



March 18, 2014

Steve Watts
NYSDEC
47-40 21st Street
Long Island City, NY 11101-5407

Re: Draft SPDES Permit No. NY-0287890 (NYC MS4 Permit)

Dear Mr. Watts,

On February 5, 2014, the New York State Department of Environmental Conservation (DEC) issued a public notice for a draft State Pollutant Discharge Elimination System (SPDES) Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s) owned or operated by the City of New York. According to the notice and accompanying fact sheet, discharges to surface waters, from both public and private property, via MS4 outfalls owned or operated by the City, as well as discharges to surface waters from municipal operations and facilities that drain via overland flow, would be authorized under the terms of the permit (draft SPDES Permit No. NY-0287890).

We wish to thank DEC for releasing this draft permit, which addresses polluted stormwater runoff from about half of the City's land area, for public comment. The Stormwater Infrastructure Matters (S.W.I.M.) Coalition is a coalition with more than 60 member organizations dedicated to ensuring swimmable waters around New York City through natural, sustainable storm water management practices (a.k.a. green infrastructure) in our neighborhoods.

We note that, under federal regulations, DEC was required to issue an MS4 permit to New York City to comprehensively regulate these discharges in 1993 [See 40 C.F.R. § 122.26(e)(7)(ii)]. Especially as the permit is now twenty years overdue, it is essential that DEC issue a strong permit with terms that ensure the City will develop and implement an effective stormwater pollution control program as quickly as possible.

Although the draft permit recognizes that MS4 discharges contribute to water quality standards violations in many waters throughout New York City, overall it does not hold the City accountable for achieving pollutant load reductions sufficient to ensure that MS4 discharges cease to contribute to such impairments, as required by law. Nor does it ensure that New York City will adopt specific practices that reduce pollution system-wide to the "maximum extent practicable," as also required by law. Additionally, while the permit provides several avenues for public participation in the City's stormwater management efforts, it omits some of the most essential public participation rights and is too vague with respect to others.

On behalf of our member organizations, we urge DEC to improve the draft permit as follows:

1. Mandate more robust public processes for the City's development of its Stormwater Management Program (SWMP) and DEC approval of said plan;
2. Clearly and unequivocally prohibit discharges that cause or contribute to water quality standards, and provide for a specific compliance schedule to eliminate discharges that cause or contribute to existing water quality impairments; and

3. Demand that planning under this permit be specifically integrated with other water pollution control programs currently under development by the City and State;
4. Reduce the size of the construction and post-construction trigger from 1 acre to 5,000 square feet, to ensure that stormwater management requirements cover a substantial portion of lots in a city as densely developed as New York.

The National Research Council, an arm of the National Academies of Science, 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.”¹ As such, DEC must ensure that this permit includes clear and strong provisions that hold New York City accountable for achieving stormwater pollution reduction and water quality mandates.

Please accept the detailed comments below, which elaborate on each of our four main concerns.

First, there must be more robust public involvement in the development and approval of the Stormwater Management Program Plan. Under the draft Permit, the City is required to submit a SWMP for DEC review and approval within three years of the effective date of the permit (*Permit, at III.A.1*). As written, there are many areas for significant improvement of public participation:

- All draft annual reports should be presented and made available for public questions and comments at both open meetings and on a Permittee website – not one or the other (*Permit, at IV.B.4.a*); likewise, notice of such presentations and availability should be provided both at open meetings and online, with notice also sent directly to interested stakeholders (*Permit, at IV.B.4.b*);
- The Permittee should ensure that all submitted comments (not just summaries) are made available for public inspection with the final annual report and SWMP plan (*Permit, at IV.B.4.d*);
- For developing illicit discharge plans (*Permit, at IV.D*), post-construction stormwater control (*Permit, at IV.F*), and industrial and commercial stormwater source management (*Permit, at IV.H*), the Permittee should be required to develop a public-reporting system for complaints (accessible telephonically and electronically) that also allows members of the public to track their reports through to ultimate Permittee resolution online or through a Permittee point of contact in the City; and
- For construction site stormwater control (*Permit, at IV.E*), the draft permit requires that the Permittee describe “procedures for receipt and follow up on complaints or other information submitted by the public regarding construction site storm water runoff” – this section (*IV.E.h*) should be expanded to require a robust electronic and telephonic system for reporting complaints that allows any member of the public to track complaints from submission to resolution.

Perhaps most importantly, DEC must provide opportunity for public participation in the agency’s final review and consideration of the SWMP in three years’ time. The draft Permit does not contain all of the substantive requirements with which the Permittee must comply. Rather, it binds the City to a plan that the City itself will develop – after the permit is granted. As a result, DEC’s ultimate approval of a SWMP will amount to a SPDES permit modification, and must be treated as such with regard to public participation.

¹ National Research Council, *Urban Stormwater Management in the United States* at 3 (2009), available at http://www.nap.edu/catalog.php?record_id=12465.

According to the 9th Circuit Court of Appeals, “storm water management programs that are designed by regulated parties must, in every instance, [be] 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.”² Furthermore, 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 not only subject to review and approval by the permitting agency, as the draft permit provides, but also “subject to the public availability and public hearings requirements of the Clean Water Act” in connection with such review and approval.³ The Second Circuit also has held that the public must be able to comment to the permitting agency, and request a hearing before the permitting agency, on the terms of pollution management plans drafted by Clean Water Act permittees.⁴

Despite these clear legal requirements, the draft permit fails to ensure an opportunity for public comment to the DEC or the opportunity for a hearing in front of DEC about the adequacy of the City’s to-be-developed stormwater management program. DEC must remedy this shortcoming in the final permit.

Second, the permit must clearly and unequivocally prohibit discharges that cause or contribute to water quality standards, and provide for a compliance schedule to eliminate any existing contributions to water quality impairments that are attributable to MS4 discharges. DEC is obliged to include such requirements in this permit, as in all SPDES permits, regardless of whether or not DEC has already developed a TMDL for the receiving water body. Waiting for a TMDL is both unlawful and, as a practical matter, would entail decades of delay in light of DEC’s track record for delay in TMDL development. (We further note that, for many waterways, despite DEC’s recognition – and often the City’s recognition as well – that MS4 discharges contribute to impairments, DEC has removed those waterways from the 303(d) list of waters for which a TMDL is deemed necessary. Waiting for a TMDL for these waters would be a complete exercise in futility).

Third, the permit also fails to account for the numerous complementary and often overlapping regulatory requirements and processes that the City of New York is currently subject to or otherwise involved in. This includes the development of Combined Sewer Overflow Long Term Control Plans, Newtown Creek and Gowanus Canal Superfund remediation, and remediation of brownfield and State Inactive Hazardous Waste site cleanups. The permit should identify these and any other efforts aimed at improving water quality in waters adversely affected by MS4 discharges, and should require that the SWMP describe how the City will integrate its MS4 pollution control efforts with these other initiatives in order to achieve compliance with water quality standards.

Finally, a one acre threshold is far too large for triggering the application of construction and post-construction runoff controls. As demonstrated by analyses described by the public at a DEC information session on this permit (March 5, 2014) – which have separately been provided in writing to DEC – a one-acre threshold would cover only a small minority of the land area within the City’s MS4 system, whereas a lower threshold, such as 5,000 square feet, would capture a significantly larger percentage of the City’s land area. Moreover, a 5,000 square foot threshold is entirely “practicable,” as it is already in effect in other large cities around the nation.

² *Environmental Defense Center v. EPA*, 344 F.3d 832, 856 (9th Cir. 2003).

³ *Environmental Defense Center v. EPA*, 344 F.3d 832, 857 (9th Cir. 2003).

⁴ *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 503-04 (2d Cir. 2005).

Thank you for this opportunity to comment on the draft permit. We look forward to receiving DEC's response.

Sincerely,

A handwritten signature in black ink that reads "Robert J Crauderueff". The signature is written in a cursive style with a light blue rectangular highlight behind the name.

Robert Crauderueff

S.W.I.M. Coalition Coordinator on behalf of:

S.W.I.M. Coalition Steering Committee

Sean Dixon, Riverkeeper

Robin Kriesberg, Bronx River Alliance

Larry Levine, Natural Resources Defense Council

Paul Mankiewicz, the Gaia Institute

Sam Marquand, Rocking the Boat

Tatiana Morin, New York City Soil & Water Conservation District

Phillip Musegaas, Riverkeeper

Jaime Stein, Pratt Institute

Shino Tanikawa, New York City Soil & Water Conservation District

cc: Emily Lloyd, Commissioner, NYC DEP
Venetia Lannon, Regional Director, NYS DEC Region 2
Angela Licata, Deputy Commissioner, NYC DEP
Joan Leary Matthews, US EPA Region 2
Jeff Gratz, US EPA Region 2