J.A.C. 7:14A-16.4(b)(7).

low density and rural to 2,819.9 KG/year (a 53.92% reduction), from commercial to 455.04 KG/year (a 8.70% reduction), from industrial to 0 KG/year (no reduction) and from mixed and other urban to 311.48 KG/year (a 5.96% reduction).[23]

- In April of 2008, DEP adopted a TMDL for the non-tidal Passaic River Basin to address phosphorus impairments. This TMDL divided the non-tidal portion of the Passaic into three sections and assigned waste load allocations for four point source categories, two of which are regulated by the state's MS4 general permit. In the Pompton River Basin, the TMDL limits total phosphorus from Stormwater from Residential Land Use Areas to 4.5 KG/day (a 53% reduction) and from Stormwater from Other Urban Land Use Areas to 4.4 KG/day (a 54% reduction). In the Upper and Middle Passaic River Basin, the TMDL limits total phosphorus from Stormwater from Residential Land Use Areas to 9.6 KG/day (a 60% reduction) and from Stormwater from Other Urban Land Use Areas to 10.0 KG/day (a 60% reduction). In the Lower Passaic River Basin, the TMDL limits total phosphorus from Stormwater from Residential Land Use Areas to 3.2 KG/day (a 60% reduction) and from Stormwater from Other Urban Land Use Areas to 3.8 KG/day (a 60% reduction).[24]

- The TMDL for fecal coliform in the Raritan Water Region calls for up to a 98% reduction in fecal coliform loadings and states that stormwater is a "primary contributor" to fecal coliform loads.[25] As a result, while it does not establish specific waste load allocations, the TMDL calls for the specified percent reductions to be applied to stormwater point sources and states that implementation will rely in part on the state's MS4 permits, which will require permittees to "substantially reduce bacteria loadings."[26]

- The TMDL for phosphorus in Annaricken Brook, Barkers Brook North Branch, and Doctors Creek (in the Lower Delaware Water Region) contains wasteload allocations for stormwater sources in all four stream segments covered by the plan. The TMDL's wasteload allocations call for reductions from stormwater sources of 54.6% in Annaricken Brook, 66% in Barkers Brook North Branch near Jobstown, 78.7% in Doctors Creek at Rt. 539, and 77.5% in Doctors Creek at

[23] NJDEP, Total Maximum Daily Loads for Phosphorus to Address Three (3) Stream Segments in the Northeast Water Region (2005), *available at* http://www.nj.gov/dep/wms/bear/WMA%205%202005.pdf.
[24] NJDEP, Total Maximum Daily Load Report for the Non-Tidal Passaic River Basin Addressing Phosphorus Impairments (2008), *available at* http://www.nj.gov/dep/watershedmgt/DOCS/TMDL/passaic_tmdl.pdf.
[25] NJDEP, Total Maximum Daily Loads for Fecal Coliform to Address 48 Streams in the Raritan Water Region at 6, 37-39 (2003), *available at* http://www.nj.gov/dep/wms/bear/Raritan%20FC.pdf.
[26] *Id*. at 34, 40.

Allentown.[27] The TMDL further states that these phosphorus reductions are to be attained via requirements in MS4 permits, such as "more frequent street sweeping and inlet cleaning, or retrofit of stormwater management facilities to include nutrient removal."[28]

- The TMDL for pathogens to address 18 lakes in the Atlantic Coastal Water Region assigns wasteload allocations to MS4s that require between 73% and 99% reductions in pathogen loadings.[29] These allocations affect 26 municipalities that are covered by MS4 permits.[30] The TMDL states, "Stormwater point sources will be addressed through the management practices required through the MS4 permits."[31]

- The TMDL for total coliform in Watershed Management Area 12, Atlantic Coastal Water Region, assigns wasteload allocations to MS4s requiring between 35% and 93% pollutant load reductions.[32] These allocations affect 40 municipalities that are covered by MS4 permits.[33]

Despite the stormwater-related pollutant decreases called for in these and other TMDLs, none of the MS4 General Permits incorporate the associated wasteload allocations as enforceable end-of-pipe discharge limits or mandate actions shown to be sufficient to attain the reductions.[34] The MS4 Permits must therefore be modified to incorporate both the numeric pollution reduction targets from all applicable wasteload allocations, and to require whatever specific pollution control measures are necessary to meet those targets.

C. The Permits Must Be Revised to Address Permittee Noncompliance

A permit shall be modified if DEP identifies instances of "Noncompliance by the permittee with any condition of [the] permit."[35] Municipalities regulated under the Tier A Municipal Stormwater General Permit are violating the terms and conditions of the permit by

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[27] NJDEP, Total Maximum Daily Loads for Phosphorus to Address 4 Stream Segments at 30, 33, 36, 38 (2007), *available at* http://www.nj.gov/dep/wms/bear/wma20_tp_tmdl100107.pdf.
[28] *Id.* at 41.
[29] NJDEP, Total Maximum Daily Loads for Pathogens to Address 18 Lakes in the Atlantic Coastal Water Region at 22-23 (2009), *available at* http://www.nj.gov/dep/wms/bear/adopted_atlantic_fecal_lake.pdf.
[30] *Id.* at Appendix B, 33-34.
[31] *Id.* at 13.
[32] NJDEP, Five Total Maximum Daily Loads for Total Coliform to Address Shellfish-Impaired Waters in Watershed Management Area 12 Atlantic Coastal Water Region at 27 (2011), *available at* http://www.nj.gov/dep/wms/bear/coastal_pathogen_tmdls_wma12%20for%20adoption.pdf.
[33] *Id.* at Appendix C, 43-44.
[34] The one known exception to this statement is the Additional Measure (AM) requiring MS4s to adopt fertilizer management ordinances, which was incorporated into the Permits to implement the Passaic phosphorus TMDL.
[35] N.J.A.C. 7:14A-16.6(a)(1). This regulatory provision states that noncompliance with the permit is cause for permit revocation. However, the regulations also provide that the grounds for permit revocation are also grounds for permit modification. N.J.A.C. 7:14A-16.4(b)(17).

failing to fully and adequately review development applications for stormwater compliance in cases where the developer also requires a DEP permit. Even when municipal staff do review development applications, they often fail to enforce all the requirements of state stormwater regulations due to misinterpretation of the rules or inadvertent oversights. Thus, in order to ensure compliance with the Residential Site Improvement Standards (RSIS) for stormwater management at N.J.A.C. 5:21-7 and the stormwater design and performance standards established under N.J.A.C. 7:8, two permit conditions under the Tier A and B General Permits should be modified to be more clear and explicit that municipal stormwater review must be conducted for all residential and commercial development applications, except where review is explicitly exempted under the permit, and to ensure that municipal engineers, municipal officials, and the engineering firms which that municipalities contract to perform stormwater reviews have all received adequate training regarding how to apply those performance standards.[36]

Based on a review of Hamilton Township's compliance with the stormwater rules, municipal engineers and officials in the Township have misunderstood their duty to conduct stormwater review when a developer was also applying for a DEP permit. The Delaware Riverkeeper Network's May 2010 Hamilton Township Case Study evaluated twelve (12) development projects in Hamilton Township (Mercer County) for compliance with the applicable RSIS and N.J.A.C § 7:8 standards.[37] The CareOne development project is perhaps the best example of the Township's confusion as to its duty to undertake stormwater review when the developer has also applied for a DEP permit. Specifically, on the eve of the Township's Zoning Board hearing for the CareOne project's land variance application, DEP advised the Township that it had already approved the stormwater plan, stating:

> [T]he Department approved CareOne's stormwater management plan when it issued the [Freshwater Wetlands Permit]. I understand that this letter will be submitted to the Hamilton Township zoning board to prove that the Department approved the stormwater management plan for this project.[38]

The clear purpose of this letter was to preempt municipal stormwater review. Acting upon this advice from the Department, the Township determined that the "stormwater system as

[36] The particular exemptions contemplated here are as follows: currently municipal stormwater review of a major development for compliance with N.J.A.C. 7:8 is exempted in the two following scenarios: (1) Those standards do not apply because of a variance or exemption granted under N.J.A.C. 7:8; or (2) Alternative standards are applicable under an areawide or Statewide Water Quality Management Plan adopted in accordance with N.J.A.C. 7:15.
[37] Delaware Riverkeeper Network, *New Jersey Stormwater Management Implementation: A Case Study of Hamilton Township, Mercer County* (May 2010), *available at* http://www.delawareriverkeeper.org/resources/Reports/Hamilton_Twp_NJ_SWM_Implementation_Report.pdf.
[38] Letter from Vincent Mazzei, Jr., Acting Supervisor of the North/Central Engineering Section, NJDEP, to David Roth, Taylor Wiseman & Taylor (Dec. 19, 2008), attached as Exhibit B.

designed, was appropriate pursuant to the required standards for the purposes of the use variance approval," thereby misidentifying its duty to perform a stormwater review.[39]

On other occasions, the Township simply deferred its review for stormwater compliance to some indeterminate future time. For example, in multiple Resolutions of Memorialization for project approvals, the Hamilton Township land use boards state that the "applicant shall comply with all requirements of the Stormwater regulations" without specifications or further review to ascertain if or how those requirements would be met and without a mechanism put in place to assure compliance.[40]

By doing so, the Township continued to rely upon DEP to conduct stormwater review for many of the projects that required a Department wetland permit. The Township's expectation and reliance on DEP to conduct stormwater review also, in part, likely explains the "widespread inaccuracies and apparent neglect . . . in the Township's review process" that were identified in the Hamilton Case Study. The case study went on to conclude:

> During our preliminary document review it became apparent that vital documents including the Stormwater Management Report, containing the most basic and fundamental information necessary for project approval, were often never presented to the Township. An informed and consequently accurate interpretation of these projects was not even possible by the Township Planning Board or Zoning Board of Adjustment.[41]

The absence of such vital documentation necessary for the Township to conduct its stormwater review further signals the Township's reliance on DEP to perform its stormwater reviews. While the conduct of Hamilton Township deferring its stormwater review is sobering, should the state review other municipalities' track record for deferring stormwater review, it will likely find similar practices because of vague and ambiguous permit conditions that direct municipal review.

The implementing regulations that govern New Jersey's Municipal Stormwater Regulation Program require a municipality subject to the Tier A General Permit to "develop, implement, and enforce a program to address stormwater runoff from new development and redevelopment" by, among other things:

- "requir[ing] compliance with the applicable design and performance standards established under N.J.A.C. 7:8" and

[39] Hamilton Township Zoning Board of Adjustment Resolution 99-01-005B, Paragraph 52 (Nov. 16, 2009), *available at* http://www.delawareriverkeeper.org/resources/..%5Cresources%5CReports%5CResolution_Care_One.pdf.
[40] Delaware Riverkeeper Network, *Hamilton Township Case Study* at 15.
[41] *Id.* at 10.

- "ensur[ing] that any residential development and redevelopment projects that are subject to the Residential Site Improvement Standards for stormwater management (N.J.A.C. 5:21-7) comply with those standards."[42]

The Tier A and B Municipal Stormwater General Permit incorporate these requirements almost verbatim.[43] However, the regulations and the Permits fail to inform each regulated municipality how it may "require" and "ensure" appropriate compliance, thereby creating arguably vague and ambiguous obligations. Instead, the Permits should explicitly outline that it is the municipalities' duty to review and analyze development applications for stormwater compliance with the RSIS and NJAC 7:8, even when the developer has applied for a DEP permit.

The Permits should also be revised to require enhanced and mandatory stormwater technical training to municipal engineers, municipal officials, and the engineering firms that municipalities contract with to perform stormwater reviews. To the extent that a municipality actually conducts a stormwater review of proposed development, much of the noncompliance with the stormwater standards can be attributed to the municipality's engineers, staff, and outside consultants' insufficient understanding of the stormwater regulations.

The Delaware Riverkeeper Network's Hamilton Township Case Study highlighted twelve (12) development projects, eleven (11) of which were significantly failing to comply with the stormwater regulations.[44] The case study found widespread and almost uniform "non-compliance with, the nonstructural stormwater management strategies, a central tenet of the [stormwater] rules."[45] Other requirements of the stormwater rules, like groundwater recharge and runoff quality and quantity standards, were also not enforced. These instances of noncompliance are most likely attributed to "[m]isinterpretation of the [stormwater] rules, incorrect usage of data and apparent carelessness."[46] Importantly, DEP has reviewed and corroborated many of the Hamilton Case Study's conclusions, confirming that most of the eleven (11) noncompliant projects noted in the study have significant stormwater deficiencies.[47]

Engineers and municipal officials outside Hamilton Township are also struggling to fully comprehend and appropriately apply the stormwater rules in their review of development projects. Investigations have found inadequate municipal review of development stormwater plans in Pohatcong Township (Hunterdon County), Morris Township (Morris County), Mansfield Township (Burlington County), Franklin Lakes Borough (Bergen County), the Borough of South Plainfield (Middlesex County), Franklin Township (Somerset County), Edison

[42] N.J.A.C. 7:14A-25.6(b)(3)(ii), (iv)(1).
[43] Tier A Permit at 8-9; Tier B Permit at 6-7.
[44] Delaware Riverkeeper Network, *Hamilton Township Case Study* at 14.
[45] *Id.*
[46] *Id.*
[47] Letter from Sandra Blick, Supervisor, Stormwater Management Unit, NJDEP, to Richard S. Williams, Acting Director, Department of Community Planning & Compliance (Jan. 16, 2013), attached as Exhibit C.

Township (Middlesex County), City of Vineland (Cumberland County), and Township of Toms River (Ocean County).[48] Many of these stormwater deficiencies include the very same compliance issues within Hamilton Township, namely that the municipalities are failing to ensure compliance with the stormwater rules' nonstructural design strategies, ground water recharge, and water quality and quantity requirements.[49]

Such widespread municipal noncompliance suggests the need for greater training on the stormwater rules' central requirements. Currently, the Tier A General Permit requires Tier A municipalities to conduct "annual employee training to educate all municipal employees on those stormwater topics which are applicable to their job and title" including the "requirements for Post-Construction Stormwater Management in New Development."[50] However, given the level of noncompliance by Tier A and B municipalities and the complexity of the stormwater rules, the trainings should be more frequent and/or more focused. For example, the Permits could require that permittees "ensure that the individual performing the reviews are adequately trained and understand the State and local post construction stormwater requirements," and that they "ensure that the individuals performing the reviews [of development stormwater plans] that include post-construction stormwater management practices are qualified professionals or under the supervision of a qualified professional," as New York's statewide stormwater general permit requires.[51] Other, more specific training requirements may also be necessary and appropriate. The current permit condition also does not account for the newly hired municipal engineer or newly appointed municipal official. Prior to beginning their official duties, these individuals should be required to undergo appropriate stormwater training.

D. Stormwater Pollution That Continues to Occur Under the Permits Endangers Human Health and the Environment

DEP regulations state that a discharge permit shall be modified if the Department determines "that the permitted activity endangers human health or the environment…"[52] Stormwater is an issue of great environmental and human safety significance.[53] Mismanaged

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[48] *See* Letter from Delaware Riverkeeper Network to Ed Frankel, Acting Bureau Chief, Bureau of Nonpoint Pollution Control (Sept. 15, 2011), attached as Exhibit D.
[49] *Id.*
[50] Tier A Permit at 16. Note that the Highway Agency and Public Complex Permits have identical training requirements, but the Tier B Permit requirements are more lax and do not mandate training at all.
[51] New York State Department of Environmental Conservation, SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s), Permit GP-0-10-002, at Part VII.A.5.a.v (May 1, 2010), *available at* http://www.dec.ny.gov/docs/water_pdf/ms4gp2011.pdf. A "qualified professional" is defined as "a person that is knowledgeable in the principles and practices of stormwater management and treatment, such a licensed Professional Engineer, Registered Landscape Architect or other Department endorsed individual(s)." *Id.* at Part X.B.
[52] N.J.A.C. 7:14A-16.6(a)(3). This regulatory provision states that noncompliance with the permit is cause for permit revocation. However, the regulations also provide that the grounds for permit revocation are also grounds for permit modification. N.J.A.C. 7:14A-16.4(b)(17).
[53] *See, e.g.*, Natural Resources Defense Council, *Rooftops to Rivers II: Green Strategies for Controlling Stormwater and Combined Sewer Overflows* at Ch. 1 (2011), *available at*

stormwater causes increased water pollution, streambank erosion, aquifer depletion, aquatic and terrestrial habitat destruction, wetland degradation, and flooding.[54] Because these problems are severe in New Jersey, and have not been remedied by the existing permits, DEP must determine that stormwater discharges under the existing permits endanger human health and the environment and that the permits must be strengthened.

New Jersey's waters are severely impaired by pollution. According to the most recent assessment by the U.S. Environmental Protection Agency (EPA) and DEP, 17,089 miles or 90 percent of assessed river and stream miles, 45,307.5 acres or 95 percent of assessed lakes, reservoirs, and ponds, 664.9 square miles or 89 percent of bays and estuaries, and 514.6 square miles or an astonishing 100 percent of New Jersey's ocean and near coastal waters are not meeting at least one of their designated uses, such as swimming or fishing.[55] Urban runoff is listed as a source of impairment for more New Jersey waters than any other source, including 13,690.6 miles of rivers, 28,435.6 acres of lakes, reservoirs, and ponds, 195.1 square miles of bays and estuaries, and 445.6 square miles of ocean and near coastal waters.[56]

New Jersey is particularly threatened by the impacts of stormwater because it is the most densely populated state in the nation.[57] In the last 30 years, New Jersey's rural lands have been urbanized at an extraordinary rate.[58] In 1982, 26 percent of New Jersey's land was developed and 76 percent was rural.[59] However, by 2007 the proportion of New Jersey's developed land had grown to 40.7 percent while only 59.3 percent of its land remained rural.[60] What was once a huge swath of permeable land that played a vital role in the absorption of stormwater has now been largely developed, paved over, and sealed off, substantially altering the natural hydrologic cycle.

Put in a regional context, the Delaware River Watershed receives, on average, 45 inches of rainfall annually. In undeveloped, naturally vegetated, portions of the watershed, only about 8 inches of water run off the land, while the other 37 inches either evaporate or are absorbed into the ground. In the highly developed, urbanized landscape, by contrast, the proportion flips: 40 inches or more of average annual rainfall becomes stormwater runoff.[61]

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http://www.nrdc.org/water/pollution/rooftopsii/files/rooftopstoriversII.pdf; Delaware Riverkeeper Network, *Stormwater Runoff, Lost Resource or Community Asset? A Guide to Preventing, Capturing and Recovering Stormwater Runoff*, Ch. 1: Stormwater Runoff – the Lost Resource at 3-5 (2001), attached as Exhibit E.

[54] *Id.*

[55] U.S. EPA, New Jersey Water Quality Assessment Report, http://ofmpub.epa.gov/waters10/attains_state.control?p_state=NJ.

[56] *Id.*

[57] U.S. Census, Population Density, http://www.census.gov/2010census/data/apportionment-dens-text.php.

[58] New Jersey Sierra Club, *A Disappearing Act by the "Garden State"* (Sept. 2, 2011), *available at* http://newjersey.sierraclub.org/pressreleases/0186.asp.

[59] *Id.*

[60] *Id.*

[61] Delaware Riverkeeper Network, *Stormwater Runoff, Lost Resource or Community Asset?* at 4.

The downstream impacts of stormwater runoff are significant in both environmental and human health terms. Not only is stormwater runoff in a developed landscape no longer available to recharge aquifers, streams, and wetlands, but it also picks up a toxic burden of pollutants. Degraded water quality and depleted groundwater lessen the ability of streams and water bodies to support aquatic life and diversity or to provide sufficient quantities of clean drinking water for human needs. Pollution and siltation in stormwater runoff degrades and destroys wetlands that would otherwise provide invaluable environmental services such as buffering waterways from pollution and mitigating flooding impacts. Moreover, the vastly increased volume of stormwater runoff during a rain or storm event leads to flooding when downstream systems cannot handle the rapid influx of water. Below, each of these impacts from mismanaged stormwater is explored in greater detail.

Water Pollution[62]

DEP has recognized that "stormwater/nonpoint sources are the largest remaining major source of pollutants in our waters."[63] Not surprisingly, EPA agrees that stormwater runoff is the nation's largest water quality problem.[64] Because of mismanaged runoff, water that once took more of a meandering path, permeating through the soil in a natural filtration process, is now directly discharged into streams. The result is dirtier water, and a greater volume of it, which has significant and sometimes devastating water quality impacts on receiving waterways.[65] This first flush of stormwater picks up a number of harmful pollutants from urban and suburban areas, including oil, garbage, road salt, chemicals, metals, fertilizer, and sediment.

DEP has acknowledged the role that stormwater pollution plays in the violation of water quality standards in, for example, New York Bay. The Department and EPA have been working on a TMDL for New York Bay for decades. This collaboration has produced extensive data demonstrating stormwater's impact on estuarine water quality. For example, the Hydroqual Technical Memo delivered to the Pathogen Work Group shows that stormwater is an important source of pathogens in the harbor. The Hydroqual Assessment of Pathogen Strategies found that the primary sources of bacteria are generally attributed to combined sewer overflows and stormwater and that "(the Hackensack and Passaic Rivers) are heavily influenced by stormwater and therefore stormwater reductions of greater than 10% would be necessary to meet the 30 day

[62] *See also* Sections I.A (presenting data on number of water bodies listed as impaired by stormwater runoff in 2010 and 2012), I.B. (describing TMDLs assigning pollutant load reductions to stormwater sources), *supra*.
[63] NJDEP, Tier A Municipal Stormwater Guidance Document at 1 (Apr. 2004), *available at* http://www.nj.gov/dep/dwq/tier_a_guidance.htm.
[64] *See* U.S. EPA, Nonpoint Source Pollution: The Nation's Largest Water Quality Problem, http://water.epa.gov/polwaste/nps/outreach/point1.cfm.
[65] *See* Delaware Riverkeeper Network, *Stormwater Runoff, Lost Resource or Community Asset?* at 12.

geometric mean concentration of 35 (colony forming units)."[66] Pathogens make water unsafe for swimming.

Similarly, the Hydroqual Nitrogen and Carbon Sub-Regional TMDLs Planning Document reported that "stormwater represents the largest nonpoint source category" for nitrogen and carbon loading.[67] Consequently, much of the Hackensack River fails to meet water quality standards for dissolved oxygen at or more than 80 days a year.[68]

Stormwater runoff is also an important source of toxic pollution.[69] According to "A Review of the Contaminants and Toxicity Associated With Particles in Stormwater Runoff," prepared for the California Department of Transportation in 2003, "Roadway and pavement runoff contains organic and inorganic contaminants that can impair receiving water quality and disrupt aquatic and benthic ecosystems. Potential contaminants in roadway runoff include suspended solids, heavy metals, hydrocarbons, indicator bacteria and pathogens, and deicing salts. Runoff from roadways contributes as much as 50 percent of the total suspended solids, 16 percent of the total hydrocarbons, and 35 to 75 percent of the total metal pollutant inputs to impaired receiving waters. In terms of toxicity and health risk, heavy metals, organic contaminants and microorganisms are frequently cited as the contaminants of most concern in runoff."[70] Toxic pollutants are the primary reason that many fish, shellfish and crustaceans in the New York-New Jersey Harbor Estuary are unsafe for human consumption.

Depletion of Groundwater Aquifers

Groundwater aquifers store captured rainwater, slowly releasing it to form the base flow of streams and rivers and of drinking water obtained from wells.[71] A typical suburban-density development with a typical 23 percent impervious cover deprives groundwater aquifers of over forty million gallons of recharge per square mile annually, negatively affecting drinking water supplies.[72] As the recharge of aquifers slows, so do the associated base flows to streams,

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[66] Hydroqual, *Assessment of Pathogen Strategies* at 11 (2010), *available at* http://www.harborestuary.org/pdf/Pathogens-AssessPathogenStrategies0610.pdf.
[67] Hydroqual, *Nitrogen and Carbon Sub-Regional TMDLs Planning Document* at 20 (2009), *available at* http://www.harborestuary.org/reports/nutrient/SubRegionalEvaluations-Report0509.pdf.
[68] *Id.* at 24.
[69] *See* Robert Pitt, *The National Stormwater Quality Database, Version 3.1* (2011), *available at* http://rpitt.eng.ua.edu/Publications/4_Stormwater_Characteristics_Pollutant_Sources_and_Land_Development_Characteristics/Stormwater_characteristics_and_the_NSQD/NSQD%203.1%20summary%20for%20EPA%20Cadmus.pdf; Earl Shaver et al., *Fundamentals of Urban Runoff Management: Technical and Institutional Issues* (2007), *available at* http://www.ilma-lakes.org/PDF/Fundamentals_full_manual_lowres.pdf; Robert Pitt et al., *The National Stormwater Quality Database (NSQD, Version 1.1)* (2004), *available at* http://rpitt.eng.ua.edu/Research/ms4/Paper/MS4%20Feb%2016%202004%20paper.pdf; G.A. Burton & R.E. Pitt, *Stormwater Effects Handbook* (2002).
[70] California Department of Transportation, *A Review of the Contaminants and Toxicity Associated with Particles in Stormwater Runoff* at 1-1 (2003), *available at* http://www.dot.ca.gov/hq/env/stormwater/pdf/CTSW-RT-03-059.pdf (internal citations omitted).
[71] Delaware Riverkeeper Network, *Stormwater Runoff, Lost Resource or Community Asset?* at 3.
[72] *Id.* at 10-11.

resulting in a greater concentration of pollutants in our waterways.[73] The loss of water in our streams also places unnecessary stress on aquatic and riparian ecosystems.

Wetlands Destruction and Degradation

Increased volumes of runoff from improperly managed stormwater can destroy wetlands, thereby diminishing their beneficial effects.[74] Wetlands provide numerous benefits including recharging groundwater, reducing erosion, and serving as habitat to some of the most biologically productive ecosystems in the world.[75] Wetlands also provide a water purification service by filtering out pollutants. This service has been estimated to be worth $6,600 per acre.[76] In addition, wetlands reduce the intensity and frequency of flooding by slowing the release of stormwater.[77] According to EPA, "[i]f more communities protect existing wetlands and increase the quantity of wetlands… we will be better protected against the consequences of floods."[78]

Increased Flooding

When federal and state agencies fail to properly regulate stormwater, increased flooding and flood damage results. In urbanizing or urbanized watersheds, the frequency of flooding from smaller storms has increased. Consequently, two year and five year storm events, twenty-four hour events that exceed bankfull capacity and occur on average once every two or five years, cause greater flood damage.[79]

The property damage and nuisance caused by downstream flooding impose significant financial costs on private property and business owners and on every level of government, municipal, state, and federal, especially in terms of response and repair costs. Flooding may even pose a risk to human safety and life.[80] Inadequately designed stormwater plans externalize the impacts of mismanaged runoff to downstream residents, municipalities and the State of New Jersey, allowing developers to force stormwater's true costs to be borne by taxpayers and governments.

Flooding also has a direct effect on downstream residents. In May 2010, Delaware Riverkeeper Network released a report outlining significant deficiencies in approved stormwater management plans from Hamilton Township, New Jersey (discussed in Section I.C above). While Hamilton Township has felt the environmental and human health impacts of stormwater runoff, so has the downstream City of Trenton, which suffers from high flood vulnerability via

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[73] *Id.* at 10.
[74] *Id*. at 11.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] EPA, *Wetlands: Protecting Life and Property from Flooding* (May 2006), *available at* http://water.epa.gov/type/wetlands/upload/Flooding.pdf.
[79] *See* Delaware Riverkeeper Network, *Stormwater Runoff, Lost Resource or Community Asset?* at 9.
[80] *See generally id.* at 5-15.

the flash-flood-prone Assunpink Creek.[81] According to Trenton's Natural Hazard Mitigation Plan, "[t]he most significant natural hazard to which the City of Trenton is exposed is clearly flooding."[82] The Plan states that the flooding "...has happened so often recently that the problem has gone past the level of nuisance," and furthermore that "many areas adjacent to the Assunpink Creek flood almost annually...."[83]

Because stormwater runoff indisputably threatens human health and the environment throughout New Jersey, DEP must modify the MS4 Permits to include strong pollution reduction requirements.

E. The MS4 Permits Violate the Clean Water Act and State Regulations

A permit shall be modified for cause if it is inconsistent "with any duly promulgated effluent limitation, permit, regulation, statute, or other applicable State or Federal Law."[84] The General Permits are inconsistent with legal requirements for at least three reasons: (1) they are inconsistent with the Clean Water Act's "maximum extent practicable" standard for stormwater permits; (2) they do not prohibit permittees from causing or contributing to violations of water quality standards and are inconsistent with TMDL wasteload allocations; and (3) they are inconsistent with public participation requirements.[85] Because the General Permits do not meet the requirements of state and federal law, Petitioners request that DEP modify the Permits. The modifications described below are necessary to meet legal requirements and conform to the recommendations contained in EPA's MS4 Permit Improvement Guide.[86]

1. *The Tier A, Highway Agency, and Public Complex MS4 Permits are inconsistent with the "maximum extent practicable" standard contained in the Clean Water Act and New Jersey regulations because they do not provide for DEP review and approval of MS4s' pollution control programs.*

The federal Clean Water Act states that MS4 permits "shall require controls to reduce the discharge of pollutants to the *maximum extent practicable*," otherwise known as the "MEP" standard.[87] Likewise, CWA regulations mandate that permits for small MS4s "will require at a minimum that [regulated entities] develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from [their] MS4[s] to the *maximum*

[81] Delaware Riverkeeper Network, *Hamilton Township Case Study* at 10, 16, 18-19.
[82] *Id.* at 18.
[83] *Id.*
[84] N.J.A.C. 7:14A-16.6(a)(7). This regulatory provision states that inconsistency with law is cause for permit revocation. However, the regulations also provide that the grounds for permit revocation are also grounds for permit modification. N.J.A.C. 7:14A-16.4(b)(17).
[85] Because the Tier B MS4 Permit is not a type of permit mandated by the federal Clean Water Act, *see* 40 C.F.R. Part 122, N.J.A.C. 7:14A-25.2(d)(1), 25.8(a), that permit is subject only to state (not federal) legal requirements.
[86] U.S. Environmental Protection Agency, *MS4 Permit Improvement Guide* (April 2010), *available at* http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf.
[87] 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added).

extent practicable."[88] This requirement is echoed in New Jersey's regulations for Tier A, Highway Agency, and Public Complex permits: "The NJPDES small MS4 permit shall require at a minimum that the permittee develop, implement, and enforce a stormwater program designed to reduce the discharge of pollutants from the permittee's small MS4 to the maximum extent practicable …."[89]

Critically, it is the responsibility of the permitting authority to determine whether each MS4 seeking coverage under the MS4 Permit is meeting the MEP standard.[90] It is not enough for a permit to direct a permittee to make a plan, on its own without regulatory and public oversight, to reduce discharges to the MEP; the permitting authority must verify that the MS4s' plans actually meet the MEP standard. "[S]torm water management programs that are designed by regulated parties must, in every instance, but subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable."[91]

Permitting authorities must verify that MS4s' plans meet the MEP standard because the contents of those plans are themselves "effluent limitations" under the Clean Water Act.[92] As a result, the contents of the plans must be reviewed by the permitting authority to ensure that they meet the legal standards applying to all effluent limitations – including, in the MS4 context, the MEP standard.[93] This legal requirement is thwarted when some or all of the permit's requirements are left unspecified for future development by an MS4 after receiving permit coverage, without review by the permitting authority. The National Research Council has stated that, of all the challenges facing stormwater management in this country, "Perhaps most problematic is that the requirements governing stormwater dischargers leave a great deal of discretion to the dischargers themselves in developing stormwater pollution prevention plans and self-monitoring to ensure compliance."[94]

The Tier A, Highway Agency, and Public Complex MS4 Permits, in this regard, give the permittees discretion to develop several critical pollution control requirements with insufficiently specific guidance and directives. These Permits' statements that permittee programs must be designed to reduce the discharge of pollutants to the maximum extent practicable is not sufficient to ensure compliance with the MEP standard.[95] Rather, DEP must review the programs to ensure that they will *in fact* meet that standard. Despite DEP's contention that the Statewide

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[88] 40 C.F.R. § 122.34(a) (emphasis added). States such as New Jersey that have been delegated authority to implement the NPDES program must administer their programs in conformance with this federal requirement. 40 C.F.R. § 123.25.
[89] N.J.A.C. 7:14A-25.6(a). This provision explicitly does not apply to the Tier B Permit.
[90] *Environmental Defense Center v. EPA*, 344 F.3d 832, 855-56 (9th Cir. 2003) (hereinafter "*EDC*").
[91] *Id.* at 856.
[92] *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 501 (2d Cir. 2005).
[93] *Id.*; *see also EDC*, 344 F.3d at 854-56.
[94] National Research Council, *Urban Stormwater Management in the United States* at 3 (2009), *available at* http://www.nap.edu/catalog.php?record_id=12465.
[95] Tier A Permit at 7; Highway Permit at 8; Public Complex Permit at 8.

Basic Requirement (SBR) approach adopted in the Permits ensures "consistent" implementation of pollution control measures,[96] the SBRs do leave substantial latitude for discretion in how each MS4 chooses to apply them. In fact, DEP regulations state that some "SBRs … give the permittee a *choice* of BMPs [best management practices]."[97] Therefore, the SBRs provide no assurance that MS4s' programs will meet the MEP standard, absent meaningful review of permittees' Stormwater Pollution Prevention Plans (SPPPs). Indeed, as discussed in Section I.C above, evidence shows that MS4s' programs are not, in fact, operating in a consistent way or reducing pollution to the MEP.

The three Permits establish general requirements with which permittees may comply using a range of implementation measures that can vary substantially in their degree of pollution reduction. For example, the SBR for post-construction stormwater management requires permittees to "[e]nsure adequate long-term operation and maintenance of BMPs"; permittees could implement this requirement with BMP inspections of widely varying frequency, and with maintenance protocols of widely varying effectiveness.[98] The same SBR requires Tier A permittees to adopt "a municipal stormwater management plan…in accordance with N.J.A.C. 7:8-4."[99] That cross-referenced regulation, in turn, sets forth many vague requirements, such as that stormwater management plans must "[d]escribe how adequate long-term operation as well as preventative and corrective maintenance (including replacement) of the selected stormwater measures will be ensured," but leaves the means of ensuring operations and maintenance completely at the discretion of the MS4.[100] As another example, the SBR for illicit connection elimination requires permittees to adopt a ban on illicit connections to the MS4s and then "enforce [it] through appropriate enforcement measures and actions" (for Tier A municipalities) or "implement appropriate enforcement procedures and actions" (for highway agencies and public complexes), without providing any further guidance about what measures and actions would be considered "appropriate."[101]

Tier A permittees must also adopt ordinances that "[c]ontrol aspects of residential development and redevelopment projects that are not pre-empted by the Residential Site Improvement Standards…," yet the Permit does not specify any standards for such "controls."[102] As a further example, the Highway Agency Permit requires permittees to "develop and

[96] New Jersey Department of Environmental Protection, *Response to Comments – Municipal Stormwater Regulation Program* 11 (2009), *available at* http://www.nj.gov/dep/dwq/pdf/municipal_renewal_response_comments.pdf ("The Department's approach of mandating Statewide Basic Requirements for all regulated entities ensured that every permittee met the USEPA six minimum control measures in a consistent and equitable manner.").
[97] N.J.A.C. 7:14A-25.6(j)(3)(ii) (emphasis added).
[98] Tier A Permit at 8; Highway Permit at 9; Public Complex Permit at 10.
[99] Tier A Permit at 8.
[100] N.J.A.C. 7:8-4.2(c)(5).
[101] Tier A Permit at 12; Highway Agency Permit at 12; Public Complex Permit at 14.
[102] Tier A Permit at 8.

implement a litter pick up program that includes roadside clean up of trash and debris…" but does not specify frequency or other performance metrics.[103]

The state has itself acknowledged that permittees' SPPPs are where the details of permittees' programs can be found (for the non-Tier B MS4s that are required to develop them), as the Permits themselves lack in specificity for many obligations. DEP regulations state, "The permittee shall prepare and implement a written stormwater pollution prevention plan (SPPP) that describes the permittee's stormwater program…."[104] And in the MS4 Permits response to comments document, DEP wrote, "It is important to remember that the SPPP is a planning document that describes a municipalities [sic] stormwater program…."[105]

Yet the Tier A, Highway Agency, and Public Complex Permits fail to require DEP review of MS4s' programs developed pursuant to these requirements. MS4s receive authorization to discharge under the Permits without providing any specific information about their intended pollution control measures and programs, but rather simply by submitting a one-page Request for Authorization form "acknowledging the best management practices and measurable goals specified in the permit[s]."[106] These three Permits state that DEP *may* require additional information if it determines that it is "reasonably necessary to determine whether to authorize the discharge," but this information request is discretionary and DEP does not necessarily solicit this information from all applicants.[107] After the MS4s develop their SPPPs, those plans are not submitted to DEP, only retained on file with the MS4.[108] And when MS4s submit their annual reports, they do so on web forms that mostly consist of "yes or no" questions and do not provide sufficient detail for DEP to determine whether the MS4 is attaining the MEP standard.[109]

As a result, under the current MS4 Permits' structure, DEP cannot ensure that all permittees' stormwater programs are in fact reducing their discharges of pollution to the maximum extent practicable. DEP must modify the Permits to provide for review of all permittee-developed programs, including SPPPs.

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[103] Highway Permit at 11.
[104] N.J.A.C. 7:14A-25.6(a)(3).
[105] NJDEP, *Response to Comments – Municipal Stormwater Regulation Program* at 10.
[106] Tier A Permit at 4; Highway Permit at 5; Public Complex Permit at 5 *see also* NJDEP, Tier A Municipal Stormwater Permit Request for Authorization, http://www.state.nj.us/dep/dwq/pdf/rfa_tier_a_permit.pdf; NJDEP, Highway Agency Stormwater General Permit Request for Authorization, http://www.state.nj.us/dep/dwq/pdf/rfa_highway_permit.pdf; NJDEP, Public Complex Stormwater General Permit Request for Authorization, http://www.state.nj.us/dep/dwq/pdf/rfa_public_complex_permit.pdf; NJDEP.
[107] *Id.*
[108] Tier A Permit at 7; Highway Permit at 8; Public Complex Permit at 8.
[109] *See* NJDEP, Tier A Annual Report Tutorial, http://www.nj.gov/dep/dwq/pdf/2011_msrp_tiera_ar_pres.pdf; NJDEP, Highway Agency Annual Report Tutorial, http://www.nj.gov/dep/dwq/pdf/2011_msrp_highway_ar_pres.pdf; NJDEP, NJDEP, Public Complex Annual Report Tutorial, http://www.nj.gov/dep/dwq/pdf/2011_msrp_public_comp_ar_pres.pdf.

2. *The Tier A, Highway Agency, and Public Complex MS4 Permits are also inconsistent with the Clean Water Act and state law "maximum extent practicable" standard because they contain pollution control requirements that fall short of MEP.*

The MEP standard is a technology-based standard that applies specifically to MS4s.[110] As EPA has explained, technology-based standards "are based on the pollutant control capabilities of available technologies."[111] Consequently, the MEP standard requires permitting authorities to impose whatever requirements will, in fact, reduce MS4s' pollutant discharges to the maximum extent practicable.

Courts have held that the phrase "'to the maximum extent practicable' does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible."[112] While the term "practicable" is not defined in the municipal stormwater context, "practicable" as used in a different section of the Clean Water Act has been defined as meaning that technology is required unless the costs are "wholly disproportionate" to pollution reduction benefits.[113]

As EPA has explained, all NPDES permits, including the MEP standard, will "evolve and mature over time" and must be flexible "to reflect changing conditions."[114] "MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards."[115] In other words, successive iterations of permits for a given jurisdiction will necessarily evolve and contain new and more stringent requirements for controlling the discharge of pollutants in runoff.

The post-construction stormwater management requirements in the Tier A, Highway Agency, and Public Complex MS4 Permits fail to meet the MEP standard. The Tier A Permit requires MS4s to: "Adopt and implement a municipal stormwater control ordinance or ordinances in accordance with N.J.A.C. 7:8-4."[116] The Permit states that the ordinance(s) must control stormwater from non-residential development and redevelopment projects, and that the MS4 must also ensure that residential projects are complying with separately established

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[110] This technology-based requirement applies separately and in addition to the Clean Water Act's water quality-based requirements for all NPDES permits. *See infra*.
[111] U.S. EPA, "Section B. Clean Water Act Requirements," http://www.epa.gov/dfe/pubs/pwb/tech_rep/fedregs/regsectb.htm (last visited Jan. 14, 2014).
[112] *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 131 (D.D.C. 2001) (internal citations omitted); *see also Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible").
[113] *Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990).
[114] 55 Fed. Reg. 47,990, 48,052 (Nov. 16, 1990).
[115] 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999).
[116] Tier A Permit at 8.

residential site standards at N.J.A.C. 5:21.[117] The Permit further directs the MS4 permittees to "control aspects" of residential projects not preempted by the statewide site standards "where necessary."[118]

The state regulations for municipal stormwater ordinances in turn incorporate design standards for erosion control, groundwater recharge, stormwater runoff quantity, and stormwater runoff quality; these standards are to be applied to "major development" only (disturbing one or more acres of land or increasing impervious surface by one-quarter acre or more).[119] Such development must achieve groundwater recharge equivalent to average annual pre-construction groundwater recharge for the site and must not cause any increase in peak runoff rates from pre-construction conditions.[120] In the case of redevelopment projects where considerable impervious surface coverage already existed, this standard requires no reduction in the quantity of runoff from the redeveloped site. The regulations allow municipalities to grant exemptions and waivers from the standards,[121] and waive the groundwater recharge standard entirely for sites located within the "urban redevelopment area."[122]

The Highway Agency and Public Complex Permits require the permittees to control stormwater runoff from projects on property that they control directly[123] and, similar to the Tier A Permit, require permittees to apply the standards contained in N.J.A.C. 7:8 to all new and redevelopment projects disturbing one acre or more.[124]

These requirements fall short of the pollution reduction that is currently practicable using today's technologies. Many jurisdictions around the country have demonstrated the feasibility of implementing requirements for the on-site retention of stormwater beyond the "pre-construction" recharge volume. The National Research Council (NRC) has recommended that stormwater management efforts focus on maintaining the pre-*development* hydrology of a site – the natural conditions that existed prior to any development occurring there – as opposed to the conditions that existed prior to the specific construction project at issue.[125] Pre-*construction* conditions may not be sufficient to prevent water quality degradation – and are, by definition, never sufficient to restore water quality in a watershed that is already impaired by stormwater. In many cases, replicating pre-development hydrology may not even be sufficient to protect water quality, because even if the post-development runoff volume is the same, it will carry more pollutants than the same amount of runoff from undeveloped land in a natural state. The NRC emphasizes this focus on reducing runoff volumes due to the "water degradation resulting from the increased

[117] *Id.*
[118] Tier A Permit at 8.
[119] N.J.A.C. 7:8-1.2, 7:8-5.
[120] N.J.A.C. 7:8-5.4.
[121] N.J.A.C. 7:8-4.6.
[122] N.J.A.C. 7:8-5.4(a)(2)(iii).
[123] Highway Agency Permit at 9; Public Complex Permit at 9.
[124] *Id.*
[125] *See, e.g.*, National Research Council at 119.

volume as well as increased pollutant loadings in stormwater runoff."[126] Because greater runoff volumes lead to more pollution, reducing stormwater runoff by retaining it on-site can dramatically reduce the pollutant loads from development.[127] In fact, the NRC recommends that stormwater flow be used as a regulatory proxy for the loading of pollutants.[128]

Further, the NRC advocates the use of controls that restore or maintain pre-development hydrology rather than those that simply avoid increases in peak runoff rates, as required by New Jersey regulations. As the NRC has stated, "effective hydrologic mitigation for urban development cannot just aim to reduce post-development peak flows to predevelopment peak flows."[129] This is because reducing peak discharge leaves the underlying increase in runoff volumes untouched, which "partly explains why evaluation of downstream conditions commonly document little improvement resulting from traditional flow-mitigation measures."[130]

Additionally, controlling volume has been shown to be more effective than relying on runoff quality standards like those in DEP's regulations.[131] This is because "the constituents remaining even in 'treated' stormwater represent a substantial, but largely unappreciated, impact to downstream watercourses,"[132] and because "flow is itself responsible for additional erosion and sedimentation that adversely impacts surface water quality."[133] Not only are runoff quality standards inadequately protective of water quality generally, DEP's specific runoff quality standards are deficient because the quality standards contain narrative standards for nutrients – rather than the "measurable" and "quantifiable" standards that EPA has stated should be included in MS4 permits[134] – and no standards at all for other urban stormwater pollutants that harm water quality, such as lead, copper, zinc, sediment, chemical oxygen demand, and biological oxygen demand.[135]

Recognizing that additional benefits can be achieved by additional retention, a number of jurisdictions require new development and redevelopment projects to capture the full volume of a specific storm size, generally in the range of the 85th to 95th percentile events. For example,

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[126] National Research Council at 4.
[127] *See id.* at 9.
[128] *See id*. at 50-51.
[129] *Id.* at 6.
[130] *Id.* at 33.
[131] N.J.A.C. 7:8-5.5.
[132] National Research Council at 25.
[133] *Id.* at 99.
[134] EPA, MS4 Permit Improvement Guide at 5-6.
[135] *See* Robert Pitt, *The National Stormwater Quality Database, Version 3.1* (2011), *available at* http://rpitt.eng.ua.edu/Publications/4_Stormwater_Characteristics_Pollutant_Sources_and_Land_Development_Characteristics/Stormwater_characteristics_and_the_NSQD/NSQD%203.1%20summary%20for%20EPA%20Cadmus.pdf; Earl Shaver et al., *Fundamentals of Urban Runoff Management: Technical and Institutional Issues* (2007), *available at* http://www.ilma-lakes.org/PDF/Fundamentals_full_manual_lowres.pdf; Robert Pitt et al., *The National Stormwater Quality Database (NSQD, Version 1.1)* (2004), *available at* http://rpitt.eng.ua.edu/Research/ms4/Paper/MS4%20Feb%2016%202004%20paper.pdf; G.A. Burton & R.E. Pitt, *Stormwater Effects Handbook* (2002).

in Washington, D.C., the city's Clean Water Act stormwater permit requires on-site retention of 1.2" of stormwater from a 24-hour storm (the 90th percentile storm in the region) through evapotranspiration, infiltration, and/or stormwater harvesting and use.[136] The City of Philadelphia imposes a one-inch infiltration requirement for new development and redevelopment projects,[137] and Pittsburgh requires development projects to retain one inch of stormwater through reuse, evaporation, transpiration, or infiltration.[138] New York's statewide Clean Water Act general permit for municipal separate storm sewer systems incorporates the standards from the state's Stormwater Management Design Manual, which provides for on-site retention of the 90th percentile storm, using infiltration, evapotranspiration, and/or rainwater harvesting.[139] San Diego's MS4 permit requires the use of green infrastructure to retain the 85th percentile storm.[140]

Many jurisdictions have also demonstrated the practicability of applying these requirements to sites that disturb less than 1 acre of land. In fact, at least two municipalities within New Jersey set a lower threshold. The Borough of Hightstown applies its stormwater ordinance to projects disturbing 1,000 square feet or more of soil, or the construction or redevelopment of 250 square feet or more of impervious surface;[141] the Township of Bernards applies its ordinance to projects in excess of 1,000 square feet or more of new impervious surface, as well as projects that disturb in excess of 2,500 square feet of land.[142] Washington, D.C.'s retention requirements apply to development and redevelopment that disturb more than 5,000 square feet of soil (about 0.1 acre), as well as to substantial renovations to large buildings.[143] The state of Maryland's stormwater management regulations, which require the use of green infrastructure to the MEP to mimic natural hydrologic runoff characteristics, apply to developments disturbing over 5,000 square feet of land area as well.[144] Philadelphia's regulations apply to development that results in an area of earth disturbance of 15,000 square feet

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[136] U.S. EPA Region 3, Permit for the District of Columbia Municipal Separate Storm Sewer System (2011, modified 2012), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf.

[137] Philadelphia Water Dep't (PWD) Stormwater Management Regulations § 600.5, *available at* http://www.phillyriverinfo.org/WICLibrary/StormwaterRegulations.pdf.

[138] Pittsburgh Ordinance § 1003.04(d), *available at* http://library.municode.com/index.aspx?clientId=13525.

[139] New York State Department of Environmental Conservation, SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s) (2010), *available at* http://www.dec.ny.gov/docs/water_pdf/ms4gp2011.pdf; New York State Stormwater Management Design Manual (2010) at Chapter 4: Uniform Sizing Criteria, *available at* http://www.dec.ny.gov/chemical/29072.html.

[140] California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001/NPDES No. CAS0109266 at 83-84, *available at* http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/updates052313/2013-0523_Order_No._R9-2013-0001.pdf.

[141] Borough of Hightstown, Ordinance 2012-12, http://www.hightstownborough.com/Ordinances/2012/2012-12_SW_Control.pdf.

[142] Bernards Township, Stormwater Management Ordinance, http://www.bernards.org/Departments_Services/Engineering/eng_stormwater_mo.aspx.

[143] 21 D.C. Regs. §§ 516, 599.

[144] Code Md. Regs. 26.17.02.05(B)(2).

or more (about one-third of an acre).[145] Similarly, Pittsburgh's local regulations apply to projects over 15,000 square feet.[146] In San Diego, retention requirements apply to projects creating and/or replacing at least 2,500, 5,000, or 10,000 square feet of impervious surface area, depending on the type of project.[147] In California, the statewide general permit for small MS4s provides that projects that create and/or replace at least 5,000 square feet of impervious area must use green infrastructure to manage a specified amount of runoff (*e.g.*, the 85th percentile storm), and requires projects that create and/or replace 2,500 to 5,000 square feet of impervious area to use at least some green infrastructure measures.[148]

Finally, many jurisdictions have demonstrated that strong retention standards can be feasibly applied to redevelopment sites and residential land uses. As mentioned above, Washington, D.C.'s and Philadelphia's regulations, for example, apply equally to new development and redevelopment, in contrast to the New Jersey regulations' exemption from volume control requirements for redevelopment projects. All of the jurisdictions listed in the preceding two paragraphs either do not distinguish between land uses at all, or at least apply their requirements to residential land uses in addition to commercial, industrial, and institutional uses.[149]

The New Jersey state regulations cross-referenced in the Permits were finalized ten years ago, in 2004. Not only are their requirements now out-of-date, they were already outdated when the Permits were issued in 2009. The Permits must be updated to incorporate requirements that will achieve the maximum pollutant reductions that are practicable. Such a standard would: require on-site retention of a minimum amount of runoff, beyond the amount currently required by DEP's groundwater recharge standards (e.g., the runoff from the 1.25-inch, 2-hour rainfall event[150]), using any combination of infiltration, evapotranspiration, and rainwater harvesting; apply to both small and large sites (e.g., all projects that add or replace (alone or in combination) greater than 5,000 square feet of impervious surface); and apply not only to non-residential and new development sites, but also to residential sites and redevelopment sites.

The fact that New Jersey regulations explicitly state that compliance with the existing, insufficient stormwater management requirements constitutes compliance with the MEP standard does not make it true.[151] States may not adopt or enforce any effluent limitation or standard of

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[145] PWD Stormwater Management Regulations § 600.2(a).
[146] Pittsburgh Ordinance § 1003.04.
[147] California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001/NPDES No. CAS0109266 at 85.
[148] California Statewide Phase II MS4 General Permit at 48, 49 (see definition of "regulated projects"), *available at* http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf.
[149] 21 D.C. Regs. § 599; PWD Stormwater Management Regulations § 600.2; Md. Code Regs. 26.17.02.01(B); NYSDEC, SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s) (2010), *available at* http://www.dec.ny.gov/docs/water_pdf/ms4gp2011.pdf; NY State Stormwater Management Design Manual (2010), *available at* http://www.dec.ny.gov/chemical/29072.html.
[150] This is defined as the "water quality design storm" under current DEP rules. N.J.A.C. 7:8-5.5(a).
[151] N.J.A.C. 7:14A-25.6(a)(1).

performance that is less stringent than required by the federal Clean Water Act.[152] If state regulations fall short of the federal MEP standard, then DEP must incorporate additional, stronger requirements into the Permits in order to make sure that permittees are reducing their pollutant discharges to the maximum extent practicable.

3. *The General Permits are inconsistent with the Clean Water Act and state law because they do not prohibit permittees from causing or contributing to violations of water quality standards; are not consistent with the terms of applicable Total Maximum Daily Load wasteload allocations; and do not include monitoring requirements as needed to ensure compliance with water quality standards.*

The stated goal of the Clean Water Act is the complete elimination of the discharge of pollutants into the Nation's waters.[153] In keeping with this goal, the Act requires each state to adopt and submit for federal approval water quality standards for all waters within its boundaries.[154] When Congress enacted the 1972 amendments that created the modern Clean Water Act, Council on Environmental Quality (CEQ) Chairman Train explained the role of water quality standards, stating, "Speaking very generally, the whole permit program is tied to the water quality program standards and is a mechanism designed to reach those standards."[155]

For this reason, the Act and implementing regulations require that all NPDES permits must include conditions adequate to "ensure compliance" with applicable water quality standards.[156] Further, the regulations require each NPDES permit to contain limitations on all pollutants or pollutant parameters that "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard."[157] The EPA's Environmental Appeals Board has held that this requirement applies equally to MS4 permits.[158] In the words of EPA's General Counsel, "[t]he better reading of Sections 402(p)(3)(B) and 301(b)(1)(C) [of the Clean Water Act] is that all permits for MS4s must include any requirements necessary to achieve compliance with WQS."[159]

In accordance with this federal requirement, New Jersey regulations confirm that Tier A, Highway Agency, and Public Complex MS4 permits "shall require at a minimum that the permittee develop, implement, and enforce a stormwater program designed to…satisfy the

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[152] 33 U.S.C. § 1370.
[153] 33 U.S.C. § 1251(a).
[154] 33 U.S.C. §§ 1311(b)(1)(C), 1313.
[155] Remarks of CEQ Chairman Train, 92 Cong. S4340 (June 22, 1971).
[156] 40 C.F.R. § 122.4(d); *see also* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a).
[157] 40 C.F.R. § 122.44(d)(1)(i).
[158] *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 329, 335-43 (EAB 2002).
[159] Memorandum from E. Donald Elliott, Assistant Administrator and General Counsel, EPA, re: Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems (Jan. 9, 1991) at 1, attached as Exhibit F.

appropriate water quality requirements of the Federal Act and the State Act."[160] State regulations also provide that *all* permits regulating discharges into surface water – including Tier B MS4 permits – "shall include … [w]ater quality based limitations … when the Department has determined that the discharge causes, has the reasonable potential to cause, or contributes to an excursion above the SWQS [water quality standards]."[161]

In addition, all NPDES permits must contain requirements "consistent with the assumptions and requirements of any available wasteload allocation."[162] Wasteload allocations (WLAs) represent the maximum amount of pollutant that a source – such as an MS4 – can discharge into a water body each day and still attain water quality standards, in accordance with that water body's total maximum daily load (TMDL).[163] Once a point source such as an MS4 is assigned a WLA, that WLA must be implemented through a NPDES permit.[164] The EPA's MS4 Permit Improvement Guide confirms, "If there are waste load allocations (WLAs) applicable to the permittee, these should be addressed in the permit."[165] A 2010 EPA policy memorandum addresses this obligation directly: "If the State or EPA has established a TMDL for an impaired water that includes WLAs for storm water discharges, permits for … MS4 discharges must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs in the TMDL. … Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant load or numeric surrogate pollutant parameter objectives, the WLA should, where feasible, be translated into numeric WQBELs [water quality based effluent limitations] in the applicable stormwater permits."[166] If a permitting authority chooses to express the WQBELs in the form of BMPs, "the permit's administrative record needs to provide an adequate demonstration that … the BMPs required by the permit will be sufficient to implement applicable WLAs."[167]

Despite the clear legal requirement for all four General Permits to ensure compliance with WQS via water quality based effluent limitations, they do not do so. All of the Permits lack any prohibition on discharges that cause or contribute to violations of water quality standards. Nor do they contain effluent limitations demonstrated to be sufficient to ensure compliance with such standards.

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[160] N.J.A.C. 7:14A-25.6(a).
[161] N.J.A.C. 7:14A-13.2(a)(2).
[162] 40 C.F.R. § 122.44(d)(1)(vii)(B).
[163] 33 U.S.C. § 1313; 40 C.F.R. § 130.2(h).
[164] *See Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 143 (D.C. Cir. 2006) ("Once approved by EPA, TMDLs must be incorporated into permits.").
[165] U.S. EPA, *MS4 Permit Improvement Guide* at 5.
[166] Memorandum from James A. Hanlon, Director, Office of Wastewater Management, U.S. EPA, and Denise Keehner, Director, Office of Wetlands, Oceans and Watersheds, U.S. EPA, to Water Management Division Directors, EPA Regions 1-10, at 3 (Nov. 12, 2010), *available at* http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf (hereinafter "Hanlon Memorandum").
[167] *Id.* at 4.

In addition, the Permits are not consistent with the terms of applicable TMDL WLAs. Numerous TMDLs have been developed for New Jersey water bodies that assign wasteload allocations to urban stormwater.[168] Yet despite the Permits' assertion that Additional Measures (AMs) needed to implement TMDLs would be incorporated into the Permits via minor modifications, no AMs have yet been included, with one exception (the fertilizer management ordinance needed to implement the Non-Tidal Passaic River Basin Phosphorus TMDL). Nor have the Permits been modified to incorporate any other requirements or effluent limitations designed specifically to implement TMDL WLAs. As discussed above in Section I.B, the Permits in their current form are clearly inadequate to implement WLAs. This deficiency is underscored by the lack of any basis in the record, when the Permits were issued, to support a finding that they are sufficient to implement TMDLs,[169] despite the fact that the New Jersey Supreme Court has held that DEP must provide adequate factual support and a proper record when it makes a determination that a permit satisfies legal requirements.[170] To bring the Permits into compliance with the Clean Water Act, DEP must modify them to include a prohibition on the discharge of pollutants in amounts that cause or contribute to violations of water quality standards. DEP must also modify the Permits to incorporate numeric pollution targets from wasteload allocations in approved TMDLs, as well as any pollution control measures necessary to meet those targets – whether they take the form of AMs or other enforceable requirements.

In connection with these new, water quality based effluent limitations, DEP must also incorporate monitoring requirements into the Permits to ensure compliance with those new limits. Under the Clean Water Act, all NPDES permits are required to contain monitoring provisions sufficient to assure compliance with permit conditions, "including conditions on data

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[168] *See* Section I.B, *supra*.

[169] NJDEP, Fact Sheet: Draft Renewal of the NJPDES Tier A Municipal Stormwater General Permit (2008), http://www.nj.gov/dep/dwq/pdf/Tier%20A_2009renewal_FACT%20SHEET.pdf; NJDEP, Fact Sheet: Draft Renewal of the NJPDES Tier B Municipal Stormwater General Permit (2008), http://www.nj.gov/dep/dwq/pdf/Tier%20B_2009renewal_FACT%20SHEET.pdf; NJDEP, Fact Sheet: Draft Renewal of the NJPDES Highway Agency Stormwater General Permit (2008), http://www.nj.gov/dep/dwq/pdf/Highway_Agency_2009_renewal_FACT_SHEET.pdf; NJDEP, Fact Sheet: Draft Renewal of the NJPDES Public Complex Stormwater General Permit (2008), http://www.nj.gov/dep/dwq/pdf/Public_Complex_2009_renewal_FACT_SHEET.pdf.

[170] *Matter of Issuance of a Permit by Dep't of Envtl. Prot. to Ciba-Geigy Corp.*, 120 N.J. 164 (1990). The case arose in the context of an environmental organization and citizens raising a challenge to DEP's decision to issue a NJPDES permit that would allow discharges into the Atlantic Ocean. The pollution discharge at issue implicated the Ocean Discharge Criteria (ODC), which are guidelines under the Clean Water Act that regulate any discharge into "the territorial sea, the waters of the contiguous zone, and the oceans." The court determined that DEP was required to incorporate ODC into its NJPDES review procedure, finding that DEP had failed to provide adequate factual support for its decision to issue a permit. The court noted that "there is nothing in the draft permit, the hearing examiner's report, the final permit, or elsewhere in the record that indicates how DEP concluded that [the] permit complied with the ODC." *Id.* at 176.

and information collection, reporting, and such other requirements as [the permitting authority] deems appropriate."[171] Specifically, the Act states:

> Whenever required to carry out the objective of this chapter, including but not limited to…(2) determining whether any person is in violation of any … effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance…(A) the Administrator shall require the owner or operator of any point source to…(iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods)…as he may reasonably require.[172]

Accordingly, federal regulations require all NPDES permits to contain monitoring requirements "to assure compliance with permit limitations."[173] Stated differently, these monitoring requirements must be of the "type, intervals, and frequency sufficient to yield data which are representative of the monitored activity."[174]

In line with these federal requirements, New Jersey regulations state, "For small [MS4s] … monitoring requirements shall be established on a case-by-case basis depending upon the nature and effect of the discharge. The permittee shall be required to monitor such discharges in accordance with N.J.A.C. 7:14A-11.2(a)(2), or, at a minimum: … For small [MS4s, including Tier A, Tier B, Highway Agency, and Public Complex permittees], the permittee shall comply with the requirements for evaluation, recordkeeping, and reporting in N.J.A.C. 7:14A-25.6(j) or 25.8(i)…"[175] The requirements in N.J.A.C. 7:14A-11.2(a)(2), in turn, are: "to assure compliance with permit limitations, a permittee shall be required to monitor: i. The mass, or other measurement specified in the permit, for each pollutant limited in the permit; ii. The volume of effluent discharged from each outfall; iii. Other measurements as appropriate…"[176] N.J.A.C. 7:14A-25.6(j), applicable to Tier A, Highway Agency, and Public Complex MS4s, states that "The permittee shall evaluate compliance with NJPDES permit conditions…"[177]

None of the Permits currently contain any monitoring requirements whatsoever. Their only reference to monitoring is a cross-reference to N.J.A.C. 7:14A-6.5, which only specifies procedures and methods when monitoring is actually required by a permit. When the Permits are modified to add water quality based effluent limitations, federal and state law will also require the addition of monitoring requirements, because monitoring of end-of-pipe discharges and/or receiving waters is the only way to know whether permittees' stormwater management programs are working to achieve those water quality-based limits. Courts have recognized that self-

[171] 33 U.S.C. § 1342(a)(2).
[172] 33 U.S.C. § 1318(a).
[173] 40 C.F.R. § 122.44(i); *see also* Hanlon Memorandum at 4.
[174] 40 C.F.R. § 122.48(b).
[175] N.J.A.C. 7:14A-24.9(a).
[176] N.J.A.C. 7:14A-11.2(a)(2).
[177] N.J.A.C. 7:14A-25.6(j)(1).

monitoring by permittees is essential to effective enforcement of the Clean Water Act and achievement of the law's environmental protection objectives.[178] "The effectiveness of the permitting process is heavily dependent on permit holder compliance with the CWA's monitoring and reporting requirements."[179] "Clearly, unless there is some method for measuring compliance, there is no way to ensure compliance."[180]

As a result, when DEP incorporates water quality based effluent limitations into the Permits, it must also modify the Permits to require that permittees conduct representative monitoring of receiving waters sufficient to determine the status of compliance with such limits, including TMDL WLAs.

4. *The Tier A, Highway Agency, and Public Complex Permits are inconsistent with Clean Water Act and state law requirements for public participation in the development of effluent limitations.*

Under state and federal law, DEP must provide for public review of both NJPDES Permits and the programs that the permittee develops to implement those permits. The Tier A, Highway Agency, and Public Complex Permits currently require permittees to develop, at a later date, many of the essential components of the permit's pollution control requirements. Both DEP *and* the public must review these later-developed effluent limitations.

New Jersey regulations state that DEP must solicit public comment and hold a public hearing (when requested) regarding all draft NJPDES permits.[181] This requirement conforms to the federal Clean Water Act policy that permitting authorities "shall provide for, encourage, and assist the participation of the public."[182] As the Second Circuit has explained, "Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act."[183] This pivotal role is enshrined in the Act's express command that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States."[184]

The public had an opportunity to comment on these three Permits before they were issued. The Permits, however, do not themselves contain all of the substantive requirements with which permittees must comply; rather, they defer the development of those requirements

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[178] *See, e.g.*, *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491-91 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988) (discussing the statutory structure, federal regulations, and legislative history).
[179] *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 266 (4th Cir. 2001).
[180] *Champion Int'l Corp. v. North Carolina*, 648 F.Supp. 1390, 1395 (W.D.N.C. 1986), *vacated on other grounds*, 850 F.2d 182 (4th Cir. 1988).
[181] N.J.A.C. 7:14A-15.11.
[182] 40 C.F.R. § 25.3.
[183] *EDC*, 344 F.3d at 856.
[184] 33 U.S.C. § 1251(e).

until later, when permittees are authorized to devise their own stormwater management programs, as discussed above. The contents of those programs are, themselves, "effluent limitations" under the Clean Water Act.[185] As a result, DEP must provide for another public participation opportunity at the point when those programs are actually developed. As the Ninth Circuit has held, permittee-developed documents "that contain the substantive information about how the operator of [an] MS4 will reduce discharges to the maximum extent practicable" must be "subject to the public availability and public hearings requirements of the Clean Water Act."[186] The Second Circuit has similarly held that Clean Water Act permittees' pollution management plans must be made available to the public and that the public must be able to request a hearing on the terms of those plans.[187]

The Tier A, Highway Agency, and Public Complex Permits do require permittees to "comply with applicable State and local public notice requirements when providing for public participation in the development and implementation of the [MS4's] stormwater program."[188] However, the Permits fail to provide an opportunity for public comment *to DEP* and the opportunity for a hearing *in front of DEP* about the adequacy of permittees' stormwater management programs, in connection with DEP's review and approval of those programs, as they are required to do by law.

The Permits must therefore be modified to give members of the public the opportunity to comment and request hearings on SPPPs developed by Tier A, Highway Agency, and Public Complex MS4s.

II. Petitioners have Significant Environmental, Aesthetic, and Recreational Interests That Are Affected by the MS4 Permits

Petitioners all have environmental, aesthetic, and recreational interests that are directly affected by the legal and practical failures of the Permits. Thus, they meet the requirements of N.J.A.C. § 7:14A-16.3(b) to file this petition. The Petitioners are environmental organizations whose members are directly affected by New Jersey's failure to properly regulate stormwater pollution.

American Littoral Society

The American Littoral Society is a not-for-profit membership corporation and tax exempt organization whose mission and purpose include environmental protection and conservation of ecological, recreational, commercial and aesthetic qualities of the coastal zones, including the aquatic life and fisheries of the rivers and tributaries within the coastal zone. The American

[185] *See* 40 C.F.R. § 122.2 (defining the term "effluent limitations" to include "*any restriction*" on pollutant discharges (emphasis added)); *Waterkeeper*, 399 F.3d at 498-502.
[186] *EDC*, 344 F.3d at 857.
[187] *Waterkeeper*, 399 F.3d at 503-04.
[188] Tier A Permit at 8; Highway Agency Permit at 9; Public Complex Permit at 9.

Littoral Society promotes the study and conservation of marine life and habitat, protects the coast from harm, and empowers others to do the same. Since 1961 it has empowered people to care for the coast through advocacy, conservation, and education. It advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of watersheds in the coastal zone.

ALS and many of its approximately 6,000 members reside and transact business throughout the Barnegat Bay watershed region. ALS's members engage in recreational and commercial fishing, birdwatching, nature appreciation and other recreational, conservation, and aesthetic activities in and around Barnegat Bay, whose tributaries and the Bay itself are adversely affected by stormwater pollution. These members' use and enjoyment of the Barnegat Bay is diminished if the fish and wildlife that inhabit it are not being adequately protected. In addition, many members of the American Littoral Society use and enjoy the Barnegat Bay and its tributaries for commercial, recreational, aesthetic, and conservational purposes, including fishing, boating, swimming, environmental science, nature study, photography and many other pursuits. ALS and its members' professional, recreational, aesthetic, and conservational interests in the Barnegat Bay region are directly harmed by stormwater runoff and by the failures of the MS4 permits to minimize water pollution and other impacts to the aquatic environments which we use and enjoy.

Clean Ocean Action

Clean Ocean Action (COA) is a broad-based coalition of 135 active boating, business, community, conservation, recreation, environmental, fishing, religious, student, and women's groups, with a mission to improve the degraded water quality of the marine waters off the New Jersey/New York coast. Its work includes significant advocacy and education in the field of stormwater, stormwater management, nonpoint source pollution prevention, green infrastructure, and water quality. Ocean and coastal pollution from stormwater sources is a significant contributor to coastal water quality issues across COA's geographic area, has led to degraded marine and coastal ecosystems, has resulted in closed beaches and shuttered shellfisheries, causes region-wide debris issues, and affects human health. These issues clearly, directly, and comprehensively affect the aesthetic, environmental, and economic interests of the organizations and citizens within the COA coalition.

Delaware Riverkeeper Network

The Delaware Riverkeeper Network is a non-profit organization established in 1988 to protect and restore the Delaware River and its associated watershed, tributaries, and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River

Watershed – an area that includes portions of New York, New Jersey, Pennsylvania and Delaware.

The Delaware Riverkeeper and many of the Delaware Riverkeeper Network's more than 4,500 members that reside in New Jersey frequently use and enjoy the New Jersey shores of the Delaware River and its tributaries in the state for professional, educational, and recreational activities and aesthetic enjoyment, including water quality monitoring, canoeing, birdwatching, swimming, hiking, and fishing. Moreover, many of DRN's members also own or reside in properties affected by stormwater runoff in New Jersey. The Delaware Riverkeeper's and Delaware Riverkeeper Network's members' environmental, aesthetic, and recreational interests are or may be adversely affected by the flooding, water pollution, destruction of wetlands and other harmful effects caused by the mismanagement of New Jersey municipal stormwater.

Hackensack Riverkeeper

Hackensack Riverkeeper Inc. is a nonprofit environmental advocacy corporation that serves as a guardian for the natural and human ecosystems of the Hackensack River, including the New Jersey Meadowlands. Hackensack Riverkeeper operates two paddling centers on the Hackensack River, organizes paddling events, shore line cleanups and conducts boat tours of the Hackensack and Passaic Rivers from Spring through Fall. Hackensack River's mission to restore the natural ecosystem of the Hackensack River Watershed is primarily frustrated by water pollution. Stormwater is the primary source of nutrient pollution in the Hudson-Raritan Estuary, and is also an important source of pathogenic and toxic pollution. Were the Hackensack less affected by pollution authorized by New Jersey's illegal MS4 permits, Hackensack Riverkeeper could rent more boats and could offer events encouraging primary contact recreation and fishing. New MS4 permits with proper controls would go a long way toward making this possible.

Natural Resources Defense Council

The Natural Resources Defense Council is a national non-profit environmental organization whose purpose is to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends. NRDC's Water Program is dedicated to maintaining and restoring water quality throughout the United States and in New Jersey by protecting rivers, streams, and lakes from pollution sources such as stormwater runoff. NRDC has over 13,400 members in New Jersey, who use and enjoy water bodies that are adversely affected by stormwater runoff pollution, including for activities such as swimming, fishing, and boating. Stronger MS4 permit provisions that reduce polluted runoff would benefit these members by enabling their beneficial use of local waters and reducing the health risks that they face when coming into contact with polluted water.

New Jersey Environmental Lobby

The New Jersey Environmental Lobby has been involved in protecting New Jersey's environment for 40 years. NJEL is a non-profit environmental organization whose members are made up of individuals, environmental organizations, and businesses throughout the state. NJEL advocates for cleaner water through legislative and regulatory initiatives. Its members use NJ's waters for recreational activities and would benefit from cleaner water.

NY/NJ Baykeeper

Raritan Baykeeper Inc., doing business as NY/NJ Baykeeper (hereinafter Baykeeper), is a nonprofit membership based environmental advocacy corporation that advocates for the preservation, protection and restoration of New York Bay and associated waters. Baykeeper members use New Jersey waters stretching from Sandy Hook to Alpine for swimming, wading, fishing, birding, boating, and a variety of other recreational, professional, and aesthetic purposes. Pollution from municipal stormwater systems creates water conditions that frustrate Baykeeper and its members from many activities they would otherwise enjoy. Low dissolved oxygen limits aquatic life, reducing Baykeeper's and its members' observational and fishing opportunities. Pathogenic pollution from the systems contributes to waters being unsafe for swimming, and toxic pollution from the systems makes fish and shellfish unsafe to eat.

In particular, Baykeeper has invested tremendous resources, in both time and money, in oyster restoration. Oysters were once the keystone species in New York Bay, and provided ecological services long since lost due to overfishing and pollution. Baykeeper seeks to study the reintroduction of native oysters to create habitat, improve water quality and reduce storm impacts. Because of pollution, much of which is contributed by MS4 systems, the Department has banned Baykeeper's oyster research in New Jersey Waters. This has contributed to the loss of jobs and funding, and has reduced the state's options in responding to coastal storms.

Pinelands Preservation Alliance

Pinelands Preservation Alliance seeks to protect the natural resources of the Pinelands, especially the 17 trillion gallon surficial aquifer that lies beneath. The non-profit advocacy organization monitors all water allocation permits within the Pinelands and all development applications for impacts to the water quantity and quality of the Kirkwood Cohansey Aquifer. PPA proposed revisions to New Jerseys stormwater rules and continues to press for reforms to better protect Pinelands waterways from excess nutrients and other forms of contamination.

Stony Brook-Millstone Watershed Association

The Stony Brook-Millstone Watershed Association has worked since 1949 to protect the quality of water and environment in the 265-square-mile central New Jersey watershed of the same name. Its approximately 3,000 members and volunteers are affected by municipal stormwater pollution in that New Jersey's stormwater management permits fail to address nutrient pollution, specifically phosphorus, which is the primary nutrient impairment in the Stony

Brook-Millstone watershed. SBMWA advocates for clean water and environment, protects and restores sensitive habitats, tests waterways for pollution, and inspires others to care for and protect the natural world. The association's goal is to improve the health and quality of central New Jersey's water and sustain a network of protected habitats for wildlife and people.

III. Conclusion

Petitioners have complied with the requirements of DEP regulations and have demonstrated that cause exists to support this request for modification of the four General MS4 Permits.[189] DEP has a mandatory duty to respond to this petition.[190] Given the Permits' facial illegality, and their failure to protect the State's waters and the citizens who rely on and use those waters, DEP should grant this petition to modify the Permits – or, in the alternative, to revoke and reissue them with enhanced protections – to bring them into compliance with state and federal law.

We would welcome the opportunity to engage in a constructive dialogue with DEP in order to address the issues raised in this petition in a timely and expeditious manner. We look forward to receiving your response and, we hope, to working with DEP to improve stormwater regulation throughout New Jersey.

[189] N.J.A.C. 7:14A-16.3(b).
[190] N.J.A.C. 7:14A-16.3(c)(3).

Respectfully submitted,

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EXHIBIT G

TO THE DECLARATION OF LAWRENCE M. LEVINE

RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** Spring 2010

Title: ?Stormwater Regulations To Address Revision Discharges From Developed Sites

Abstract: Stormwater runoff from developed areas is a major cause of degradation of surface waters. This is true for both conveyance of pollutants and the erosive power of increased stormwater flow rates and volumes. Current stormwater regulations were promulgated in 1994 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program "…is not likely to adequately control stormwater's contribution to waterbody impairment," and recommended that EPA take action to address the harmful effects of stormwater flow. This proposed action would establish requirements for managing stormwater discharges from new development and re-development to reduce the amount of pollutants and excess runoff entering receiving waters. This action may also expand the areas subject to Municipal Separate Storm Sewer Systems (MS4) permits, to include rapidly developing areas and to cover some discharges that are not currently regulated. A single set of stormwater requirements may be developed for Phase I and Phase II MS4s. Retrofitting for existing discharges may be addressed, although expectations for retrofitting will likely differ significantly from requirements for new and re-development. This action would strengthen the stormwater program's effectiveness by reducing pollutant loading, promoting hydrologic sustainability, and preserving surface water health and integrity.

Agency: Environmental Protection Agency(EPA) **Priority:** Other Significant

RIN Status: First time published in the Unified Agenda **Agenda Stage of Rulemaking:** Long-Term Actions

Major: Undetermined **Unfunded Mandates:** Undetermined

CFR Citation: Not Yet Determined (To search for a specific CFR, visit the Code of Federal Regulations.)

Legal Authority: Not Yet Determined

Legal Deadline: None

Timetable:

Action	Date	FR Cite
NPRM	09/00/2011	
Final Action	12/00/2012	

Additional Information: SAN No. 5408.

Regulatory Flexibility Analysis Required: Undetermined **Government Levels Affected:** Undetermined

Small Entities Affected: No **Federalism:** Undetermined

Included in the Regulatory Plan: No

RIN Data Printed in the FR: No

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RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** Fall 2010

Title: Stormwater Regulations Revision To Address Discharges From Developed Sites

Abstract: Stormwater discharge from developed areas is a major cause of degradation of surface waters. This is true for both conveyance of pollutants and the erosive power of increased stormwater flow rates and volumes. Current stormwater regulations were promulgated in 1990 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program "…is not likely to adequately control stormwater's contribution to waterbody impairment" and recommended that EPA take action to address the harmful effects of stormwater flow. This proposed action would establish requirements for, at minimum, managing stormwater discharges from newly developed and re-developed sites, to reduce the amount of pollutants in stormwater discharges entering receiving waters by reducing the discharge of excess stormwater. This action may also expand the scope of municipal separate storm sewer systems (MS4) required to be regulated under NPDES permits, to include rapidly developing areas and to cover some discharges that are not currently regulated. The Phase I and Phase II MS4 regulations might also be combined and amended, and may include provisions for retrofitting existing development. In order to comply with the Executive order issued by President Obama on Mat 12, 2010, that among other things, require EPA to identify ways to strengthen stormwater management practices within the Bay watershed in order to restore and protect the Bay and its tributaries. EPA plans to include in this proposed rulemaking a separate section containing additional stormwater provisions for the Chesapeake Bay Watershed.

Agency: Environmental Protection Agency(EPA) **Priority:** Other Significant

RIN Status: Previously published in the Unified Agenda **Agenda Stage of Rulemaking:** Proposed Rule Stage

Major: Undetermined **Unfunded Mandates:** Undetermined

CFR Citation: Not Yet Determined (To search for a specific CFR, visit the Code of Federal Regulations.)

Legal Authority: 33 USC 1251 et seq

Legal Deadline:

Action	Source	Description	Date
Final	Judicial	Chesapeake Bay Settlement Agreement; May 11, 2010; Fowler v US EPA, No 1 :09-CV -00005-CKK (D DC)	11/19/2012
NPRM	Judicial	Chesapeake Bay Settlement Agreement; May 11, 2010; Fowler v US EPA, No 1 :09-CV -00005-CKK (D DC)	09/30/2011

Statement of Need: Section 402(p) of the Clean Water Act requires EPA to regulate certain stormwater discharges. Stormwater is a primary contributor of water quality impairment. There is a need to strengthen the stormwater program's effectiveness by reducing pollutant loading from currently regulated and unregulated stormwater discharges and preserving surface water health and integrity. This action was informed by the 2006 National Research Council report.

Summary of the Legal Basis: Section 402(p) of the Clean Water Act requires EPA to regulate certain discharges from stormwater in order to protect water quality.

Alternatives: To be determined.

Anticipated Costs and Benefits: To be determined.

Risks: To be determined.

Timetable:

Action	Date	FR Cite
NPRM	09/00/2011	
Final Action	12/00/2012	
Notice—Public Meeting	To Be Determined	

Additional Information: EPA Docket information: EPA-HQ-OW-2009-0817-0319

Regulatory Flexibility Analysis Required: Yes **Government Levels Affected:** Federal, Local, State

Small Entities Affected: Businesses, Governmental Jurisdictions **Federalism:** Undetermined

Included in the Regulatory Plan: Yes

RIN Information URL: www.epa.gov/npdes/stormwater/rulemaking

RIN Data Printed in the FR: Yes

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RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** Spring 2011

Title: Stormwater Regulations Revision to Address Discharges From Developed Sites

Abstract: Stormwater discharge from developed areas is a major cause of degradation of surface waters. This is true for both conveyance of pollutants and the erosive power of increased stormwater flow rates and volumes. Current stormwater regulations were promulgated in 1990 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program "…is not likely to adequately control stormwater's contribution to waterbody impairment" and recommended that EPA take action to address the harmful effects of stormwater flow. This proposed action would establish requirements for, at minimum, managing stormwater discharges from newly developed and re-developed sites, to reduce the amount of pollutants in stormwater discharges entering receiving waters by reducing the discharge of excess stormwater. This action may also expand the scope of municipal separate storm sewer systems (MS4) required to be regulated under NPDES permits, to include rapidly developing areas and to cover some discharges that are not currently regulated. The Phase I and Phase II MS4 regulations might also be combined and amended, and may include provisions for better managing existing discharges.

Agency: Environmental Protection Agency(EPA) **Priority:** Other Significant

RIN Status: Previously published in the Unified Agenda **Agenda Stage of Rulemaking:** Proposed Rule Stage

Major: Undetermined **Unfunded Mandates:** Undetermined

CFR Citation: Not Yet Determined (To search for a specific CFR, visit the Code of Federal Regulations.)

Legal Authority: 33 USC 1251 et seq

Legal Deadline:

Action	Source	Description	Date
Final	Judicial	Chesapeake Bay Settlement Agreement May 11, 2010, Fowler v. U.S. EPA, No. 1 :09-CV -00005-CKK (D. D.C)	11/19/2012
NPRM	Judicial	Chesapeake Bay Settlement Agreement May 11, 2010,Fowler v. U.S. EPA, No. 1 :09-CV -00005-CKK (D. D.C)	09/30/2011

Timetable:

Action	Date	FR Cite
NPRM	09/00/2011	
Final Action	11/00/2012	

Additional Information: EPA Docket information: EPA-HQ-OW-2009-0817-0319

Regulatory Flexibility Analysis Required: Yes **Government Levels Affected:** Federal, Local, State

Small Entities Affected: Businesses, Governmental Jurisdictions **Federalism:** Undetermined

Included in the Regulatory Plan: No

RIN Information URL: www.epa.gov/npdes/stormwater/rulemaking

RIN Data Printed in the FR: Yes

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RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** Fall 2011

Title: Stormwater Regulations Revision To Address Discharges From Developed Sites

Abstract: Stormwater discharge from developed areas is a major cause of degradation of surface waters. This is true for both conveyance of pollutants and the erosive power of increased stormwater flow rates and volumes. Current stormwater regulations were promulgated in 1990 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program "...is not likely to adequately control stormwater's contribution to waterbody impairment" and recommended that EPA take action to address the harmful effects of stormwater flow. This proposed action would establish requirements for, at minimum, managing stormwater discharges from newly developed and re-developed sites, to reduce the amount of pollutants in stormwater discharges entering receiving waters by reducing the discharge of excess stormwater. EPA may take other actions to implement improved control of stormwater pollution and more efficient rainwater use. The Phase I and Phase II MS4 regulations might also be combined and amended, and may include provisions for better managing existing discharges.

Agency: Environmental Protection Agency(EPA) **Priority:** Economically Significant

RIN Status: Previously published in the Unified Agenda **Agenda Stage of Rulemaking:** Proposed Rule Stage

Major: Yes **Unfunded Mandates:** Undetermined

CFR Citation: Not Yet Determined (To search for a specific CFR, visit the Code of Federal Regulations.)

Legal Authority: 33 USC 1251 et seq

Legal Deadline:

Action	Source	Description	Date
NPRM	Judicial	Chesapeake Bay Settlement Agreement, May 10, 2010, Fowler v. U.S. EPA, No. 1 :09-CV -00005-CKK (D. D.C) modified by agreement 10/04/2011.	12/15/2011
Final	Judicial	Chesapeake Bay Settlement Agreement, May 10, 2010, Fowler v. U.S. EPA, No. 1 :09-CV -00005-CKK (D. D.C)	11/19/2012

Statement of Need: Section 402(p) of the Clean Water Act requires EPA to regulate certain stormwater discharges. Stormwater is a primary contributor of water quality impairment. There is a need to strengthen the stormwater program's effectiveness by reducing pollutant loading from currently regulated and unregulated stormwater discharges and preserving surface water health and integrity. This action was informed by the 2006 National Research Council report.

Summary of the Legal Basis: Section 402(p) of the Clean Water Act requires EPA to regulate certain discharges from stormwater in order to protect water quality.

Alternatives: To be determined.

Anticipated Costs and Benefits: To be determined.

Risks: To be determined.

Timetable:

Action	Date	FR Cite
NPRM	01/00/2012	
Final Action	11/00/2012	

Additional Information: EPA Docket information: EPA-HQ-OW-2009-0817

Regulatory Flexibility Analysis Required: Yes **Government Levels Affected:** Federal, Local, State

Small Entities Affected: Businesses, Governmental Jurisdictions **Federalism:** Undetermined

Included in the Regulatory Plan: Yes

RIN Information URL: www.epa.gov/npdes/stormwater/rulemaking

RIN Data Printed in the FR: Yes

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RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** 2012

Title: Stormwater Regulations Revision to Address Discharges From Developed Sites

Abstract: : Stormwater discharges from developed areas are a major cause of degradation of surface waters due to the conveyance of pollutants and the erosive power of increased stormwater flow rates and volumes. Current stormwater regulations were promulgated in 1990 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program ". . . is not likely to adequately control stormwater's contribution to waterbody impairment" and recommended that EPA take action to address the harmful effects of stormwater flow. This proposed action would establish requirements for, at minimum, managing stormwater discharges from newly developed and re-developed sites, to reduce the amount of pollutants in stormwater discharges entering receiving waters by reducing the discharge of excess stormwater, and may take other actions to implement improved control of stormwater pollution and more efficient rainwater use. This action could promote the use of green infrastructure approaches to manage stormwater.

Agency: Environmental Protection Agency(EPA)

Priority: Economically Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Proposed Rule Stage

Major: Yes

Unfunded Mandates: Undetermined

CFR Citation: 40 CFR 122.26

Legal Authority: 33 USC 1251 et seq

Legal Deadline:

Action	Source	Description	Date
NPRM	Judicial	6/10/2013 - Settlement Agreement deadline for NPRM - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/28/2012 modification	06/10/2013
Final	Judicial	12/10/2014 - Settlement Agreement deadline for Final Action - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/28/2012 modification	12/10/2014

Timetable:

Action	Date	FR Cite
NPRM	06/00/2013	
Final Rule	12/00/2014	

Additional Information: EPA Docket information: EPA-HQ-OW-2009-0817.

Regulatory Flexibility Analysis Required: Undetermined

Government Levels Affected: Federal, Local, State

Small Entities Affected: Businesses, Governmental Jurisdictions

Federalism: Yes

Included in the Regulatory Plan: No

RIN Information URL: www.epa.gov/npdes/stormwater/rulemaking

RIN Data Printed in the FR: No

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RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** Spring 2013

Title: Stormwater Regulations Revision to Address Discharges From Developed Sites

Abstract: Stormwater discharges from developed areas are a major cause of degradation of surface waters. Stormwater conveys pollutants to nearby waterbodies and can impact the hydrology of waterbodies because of increased stormwater discharge volumes and velocities. Current stormwater regulations were promulgated in 1990 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program "is not likely to adequately control stormwater's contribution to waterbody impairment" and recommended that EPA take action to address the harmful effects of stormwater. This action would propose requirements for managing stormwater discharges from newly developed and redeveloped sites and may include other requirements to improve the effectiveness of the stormwater program.

Agency: Environmental Protection Agency(EPA)

Priority: Economically Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Long-Term Actions

Major: Yes

Unfunded Mandates: Undetermined

CFR Citation: 40 CFR 122.26 and 40 CFR 122.30-37

Legal Authority: 33 USC 1251 et seq

Legal Deadline:

Action	Source	Description	Date
NPRM	Judicial	6/10/2013 - Settlement Agreement deadline for NPRM - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/28/2012 modification	06/10/2013
Final	Judicial	12/10/2014 - Settlement Agreement deadline for Final Action - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/28/2012 modification	12/10/2014

Timetable:

Action	Date	FR Cite
NPRM	To Be Determined	

Additional Information: EPA Docket information: EPA-HQ-OW-2009-0817.

Regulatory Flexibility Analysis Required: Undetermined

Government Levels Affected: Federal, Local, State

Federalism: Yes

Included in the Regulatory Plan: No

RIN Information URL: www.epa.gov/npdes/stormwater

RIN Data Printed in the FR: No

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RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** Fall 2013

Title: Stormwater Regulations Revision to Address Discharges from Developed Sites

Abstract: Stormwater discharges from developed areas are a major cause of degradation of surface waters. Stormwater conveys pollutants to nearby waterbodies and can impact the hydrology of waterbodies because of increased stormwater discharge volumes and velocities. Current stormwater regulations were promulgated in 1990 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program "...is not likely to adequately control stormwater's contribution to waterbody impairment" and recommended that EPA take action to address the harmful effects of stormwater. This action could propose requirements for managing stormwater discharges from newly developed and redeveloped sites and may propose regulating additional municipal separate storm sewer systems

Agency: Environmental Protection Agency(EPA)

Priority: Economically Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Long-Term Actions

Major: Yes

Unfunded Mandates: Undetermined

CFR Citation: 40 CFR 122.26 and 40 CFR 122.30-37

Legal Authority: 33 USC 1251 et seq

Legal Deadline:

Action	Source	Description	Date
NPRM	Judicial	6/17/2013 - Settlement Agreement deadline for NPRM - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/10/2013 modification	06/17/2013
Final	Judicial	12/10/2014 - Settlement Agreement deadline for Final Action - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/28/2012 modification	12/10/2014

Timetable:

Action	Date	FR Cite
NPRM	To Be Determined	

Additional Information: EPA Docket information: EPA-HQ-OW-2009-0817.

Regulatory Flexibility Analysis Required: Undetermined

Government Levels Affected: Federal, Local, State

Federalism: Yes

Included in the Regulatory Plan: No

RIN Information URL: www.epa.gov/npdes/stormwater

RIN Data Printed in the FR: No

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RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** Spring 2014

Title: Stormwater Regulations Revision to Address Discharges From Developed Sites

Abstract: Stormwater discharges from developed areas are a major cause of degradation of surface waters. Stormwater conveys pollutants to nearby waterbodies, and can impact the hydrology of waterbodies because of increased stormwater discharge volumes and velocities. Current stormwater regulations were promulgated in 1990 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program ...is not likely to adequately control stormwater's contribution to waterbody impairment and recommended that EPA take action to address the harmful effects of stormwater. This action could propose requirements for managing stormwater discharges from newly developed and redeveloped sites, and may propose regulating additional municipal separate storm sewer systems.

Agency: Environmental Protection Agency(EPA) **Priority:** Economically Significant

RIN Status: Previously published in the Unified Agenda **Agenda Stage of Rulemaking:** Long-Term Actions

Major: Yes **Unfunded Mandates:** Undetermined

CFR Citation: 40 CFR 122.26; 40 CFR 122.30-37

Legal Authority: 33 USC 1251 et seq

Legal Deadline:

Action	Source	Description	Date
NPRM	Judicial	Settlement Agreement for NPRM - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/10/2013 modification	06/17/2013
Final	Judicial	Settlement Agreement for Final Action - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/28/2012 modification	12/10/2014

Timetable:

Action	Date	FR Cite
NPRM	To Be Determined	

Additional Information: EPA Docket information: EPA-HQ-OW-2009-0817.

Regulatory Flexibility Analysis Required: Undetermined **Government Levels Affected:** Federal, Local, State

Federalism: Yes

Included in the Regulatory Plan: No

RIN Information URL: www.epa.gov/npdes/stormwater

RIN Data Printed in the FR: No

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RIN Data

EPA/WATER **RIN:** 2040-AF13 **Publication ID:** Fall 2014

Title: Stormwater Regulations Revision to Address Discharges From Developed Sites

Abstract:

Stormwater discharges from developed areas are a major cause of degradation of surface waters. Stormwater conveys pollutants to nearby waterbodies and can impact the hydrology of waterbodies because of increased stormwater discharge volumes and velocities. Current stormwater regulations were promulgated in 1990 and 1999. In 2006, the Office of Water asked the National Research Council (NRC) to review the stormwater program and recommend ways to strengthen it. The NRC Report, which was finalized in October 2008, found that the current stormwater program "...is not likely to adequately control stormwater's contribution to waterbody impairment" and recommended that EPA take action to address the harmful effects of stormwater. This action could propose requirements for managing stormwater discharges from newly developed and redeveloped sites and may propose regulating additional municipal separate storm sewer systems.

Agency: Environmental Protection Agency(EPA)

Priority: Economically Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Long-Term Actions

Major: Yes

Unfunded Mandates: Undetermined

CFR Citation: 40 CFR 122.26; 40 CFR 122.30-37

Legal Authority: 33 USC 1251 et seq

Legal Deadline:

Action	Source	Description	Date
Final	Judicial	12/10/2014 - Settlement Agreement deadline for Final Action - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/28/2012 modification	12/10/2014
NPRM	Judicial	6/17/2013 - Settlement Agreement deadline for NPRM - Fowler, et al. v. EPA; # 09-0005; D. D.C.; as per 6/10/2013 modification	06/17/2013

Timetable:

Action	Date	FR Cite
NPRM	To Be Determined	

Additional Information: EPA Docket information: EPA-HQ-OW-2009-0817.

Regulatory Flexibility Analysis Required: Undetermined

Government Levels Affected: Federal, Local, State

Federalism: Yes

Included in the Regulatory Plan: No

RIN Information URL: http://cfpub.epa.gov/npdes/home.cfm?program_id=6

RIN Data Printed in the FR: No

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EXHIBIT H

TO THE DECLARATION OF LAWRENCE M. LEVINE

RIN Data

EPA/WATER **RIN:** 2040-AF43 **Publication ID:** 2012

Title: ?NPDES Regulations to Address Water Quality Impacts From Forest Road Discharges

Abstract: The EPA will propose to use flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads, including logging roads, in order to address water quality impacts from those discharges. The EPA recognizes that effective best management practices (BMPs) exist that protect receiving waters and minimize impacts. The EPA plans to propose approaches that leverage effective BMP programs.

Agency: Environmental Protection Agency(EPA)

Priority: Other Significant

RIN Status: First time published in the Unified Agenda

Agenda Stage of Rulemaking: Prerule Stage

Major: No

Unfunded Mandates: No

CFR Citation: 40 CFR 122.26

Legal Authority: 33 USC 1251(a)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
ANPRM	06/00/2013	

Regulatory Flexibility Analysis Required: No

Government Levels Affected: None

Small Entities Affected: No

Federalism: No

Included in the Regulatory Plan: No

RIN Data Printed in the FR: No

Related RINs: Related to 2040-AF42

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RIN Data

EPA/WATER **RIN:** 2040-AF43 **Publication ID:** Spring 2013

Title: NPDES Regulations to Address Water Quality Impacts From Forest Road Discharges

Abstract: The EPA will propose to use flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads, including logging roads, in order to address water quality impacts from those discharges. The EPA recognizes that effective best management practices (BMPs) exist that protect receiving waters and minimize impacts. The EPA plans to propose approaches that leverage effective BMP programs.

Agency: Environmental Protection Agency(EPA)

Priority: Other Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Prerule Stage

Major: No

Unfunded Mandates: No

CFR Citation: 40 CFR 122.26

Legal Authority: 33 USC 1251(a)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
ANPRM	09/00/2013	

Additional Information: Docket #:EPA-HQ-OW-2012-0195

Regulatory Flexibility Analysis Required: No

Government Levels Affected: Federal, State, Tribal

Small Entities Affected: No

Federalism: No

Included in the Regulatory Plan: No

RIN Information URL:
http://www.epa.gov/npdes/stormwater/forestroads

Public Comment URL: www.regulations.gov

RIN Data Printed in the FR: No

Related RINs: Related to 2040-AF42

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RIN Data

EPA/WATER **RIN:** 2040-AF43 **Publication ID:** Fall 2013

Title: NPDES Regulations to Address Water Quality Impacts from Forest Road Discharges

Abstract: The EPA is exploring the use flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads, including logging roads, in order to address water quality impacts from those discharges. The EPA recognizes that effective best management practices (BMPs) exist that protect receiving waters and minimize impacts. The EPA is considering approaches that leverage effective BMP programs.

Agency: Environmental Protection Agency(EPA)

Priority: Other Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Prerule Stage

Major: No

Unfunded Mandates: No

CFR Citation: 40 CFR 122.26

Legal Authority: 33 USC 1251(a)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
ANPRM	01/00/2014	

Additional Information: Docket #:EPA-HQ-OW-2012-0195

Regulatory Flexibility Analysis Required: No

Government Levels Affected: None

Small Entities Affected: No

Federalism: No

Included in the Regulatory Plan: No

RIN Information URL:
http://www.epa.gov/npdes/stormwater/forestroads

Public Comment URL: www.regulations.gov

RIN Data Printed in the FR: No

Related RINs: Related to 2040-AF42

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RIN Data

EPA/WATER **RIN:** 2040-AF43 **Publication ID:** Spring 2014

Title: NPDES Regulations to Address Water Quality Impacts From Forest Road Discharges

Abstract: EPA will propose to use flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads, including logging roads, in order to address water quality impacts from those discharges. EPA recognizes that effective best management practices (BMPs) exist that protect receiving waters and minimize impacts. EPA plans to propose approaches that leverage effective BMP programs.

Agency: Environmental Protection Agency(EPA)

Priority: Other Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Prerule Stage

Major: No

Unfunded Mandates: No

CFR Citation: 40 CFR 122.26

Legal Authority: 33 USC 1251(a)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
ANPRM	05/00/2014	

Additional Information: Docket #:EPA-HQ-OW-2012-0195

Regulatory Flexibility Analysis Required: No

Government Levels Affected: None

Small Entities Affected: No

Federalism: No

Included in the Regulatory Plan: No

RIN Information URL:
http://www.epa.gov/npdes/stormwater/forestroads

Public Comment URL: www.regulations.gov

RIN Data Printed in the FR: No

Related RINs: Related to 2040-AF42

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RIN Data

EPA/WATER **RIN:** 2040-AF43 **Publication ID:** Fall 2014

Title: NPDES Regulations to Address Water Quality Impacts From Forest Road Discharges

Abstract:

EPA will propose to use flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads, including logging roads, in order to address water quality impacts from those discharges. EPA recognizes that effective best management practices (BMPs) exist that protect receiving waters and minimize impacts. EPA plans to propose approaches that leverage effective BMP programs.

Agency: Environmental Protection Agency(EPA)

Priority: Other Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Long-Term Actions

Major: No

Unfunded Mandates: No

CFR Citation: 40 CFR 122.26

Legal Authority: 33 USC 1251(a)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
ANPRM	To Be Determined	

Additional Information: Docket #:EPA-HQ-OW-2012-0195

Regulatory Flexibility Analysis Required: No

Government Levels Affected: None

Small Entities Affected: No

Federalism: No

Included in the Regulatory Plan: No

RIN Information URL:
http://www.epa.gov/npdes/stormwater/forestroads

Public Comment URL: www.regulations.gov

RIN Data Printed in the FR: No

Related RINs: Related to 2040-AF42

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EXHIBIT I

TO THE DECLARATION OF LAWRENCE M. LEVINE

Water: Stormwater

Proposed National Rulemaking to Strengthen the Stormwater Program

EPA is updating its stormwater strategy to focus now on pursuing a suite of immediate actions to help support communities in addressing their stormwater challenges and deferring action on rulemaking to reduce stormwater discharges from newly developed and redeveloped sites or other regulatory changes to its stormwater program. EPA will provide incentives, technical assistance, and tools to communities to encourage them to implement strong stormwater programs; leverage existing requirements to strengthen municipal stormwater permits; and continue to promote green infrastructure as an integral part of stormwater management. EPA believes this approach will achieve significant, measurable, and timely results in reducing stormwater pollution and provide significant climate resiliency benefits to communities.

Activities that were Related to the Rulemaking

- Summary of State Stormwater Standards
- Information Collection Request (ICR) for Proposed Rulemaking
- December 28, 2009 FRN: Stakeholder Input on Proposed Rulemaking and National Listening Sessions
- Stakeholder Input on Stormwater Rulemaking Related to the Chesapeake Bay

Last updated on Monday, July 14, 2014