Natural Resources Defense Council
Riverkeeper
NY/NJ Baykeeper

April 10, 2015 ***[as corrected April 17, 2015]***

Steve Watts
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via email: **stephen.watts@dec.ny.gov**

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

Dear Mr. Watts,

On behalf of Natural Resources Defense Council, Riverkeeper, and NY/NJ Baykeeper, please accept the following comments on the March 2015 revised draft State Pollutant Discharge Elimination System (SPDES) Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s) of New York City (the "Revised Draft Permit"). The Revised Draft Permit would regulate 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.

One year ago, we submitted comments on DEC's initial draft of this permit ("Initial Draft Permit"). Unfortunately, the Revised Draft Permit fails to resolve the legal defects we identified in our original comments and remains inadequate to protect water quality in New York City.

The Revised Draft Permit still does not hold the City accountable for achieving pollutant load reductions sufficient to ensure that MS4 discharges cease to cause or contribute to such impairments, as required by law. And it still does not 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 still omits some of the most essential public participation rights and is too vague with respect to others.

To address these shortcomings, we urge DEC to improve the Draft Permit as follows:

1. apply robust post-construction stormwater management requirements – including an "on-site retention" (or "runoff reduction") standard equivalent to the standard for new development – to all new development and redevelopment projects that disturb 5,000 or more square feet of land;

2. clearly and unequivocally prohibit discharges that cause or contribute to water quality standards violations, and provide for a specific compliance schedule (including a retrofit

program) for eliminating discharges that cause or contribute to *existing* water quality impairments;

3. require that planning under this permit must specifically integrated with other water pollution control programs currently under development by the City and State (e.g., CSO Long Term Control Plans, Superfund remediation), while pollution control plans for such other pollution sources are under development;

4. strengthen various elements of the Stormwater Management Program (SWMP) requirements to ensure their effectiveness and accountability for water quality results;

5. mandate full transparency for the City's public participation plans as it develops its SWMP and other permit-required findings, as well as for the DEC SWMP approval; and

6. address certain "drafting" issues, to avoid unnecessary ambiguity.

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, "[p]erhaps 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] DEC must avoid repeating this pattern, by ensuring that this permit includes clear, precise, 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 main areas of concern.

1. In order to comply with the "maximum extent practicable" standard, the Draft Permit must require more stringent post-construction controls, including a lower size threshold for triggering post-construction stormwater management requirements, and performance standard for redevelopment projects that matches the standard for new development projects.

Under state and federal law, SPDES permits for MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable."[2] Courts interpreting the phrase "maximum extent practicable" have found it to be clear and unambiguous: it means to the fullest degree technologically feasible, except where costs are wholly disproportionate to the potential benefits.[3] DEC is responsible not merely to instruct an MS4 permittee to develop measures that

[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.

[2] 33 U.S.C. § 1342(p)(3)(B)(iii); ECL § 17-0808(3)(c); *see also* 40 C.F.R. § 122.26(d)(2)(iv), 6 N.Y.C.R.R. § 750-1.11(a)(9) (requiring SPDES permits to comply with the enumerated federal regulations).

[3] *See, e.g., Haeuser v. Dep't of Law, Gov't of Guam*, 97 F.3d 1152, 1159 (9th Cir. 1996) (finding that "practicable" means "capable of being done: feasible"); *Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990) (holding that, to meet the "practicable" standard, EPA must select best level of technology unless costs are "wholly disproportionate" to benefits); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001) ("[T]he phrase 'to the maximum extent practicable' does not permit an agency unbridled discretion. It imposes a clear duty on the agency

reduce stormwater pollution to the maximum extent practicable, but to issue permit terms that "ensure that the measures that any given…[MS4] undertake[s] will *in fact* reduce discharges to the maximum extent practicable."[4] The Revised Draft Permit, as written, does not meet this obligation.

DEC's Fact Sheet accompanying the Revised Draft Permit fails to explain why standards that have proven to be practicable in other major cities would not be "practicable" in New York City. As a matter of law, standards that are being implemented in comparable situations elsewhere are practicable, and therefore required by the "maximum extent practicable" standard. If DEC believes New York City is different from other cities in some relevant respect, DEC must identify those differences and explain why they indicate that stringent standards applied elsewhere would not be practicable in New York City.

a. <u>The Draft Permit should be modified to reduce the 1 acre "land disturbance" threshold to 5,000 square feet.</u>

The Revised Draft Permit's one acre threshold for application of post-construction stormwater management requirements (Section IV.F) excludes far too much of the MS4 service area from coverage, without any valid reason. This size threshold would not satisfy the "maximum extent practicable" legal standard. Broader application of these requirements, to all new development and redevelopment with at least 5,000 square feet of land disturbance, is indeed practicable, and is therefore mandatory. New York City recently adopted new stormwater management rules – requiring on-site management of a significant volume of stormwater – that apply to sites at least as small as 5,000 square feet.[5] There is no reason why the same threshold cannot be applied in the MS4 portions of the city. Likewise, thresholds as low as 5,000 square feet are already in effect in other large cities around the nation, demonstrating its practicability;[6] indeed, EPA's Office of Water has itself stated that "[t]his approach [as reflected in the Washington, DC MS4 permit] has been demonstrated to be

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to fulfill the statutory command to the extent that it is feasible or possible." (internal quotation omitted)); *see also Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) (holding that "feasible" means physically possible).

[4] *Environmental Defense Center v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003).

[5] *See* New York City Record, Jan. 4, 2012, pp. 15-18; NYC DEP, Guidelines for the Design and Construction of Stormwater Management Systems (2012), at Table 3-1; Environmental Assessment Short Form (#08DEP031Y), Attachment, p. 2. All of these documents are available at http://www.nyc.gov/html/dep/html/environmental_reviews/stormwater_release_rates.shtml.

[6] For example, Washington D.C.'s MS4 permit, issued by EPA Region 3, applies post-construction requirements to new development and redevelopment that disturbs over 5,000 square feet of soil, as well as to substantial renovations to large buildings. *See* http://www.epa.gov/reg3wapd/npdes/dcpermits.htm. *See also* 21 D.C. Regs. §§ 516, 599 (implementing standards from DC MS4 permit). The state of Maryland's post-construction stormwater management regulations apply to developments disturbing over 5,000 square feet of land area . Code Md. Regs. 26.17.02.05(B)(2). Philadelphia's regulations currently apply to development that results in an area of earth disturbance of 15,000 square feet or more, PWD Stormwater Management Regulations § 600.2(a), although the city will be reducing this threshold to 5,000 square feet, under a directive from the state Department of Environmental Protection. In San Diego, post-construction 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. California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001/NPDES No. CAS0109266 at 85.

'practicable.'"[7] Likewise, EPA Region 2's comments on the Initial Draft Permit (see comment #16) stated that DEC "should set 5,000 s.f. as the cutoff in this permit" and cited the Washington, DC and San Francisco MS4 permits as examples of permits for large, densely developed cities that use this threshold. As EPA Region 2 noted in its comment letter, "[i]f the cutoff is too high and too few projects are captured, the requirement will be of little benefit." DEC is required not merely to ensure that the permit's post-construction requirement is not "of little benefit" – it is required to ensure that the post-construction requirement ensures pollution reduction "to the maximum extent practicable." To do so, DEC must reduce the size threshold to 5,000 s.f.

As demonstrated by the analysis of New York City lot-level data we provided with our comments on the Initial Draft Permit, a one-acre threshold would cover only a small minority of the land area within the City's MS4 system, whereas a 5,000 square foot threshold would capture a significantly larger percentage of the City's land area. Contrary to the City's assertion that there is insufficient data for developing a standard, we have submitted ample information and by reference we incorporate this data again. Ignoring this clear evidence – in order to delay implementation of an actually realistic trigger – would be a clear violation of the spirit and letter of the law.

Additionally, application of post-construction stormwater management requirements to as many sites as possible – including existing developed sites when they are subject to redevelopment – is essential to remedying existing water quality impairments. Therefore, in other MS4s that cause or contribute to water quality impairments in receiving waters, low size thresholds for post-construction requirements not only serve to implement the "maximum extent practicable" requirement, but also contribute cost-effectively towards the MS4's obligations to reduce pollutant loadings sufficiently to meet water quality standards. In New York City, a low size threshold would serve the same dual function (see comment #2 below, regarding the requirement for the Draft Permit to ensure compliance with water quality standards).

For all of these reasons, DEC must revise Section IV.F. to apply to all new development and redevelopment projects that disturb at least 5,000 s.f. of land. To control stormwater discharges, projects of less than 5,000 s.f. must be included in the program if that project is part of a larger common plan of development or sale that will result in a land disturbance of greater than or equal to one acre.

[7] EPA Office of Water, Best Practices and End of Year Performance Report, Fiscal Year 2012 (April 2013), pp. 41-42, available at http://water.epa.gov/resource_performance/performance/upload/OW_End_of_Year_BPFY2012_Report.pdf. EPA regulations for large MS4 permits set neither a ceiling nor a floor on the size threshold for new development and redevelopment to which post-development requirements must be applied. 40 C.F.R. § 122.26(d)(2)(iv)(A)(2). The regulations require, as per § 402(p) of the Clean Water Act, that large MS4 permits must ensure that permittees "reduce the discharge of pollutants [from these sources] to the maximum extent practicable." *Id*. § 122.26(d)(2)(iv).

Likewise, Section IV.M.4.f.iii. must be revised to change "1 acre" to "5,000 s.f." for reporting purposes, and must not be limited to sites reflected in DEC permit data since sites smaller than 1 acre will not have obtained coverage under DEC's construction general permit.[8]

b. The Draft Permit should be modified to resolve flawed incorporation of other, insufficient, standards.

Earlier this year, DEC finalized a new version of the Construction General Permit, which cures this defect, and the Revised Draft Permit (section IV.F.1) now incorporates-by reference the standards from the new Construction General Permit.

The incorporation of standards from the new Construction General Permit, however, creates new problems, since the post-construction performance standards in that permit fail to meet the maximum extent practicable standard. NRDC and Riverkeeper detailed the flaws in the Construction General Permit's post-construction performance standard in our comments on the draft of that permit. (See attached comment letter dated 9/2/14, at comment #3.) The final version of the 2015 Construction General Permit did not make the necessary changes to fix those defects. Therefore, the Revised Draft Permit, by incorporating the standards from the 2015 Construction General Permit, incorporates those same defects and fails to meet the "maximum extent practicable" standard. We incorporate by reference NRDC and Riverkeeper's comments on the draft Construction General Permit as comments on the Revised Draft Permit,.

[8] The Revised Draft Permit maintains a one acre threshold and adds a requirement (at Part IV.F.4) that the City conduct a study, due in three years as part of its SWMP, to recommend an "appropriate" size threshold and propose steps for implementing such a threshold if it differs from one acre. Even if DEC were to defer a decision on a lower threshold – an approach we believe is contrary to law – the new permit provision is far weaker than necessary to achieve that approach. First, the permit does not specific how to determine what is an "appropriate" size threshold, leaving it to the City's discretion to use any method and rationale it chooses. In light of the City's comments on the Initial Draft Permit, it seems that the City's approach will be to resist any lower threshold that creates a greater administrative burden than the City currently has for stormwater regulation. That is not an acceptable approach, since the entire point of an MS4 permit is to impose new regulatory requirements on a permittee. DEC must determine what is the maximum extent practicable, and, as explained above, other cities' ability to implement a 5,000 s.f. threshold demonstrates that it is practicable. If anything, New York City is more capable than other cities of managing the administrative burdens of expanded regulation, since the city has more resources. Further, as noted above, the City's preexisting stormwater regulations already apply to sites as small as 5,000 s.f., so setting that threshold in the MS4 permit would not expand the types of projects that are already subject to City review for stormwater compliance; it would just strengthen the pollution control performance standard applicable to such projects. Second, three years is far too long for a study, to the extent such a study is considered desirable. The data to evaluate the practicability of various size thresholds is readily available to the City from its own property and permitting records. Third, this permit provision does not require the City to implement a lower threshold, if the study concludes that a lower threshold is "appropriate," as soon as possible, but instead requires only submission of a "a plan for developing adequate legal authority to implement" the City's recommended threshold and requires the City to "identify any feasible steps that could be implemented during the remainder of the permit term." In other words, the permit envisions that the threshold will remain at one acre at least until the next permit term, regardless of whether the City's study recommends a lower threshold or whether DEC determines based on the study that a lower threshold is needed. If the permit addresses the size threshold issue by means of a study requirement, it must also expressly require the City to implement, as soon as possible, any lower size threshold that the study recommends, or any lower size threshold that DEC instructs based on its review of the study. Finally, as with the entire SWMP, DEC's process for review and approval of the study must include an opportunity for public to, and a public hearing before, DEC as to whether the City's proposed size threshold satisfies applicable legal standards.

The standard for redevelopment projects is far weaker than the standard for new development projects in the 2015 Construction General Permit. As applied to New York City, where virtually every construction project is a redevelopment project, this is the Construction General Permit's most significant weakness. The City's own stormwater rules adopted in 2012 (see footnote 6 above), which apply in combined sewer drainage areas, do not apply a lower standard to redevelopment as compared to new development. While the standards in the Revised Draft Permit differ in substance from those standards, as they should – because they require runoff reduction, rather than slow release – there is likewise no basis to apply a more lenient standard to redevelopment than to new development in the MS4 areas of the city.

As explained in our comments on the draft Construction General Permit, other similar jurisdictions apply the same stringent runoff reduction standards to both new development and redevelopment, demonstrating that it is practicable, and therefore required for the NYC MS4 permit under the "maximum extent practicable" standard. Moreover, as also explained in our comments on the draft Construction General Permit, in any instances where there are technical constraints on a particular redevelopment site that makes it infeasible to capture runoff from the 90th percentile storm without discharge, the infeasibility exception built-in to the runoff reduction standard for new development standard makes it fully practicable apply that same standard to redevelopment sites.

A further major weakness is the language relating to flood management projects:

- Part IV.F.1.d includes a new provision, not included in the Initial Draft Permit, that the City must "ensure that SWPPPs for proposed flood management projects assess the impacts on the water quality of receiving waters."[9] This provision includes no definition of "flood management project," no explanation of the method the City must use to evaluate such impacts, and no requirement to avoid, mitigate, or offset such impacts. Further, the provision specifically excludes "the installation and maintenance of storm sewers, high level storm sewers, Bluebelt projects, or other projects that reduce localized flooding; recreational and aesthetic features and impoundments that do not perform a flood control function; and drainage inlets." This exclusion is completely improper and unlawful. Most such drainage improvements, almost by definition, are likely to increase pollutant loads because they are designed to capture more runoff in the MS4 system and discharge it through MS4 outfalls to city waterways, irrespective of any changes in the land use or increases in impervious area. The permit must require DEC to avoid, mitigate, or offset such increase pollutant loads by retrofitting the area draining to the new or expanded sewer lines and/or outfalls.

- Part IV.F.1.f. provides that "the SWPPPs prepared for major maintenance or rehabilitation of structural flood control devices in flood management projects shall consider the recommended controls resulting from the facility assessment conducted as required under Part IV.G.1.d. This provision needs a definition of "structural

[9] This provision seems to conflict with language in Part II, stating that such upgrades are exempt from analysis of water quality impacts unless there is a land use change or increased imperviousness in the drainage area. As noted elsewhere in this letter, that provision of Part II should be stricken.

flood control devices" and "flood management projects." Further, it must require more than mere "consideration" of controls. The permit must include requirements that ensure that the City implements controls that reduce stormwater pollution associated with such flood control devices to the maximum extent practicable.

c. Additional comments relating to post-construction requirements

- All references to the SPDES General Permit for Stormwater Discharges from Construction Activity and to the New York State Stormwater Management Design Manual should be to the "then-current" version of these documents, rather than the 2015 version specifically, since both documents are likely to be modified over the lifetime of this permit.

- The Permittee should be required to determine whether the technical designs (as distinct from the performance standards and "sizing criteria") in the New York State Stormwater Design Manual are generally appropriate for the range of site conditions encountered in New York City and, if they are not, to develop a City-specific design manual, which identifies alternative technical designs that may be used to meet the performance standards and sizing criteria of the State Manual. Any such City-specific design manual must be included as part of the Permittee's SWMP and subject to all public participation and DEC approval requirements to which the SWMP is subject.

- Section IV.F.1.g.: This provision states that the SWMP must "require[] adequate long-term operation and maintenance of [post-construction] stormwater management practices by trained individuals, including inspections to ensure that practices are performing properly." This is ambiguous regarding whether, in the case of privately owned facilities, such "individuals" would be public agency staff or staff of the private property owner. The provision should be expanded to require the City to ensure operations and maintenance of post-construction practices at private facilities in a manner consistent with the requirements of the DEC Construction General Permit, including a requirement to develop an inspection and enforcement program similar to the one which the Draft Permit (Part IV.H.) describes for industrial and commercial sites. This, specifically, was not cured or clarified fully in the revised Draft Permit.

- Section IV.F.h.: This provision must be revised to state that any "offsite alternative stormwater management" receiving credit under a "banking and credit" system must be associated with retrofit projects that are not otherwise required by law. For example, as currently drafted, this provision seems to allow retrofits within CSO drainage areas that are undertaken in compliance with the City's CSO Consent Order to generate "credits" towards meeting the Draft Permit's "no net increase" requirement; allowing such retrofits to generate credit would unlawfully grant the City carte blanche to allow increased MS4 discharges that cancel out pollution reductions achieved in CSO areas. It is unclear whether this comment was addressed in the revised Draft Permit.

- Section IV.F.h.v.: This provision requires that "[a] banking and credit system must at minimum ensure that...mitigation is applied for retrofit or redevelopment." The term retrofit is undefined here; the provision also gives no indication of what is meant by "mitigation is

applied". DEC should clarify this provision – the changes that were made did not necessarily address this comment.

2. DEC must revise the draft permit to clearly prohibit discharges that cause or contribute to violations of water quality standards, and provide for a compliance schedule to eliminate any existing contributions to water quality impairments that are attributable to MS4 discharges.

Under state and federal law, in addition to meeting the "maximum extent practicable" standard, SPDES permits must also include any further pollution control measures that are needed to ensure compliance with state water quality standards.[10] EPA's Environmental Appeals Board has made clear that these requirements apply no less to MS4 permits than to any other type of Clean Water Act permit.[11] DEC has expressly affirmed this principle, explaining recently to the New York Court of Appeals that "[s]tate law requires permits (including stormwater discharge permits) to include conditions 'necessary to insure compliance with water quality standards.'"[12]

Further, with respect to any discharge that is not in compliance with permit limitations, water quality standards, or other applicable requirements, state law provides that DEC "shall establish *specific* steps in a compliance schedule designed to attain compliance within the shortest reasonable time."[13] Where the time frame in which compliance must be attained exceeds nine months, "a schedule of compliance shall be *specified* in the [SPDES] permit."[14]

As the Draft Permit makes clear (Section II.B.1 and Appendix 2), discharges from New York City's MS4 currently contribute to water quality impairments in many waterbodies. Yet, rather than unequivocally prohibiting discharges and establishing a compliance schedule for achieving the pollutant reductions necessary to achieve water quality standards, the draft permit merely requires that the City ensure "no net increase" in pollution discharges to these impaired waters. This is plainly unlawful. Rather than holding the City accountable for meeting water quality standards and setting a specific schedule of steps to achieve that Clean Water Act goal, it holds the City accountable only for maintaining the status quo – *i.e.*, it permits continuing violations of water quality standards.[15]

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[10] ECL § 17-0811(5); 6 N.Y.C.R.R. § 750-1.11(a)(5)(i); 40 C.F.R. §§ 122.4(d), 122.44(d); *see also* 40 C.F.R. § 123.25(a)(1), (15).

[11] *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 329, 335-43 (EAB 2002) (requiring "imposition of conditions [that] ensure compliance with the applicable water quality requirements of all affected states").

[12] Respondents Brief in *NRDC v. DEC* (N.Y. Court of Appeals, Nos. APL-2014-00095 & APL-2015-00043) at 72-73.

[13] 6 N.Y.C.R.R. § 750-1.14(a) (emphasis added); *see also* 40 C.F.R. § 122.47(a)(1) (compliance schedules must be designed to achieve compliance "as soon as possible, but not later than the applicable statutory deadline under the CWA").

[14] 6 N.Y.C.R.R. § 750-1.14(b) (emphasis added).

[15] At least one other provision of the Draft Permit may establish a prohibition on discharges that cause or contribute to water quality standards violations; however, the "no net increase" clause creates uncertainty as to the meaning of that provision when the Draft Permit is read as a whole. *See* Section VI (definition of "SWMP," which states that the SWMP must "satisfy appropriate water quality requirements of the ECL and CWA"). (We further note that

In our comments on the Initial Draft Permit (Comment #2), we explained in detail why the draft permit terms do not ensure compliance with water quality standards. The new paragraph at the beginning of Part II.A of the Revised Draft Permit does nothing to rectify this problem. It is merely a statement of DEC's belief that the permit terms will ensure compliance with water quality standards. This does not change the fact that the operative terms of the permit – i.e., permit term that actually impose enforceable requirements and/or prohibitions on the permittee – do not ensure compliance with water quality standards. Indeed, those operative terms (specifically, the second paragraph of Part II.A and all of Part II.B.) are identical to corresponding terms of DEC's Small MS4 General Permit, which are currently under review by the New York Court of Appeals in *NRDC v. DEC* (No. APL-2015-00043).

We hereby incorporate by reference the appellants' briefs in that appeal insofar as they address the State's failure to ensure compliance with water quality standards. A decision from the Court of Appeals is anticipated imminently. If the Court rules for the Appellants, it will be beyond dispute that the terms of the Revised Draft Permit are unlawful and must be revised. We strongly urge DEC to wait for a ruling in *NRDC v. DEC* before finalizing the NYC MS4 Permit, and to revise the draft NYC MS4 Permit as needed to comply with the Court's holding. Otherwisde, our organizations would be forced to bring additional litigation if DEC issues a final NYC MS4 Permit that is unlawful under the forthcoming Court of Appeals decision. It would be better for all to avoid this outcome.

Specifically, to comply with state and federal law, DEC must revise Section II to expressly prohibit discharges that cause or contribute to water quality standards violations and to establish a *specific* compliance schedule consistent with the requirements of 6 NYCRR § 750-1.14.[16] The compliance schedule provision of the permit could be structured to require the Permittee to develop and submit for DEC review – subject to public notice, comment, and an opportunity for a public hearing before DEC – a proposed remedial action plan that includes all of the necessary elements of a compliance schedule pursuant to 6 NYCRR § 750-1.14(a)-(b) & 40 C.F.R. § 122.47(a)(3), including meeting the elements of the definition of a "schedule of compliance" as per 6 NYCRR § 1.2(a)(74); 40 C.F.R. § 122.2; & 33 U.S.C. § 1362(17).[17]

Section I.C.3. provides that discharges the permitting of which is prohibited under state and federal regulations – which include discharges causing or contributing to water quality standards violations – are "not authorized by this permit." However, an exclusion of certain discharges from coverage under a permit is not the same as a provision stating that the occurrence of such discharges would be a violation of the permit; nor does such an exclusion represent a "schedule of compliance" to eliminate such discharges.)

[16] In the case of one waterbody, for which DEC has quantified the MS4 pollutant load reductions necessary to achieve water quality standards, the Draft Permit should also be modified to specify a numeric pollution reduction requirement. In the Long Island Sound nitrogen TMDL, DEC determined that, to achieve water quality standards for dissolved oxygen in Long Island Sound, a 10 percent reduction (from the annual level in 2000) in aggregate nitrogen loading from urban and agricultural stormwater runoff is required by 2014, and that such reductions are achievable through "an aggressive . . . runoff control program" utilizing existing legal authority, including, specifically, stormwater permitting. Thus, for discharges of nitrogen to Long Island Sound, the Draft Permit should not only include a narrative requirement to reduce discharges sufficiently to ensure the MS4 dos not cause or contribute to water quality standards violations, but should also include a numeric requirement to achieving the 10% reduction specified by the Long Island Sound TMDL.

[17] The final permit should explicitly state the following requirements: To satisfy the requirements of a compliance schedule, the remedial action plan must contain "specific steps…designed to attain compliance within the shortest

Other sections of the Draft Permit that relate to the objectives of the SWMP and monitoring also must still be revised to address water quality standards compliance goals. Specifically, in Section IV, 1st para. and Sections IV.J.3. & IV.M.4.j.i., the language must be revised to state that the purpose of SWMP, and of monitoring, assessment, and reporting on progress towards goals, must be not only to achieve compliance with the "maximum extent practicable" standard, but also water quality standards compliance. Further, the last sentence of Section IV.M.4.j.i. should be revised to require, unconditionally (*i.e.*, not "to the extent practicable"), that the permittee "identify and use measureable goals, assessment indicators, and assessment methods" to determine progress towards achieving compliance with water quality standards.

In addition, we addressed in our comments on the Initial Draft Permit several ways in which the "no net increase" provision is inadequate even to maintain the status quo regarding MS4 contributions to water quality impairments. Those comments still apply to the Revised Draft Permit, <u>if</u> DEC does not replace the "no net increase" requirement in its entirety (which, as explained above, is required by law).

- Last line of Sec. II.B.1: The provision that "no net increase" is to be evaluated "after considering impact of [controls on non-MS4s]" renders the no net increase requirement virtually meaningless as a means for protecting water quality. It allows for increases over current MS4 pollution levels if there are reduced pollutant loads from CSO discharges or other sources; in effect, this allows the City's separate storm sewer system to cancel out any gains achieved by the City's CSO program or other pollution reduction efforts. In practice, in waterbodies impaired both by CSO discharges and MS4 discharges, for which the CSO Order requires reductions in CSO discharges, this provision will allow substantial <u>increases</u> in MS4 discharges. The permit allows these increases even when they inhibit the ability to achieve water quality standards compliance in the receiving waters. DEC must revise the Draft Permit to prohibit non-MS4 offsets of increased MS4 discharges, except where the net result is compliance with water quality standards.

- The Draft Permit should be revised to clarify that land disturbances that are <u>cumulatively</u> equal to or greater than one acre throughout an impaired watershed constitute "non-negligible land use changes." The cumulative effects of many projects over the years can be massive: A recent, peer reviewed study by researchers at the U.S. Forest Service and SUNY-ESF concluded that, from 2004-2009, New York City actually <u>lost 5.5% of its tree and shrub cover</u> (equal to 1.2% of the city's total area), and <u>increased impervious cover by 2.3%</u> (equal to 1.4% of the city's total area).[18]

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reasonable time" (6 NYCRR 750-1.14(a)). The specific steps, or interim requirements, of the schedule must be no more than 9 months apart (6 NYCRR 750-1.14(b)). Those interim requirements, upon DEC approval, must be enforceable against the Permittee (40 CFR 122.2, 6 NYCRR 750-1.2(a)(74)). The interim requirements should include milestones expressed in numeric terms, *i.e.*, as a volume reduction, pollutant load, specific implementation action or set of actions, or other objective metric. Finally, proposed remedial action plan must provide sufficiency analysis to demonstrate that proposed deadline for meeting water quality standards is, in fact, "the shortest reasonable time," and that the interim milestones will be sufficient to ensure the Permittee meets that deadline.

[18] *See* Nowak, D. and E. Greenfield, "Tree and impervious cover change in U.S. cities," *Urban Forestry & Urban Greening*, 11 (2012) 21-30. A copy of this study is enclosed as Exhibit 7.

- Section II.B.1.b.i.: Compliance with the DEC Design Manual should not be deemed compliance with the "no net increase" requirement for floatables, since the Manual makes no absolutely reference to designing for floatables control.

- Section II.B.1.b.iii.: This provision states that, "For sewer upgrade and extension projects constructed by or on behalf of the Permittee, the pollutant load analysis is not required for projects that do not result in an increase in impervious area or a change in land use that increases the pollutant load." This clause should be eliminated. Sewer upgrade and extension projects, almost by definition, are likely to increase pollutant loads because they are designed to capture more runoff in the MS4 system and discharge it through MS4 outfalls to city waterways, irrespective of any changes in the land use or increases in impervious area. The permit must require DEC to avoid, mitigate, or offset such increase pollutant loads by retrofitting the area draining to the new or expanded sewer lines and/or outfalls. (By way of contrast, we note that DEC's Small MS4 General Permit [Section VII.A.6.b.] requires that MS4s must "consider and incorporate runoff reduction techniques and green infrastructure in the routine upgrade of the existing stormwater conveyance systems.")

- Section II.B.c.: The phrase "levels of pollutant control equivalent to the New York State Stormwater Management Design Manual (2010) applicable to control of the relevant POCs" does not have any clear meaning in this context. It must be revised to state an objective pollution control standard, such as a numeric performance standard for runoff reduction (see comment 1.b above). The Design Manual (sec. 3.3) only defines pollutant removal performance for TSS (80%) and TP (40%). But, as per Appendix 2 of the Draft Permit, these are not the relevant POCs causing impairment in New York City.

Regarding implementation of TMDLs, DEC completely deleted from the draft permit Section II.B.2, which appeared in the Initial Draft Permit (and appears in the state's Small MS4 General Permit), and which concerned compliance with any future TMDLs. That provision should be reinstated and revised to state that any SWMP modifications designed to implement a TMDL must be subject to DEC review, public notice and comment and an opportunity for a hearing, and DEC approval (see comment # 5 below); and must include all necessary elements of compliance schedules under 6 NYCRR § 750-1.14.[19] We can only assume that DEC deleted this provision because no New York City waters are currently slated for development of TMDLs. However, TMDLs are, in fact, required by law for many of these waters and, regardless of whether DEC currently intends to comply with that requirement, the permit should include a provision for implementation of TMDLs if and when they are developed.

Further, there is already one TMDL applicable to NYC's MS4 discharges, for which DEC must include a compliance schedule in this permit: the Long Island Sound Nitrogen TMDL. DEC must revise the permit to establish Watershed Improvement Strategy (WIS) requirements, similar to the nitrogen WIS provisions of the Small MS4 General Permit, as well

[19] New York State Supreme Court has ruled, in *NRDC v. DEC*, that MS4 permits must include compliance schedules, within the meaning of 6 NYCRR § 750-1.14, to implement any applicable TMDL waste load allocation that has an implementation timeline greater than nine months; DEC has not challenged that ruling on appeal.

as associated schedules of compliance pursuant to applicable requirements of federal and state law, for discharges of nitrogen to Long Island Sound (LIS) It must do so to ensure compliance with the 10% pollutant load reduction target for urban runoff included in the LIS Nitrogen TMDL. Although the LIS TMDL labeled this pollution reduction target as a "Load Allocation" for unregulated non-point sources, rather than a WLA for point sources, the MS4s responsible for these discharges, including NYC, are now regulated point sources rather than unregulated non-point sources. Accordingly, the TMDL specifies numeric pollutant reductions (i.e., 10%) that must be achieved by MS4s in order to attain water quality standards in LIS. DEC is obliged to include such target as a binding effluent limitation in MS4 permits for discharges to Long Island Sound, including the NYC MS4 permit. By failing to do so, the permit instead relegated the Sound to the "ensure no net increase in its discharge" of nitrogen standard in part III.B.1, which is inconsistent with the TMDL and therefore does not comply with federal and state law.

Finally, we note that Save the Sound has submitted a petition to EPA to revise the Long Island Sound TMDL. A new TMDL would necessarily include a Waste Load Allocation for MS4s, and the New York City MS4 permit must ensure compliance with such WLA.

3. DEC should revise the Draft Permit to ensure coordination among the City's MS4 pollution reduction efforts and the numerous complementary and often overlapping regulatory requirements and processes that the City of New York is currently subject to or otherwise involved in.

Like the Initial Draft Permit, the Revised Draft Permit makes several vague references to the idea of developing a "comprehensive integrated planning approach."[20] Presumably in response to our comments on the Initial Draft Permit, the Revised Draft Permit includes one new provision (the new Part II.B.2) that addresses the relationship between MS4 discharges and CSO Long Term Control Plans, but this provision fails to adequately address the issue.

Specifically, Part II.B.2 is flawed in the following ways:

- It requires coordination only with CSO abatement efforts, not with other pollution control efforts, such as under Superfund and brownfields programs.

- The required coordination with CSO abatement efforts applies only after there is an approved LTCP. Coordination is essential during the development of LTCPs, as emphasized in our comments on the Initial Draft Permit. Also, as noted elsewhere in this letter, the draft LTCPs submitted in the last year underscore the need for such coordination.

- This permit provision only requires consideration of "non-structural" controls on MS4 discharges. This limitation should be eliminated. All controls, including structural and non-structural, must be evaluated. (We further note that the permit includes no definition of non-structural controls. This term is often used to refer to things such as public education campaigns and other behavioral changes, which do not involved physical changes to the

[20] *See*, Draft Permit, Section I.A, Section IV (first para.).

sewer system or to impervious spaces draining into the MS4 system. The latter sorts of measures must be included.)

- This permit provision requires only evaluation of options, not the development, submission for DEC review and approval (with appropriate public participation opportunities), and implementation of a remedial plan, including a lawful compliance schedule, to reduce MS4 discharges sufficient to ensure compliance with water quality standards. It must be revised to require all of these things.

As explained in our comments on the Initial Draft Permit, without a mandate for a fully integrated approach, it will be impossible to achieve compliance with existing water quality standards or to achieve the Clean Water Act's "fishable, swimmable" goals. The draft CSO Long Term Control Plans that DEP has submitted over the last year – and DEC's comments (and DEP's responses thereto) on those draft LTCPs – further underscore the point, as they include extensive analysis of the contribution of the City's own MS4 discharges to the very same water quality impairments, in the very same water bodies, that the LTCPs are intended to address. DEC's Fact Sheet accompanying the Revised Draft Permit states, however, that EPA guidance provides that "integrated planning" is at the option of the permittee and cannot be mandated in a permit. This is incorrect, as applied to the circumstances of the NYC MS4 permit.

The purpose of EPA's "integrated planning" guidance was to provide an optional pathway for municipal permittees to prioritize among multiple *independent* Clean Water Act compliance obligations. This permit, however, does not involve independent obligations that can, in the absence of integrated planning, be dealt with effectively. Rather, DEC is here obliged to issues permits that ensure compliance with water quality standards, with respect to two types of pollution discharges into the *same waterbodies* by the *same permittee* (CSO and MS4) that are responsible for the *same impairments* of the *same stream segments*. DEC is fully empowered to mandate integrated compliance plans under such circumstances; indeed, it is required to do so here, since it is otherwise impossible to ensure that the city's MS4 discharges do not contribute to water quality standards violations.[21]

4. In order to comply with the "maximum extent practicable" standard, DEC should strengthen various elements of the SWMP requirements to ensure their effectiveness and provide a basis to hold the City accountable for achieving water quality results.

DEC should strengthen various other provisions relating to the SWMP, as described below, to ensure that the permit will result in controls that reduce stormwater pollution "to the maximum extent practicable."

a. General concerns regarding the SWMP remain, despite revisions

- Three years to develop a SWMP is excessive, particularly since this permit is now 20 years overdue and the City has likely been discussing the contents of the permit with DEC for

[21] We further note that, in the City's comments on DEC's pending draft renewal permits for the city's POTW and CSO discharges, the City stated that it *wants to* undertake an integrated planning process for its multiple Clean Water Act compliance obligations.

years already. We further note that EPA's Phase I rule for large MS4 permits required submission of a proposed stormwater management program within two years of the date on which that rule was promulgated.[22] The timeline in the Draft Permit should be reduced to one year. (In our comments on the Initial Draft Permit, we urged a two-year deadline. However, one year has passed in the interim, and DEP has been well aware of what the bulk of its obligations under the permit's SWMP provisions are likely to be. DEP could and should have been – and we hope it has been – working over the last year to begin developing its SWMP. The protracted negotiations between DEC and DEP over the last year, which resulted in only modest changes to the draft permit, should not be allowed to delay the actual dates by which DEP must comply with the permit.)

- We support the Draft Permit provisions (Sections III.B., III.C., III.D, and IV [third para]) intended to ensure the Permittee has the requisite legal authority, financial resources, and inter-agency coordination protocols to implement its obligations under the permit, except that the various deadlines for submissions to DEC should be moved up consistent with the shortening of the SWMP deadline proposed above.

- Similar to the prior two points, all of the other deadlines in the permit should be shortened by one year, to compensate for the time that has passed since the original draft permit was proposed.

- Section I.B.: The provisions exempting certain non-stormwater discharges that are discharged through the MS4 system remain over-broad:
    - Several of the listed categories that relate to runoff from lawn and other landscape watering or irrigation (Sections I.B.2, 10, and 14) are well-known as significant sources of 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."[23] Accordingly, these categories should be deleted from the list of exempt non-stormwater discharges.[24]
    - Sections IV.D.1 & IV.D.9 provide that the SWMP must address otherwise-exempt non-stormwater discharges listed in Section I.B. if they "are identified by the Permittee as a substantial contributor of pollutants to waters of the State." The permit should require the SWMP to include a quantitative analysis of whether these sources are substantial contributors of pollutants.

- Section IV:

[22] 40 C.F.R. § 122.26(e)(3)(iii).

[23] 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).

[24] Several of the impaired waters listed in Appendix 2 of the Draft Permit are impaired for nitrogen or phosphorus; at a minimum, the exemption should be deleted for those watersheds.

- First para.: The SWMP Plan should be required to address activities for a longer period of time than "the duration of the permit." Under the deadlines in the Draft Permit, there would only be 2 years left of the permit term after the City submits the SWMP plan, to say nothing of additional time it will take for DEC to review and approve the plan after submission. Moreover, based on DEC's Environmental Benefits Permit Strategy, it seems likely that the permit will be "administratively renewed" beyond the end of its initial 5-year term. Thus, it is essential that the initial SWMP provide a roadmap for activities beyond the end of the permit's first term. To ensure the plan remains relevant as circumstances change, the Draft Permit should require that, once every 3 years after approval of the SWMP, or upon submission of a permit renewal application (whichever is sooner), the Permittee's annual report shall include a thorough analysis of whether each major SWMP provision need to be updated and, if updates are needed, propose such updates.[25]
- Fifth para.: The requirement to make "steady progress toward implementation" is far too subjective. The SWMP should be required to have specific milestones with associated deadlines, and the Draft Permit should hold the Permittee accountable for meeting all milestones and deadlines in the approved SWMP.
- Last para. (before section A.): The phrasing of this sentence makes it unclear whether the SWMP plan must actually meet the requirements of IV.A through IV.O., or merely "describe priorities for implementing" those requirements subsequent to development of the SWMP plan. This language should be revised to make clear that the plan itself must include, in full, all of the SWMP elements defined in IV.A. through IV.O. Thus, for example, where a provision in one of those sections requires the permittee to "develop," "identify," "select," describe," or "conduct" some action, the permit should state unambiguously that these actions must be completed by the time the SWMP plan is due to DEC. The only sorts of actions described in IV.A. through IV.O. that should be taken after completion of the SWMP plan are those related to "implementing" or "enforcing" elements of the SWMP plan.

b. Illicit Discharge Detection and Elimination

- We incorporate by reference comment #35 from EPA's comment letter on the Initial Draft Permit, which recommended including a schedule for eliminating illicit discharges once identified. The Revised Draft Permit still does not include such a schedule.

- The correspondence over the last seven months between DEC and DEP concerning the Westchester Creek and Hutchinson River draft LTCPs includes extensive discussion of sampling and/or modeling concerning illicit discharges from NYC's MS4 system. DEC should refine the illicit discharge detection and elimination requirements in the NYC MS4 permit as needed to address illicit discharge issues identified in the draft LTCPs and in the correspondence between DEC and DEP on the draft LTCPs, as well as any other new information that has been generated within the last year about illicit discharges in NYC.

[25] We note that other provisions of the Draft Permit include similar update requirements that extend beyond the first 5-year permit term. *See* Section IV.C.3 (requiring updated drainage maps every 5 years).

- Throughout the Revised Draft Permit, references to water quality indicators, including for example references in the IDDE sections to fecal coliforms, should be amended to reflect the best science available that has been incorporated into Clean Water Act standards – the EPA's 2012 Recreational Water Quality Criteria.

c. Pollution Prevention/Good Housekeeping for Municipal Operations

- IV.G.1.a.: All of the types of operations and facilities listed in the second sentence "contribute or potentially contribute POCs." Therefore, the second sentence should be revised to state: "The operations and facilities shall include…" (rather than "may include").

- IV.G.1.c.: The self-assessment of municipal operations should be required not only once every five years, but an initial assessment also should be required in connection with development of the SWMP.

- IV.G.1.d.: This provision states that the SWMP plan must "determine management practices, policies, and procedures that will be developed and implemented…" Development of these practices, etc., should be part of the process of developing the SWMP. This should be revised to state that the SWMP itself must identify these practices, policies and procedures, not merely present a plan for subsequently developing them.

- IV.G.1.e.: This section should delete the reference to "Permittee's capabilities." The Permittee's existing capacity should not be a limiting factor on the implementation of pollution prevention and good housekeeping practices; rather, where needed to meet the permit's pollution control requirements, the Permittee should be required to develop additional capacity and capabilities.

- IV.G.2.: In our comments on the version of this provision that appeared in the Initial Draft Permit, we stated that it should not establish a weaker "runoff reduction" standard for "new development or redevelopment of municipal properties" that applies to all development and redevelopment projects generally. The Revised Draft Permit eliminates from this section any reference to "new development or redevelopment of municipal properties." Please confirm that this change means that such projects would be subject to the post-construction standards applicable under Part IV.F.
    - This provision now requires the City to "Consider and if feasible incorporate, to the MEP, runoff reduction techniques and green infrastructure during planned municipal upgrades including municipal rights of way." This language appears designed to address one our comments on the Initial Draft Permit, and we appreciate DEC's effort to address right of way projects explicitly. However, as drafted, this provision remains too vague, as it qualifies the City's obligation with the term "MEP" ("maximum extent practicable") but does not provide a means of determining what is "feasible…to the maximum extent practicable." The provision identifies several appropriate technical factors to consider in determining what is "feasible," but the provision, as drafted, states that runoff reduction and green infrastructure, even if feasible, must be implemented in right-of-way projects only "to the MEP." As EPA Region 2 emphasized in its comments on the Initial Draft Permit (comment #22), Part

IV.G. repeatedly uses the term "MEP" to qualify various obligations of the permittee, but provides no decision-making criteria to determine whether the City has, in fact, done something (such as integrating runoff reduction and green infrastructure into any given right-of-way project) "to the MEP." While the "if feasible" language is appropriate, the "to the MEP" language, as written, is so vague as to hinder the enforceability of the provision; it provides no objective metrics or criteria to evaluate compliance. The "if feasible" limitation is, by itself, a sufficient qualifier on the obligation imposed by this permit provision; DEC should strike "to the MEP" from this provision entirely.

- DEC should add more examples of runoff reduction and green infrastructure techniques to this section. The ones listed are a good start, but others should be included, such as right-of-way bioswales and greenstreets (which the City is very familiar with from its green infrastructure program under the CSO Consent Order), as well as permeable pavement and street trees.
- In our comments on the Initial Draft Permit, we stated that the permit should provide, similar to the MS4 General Permit (Section VII.A.6.b.), that the city must "consider and incorporate runoff reduction techniques and green infrastructure in the routine upgrade of the existing stormwater conveyance systems," regardless of whether such projects would otherwise trigger application of the post-construction requirements under Section IV.F. Please clarify whether the new Part IV.G.2 encompasses such projects. If they are not so encompassed, DEC should add language to include them.

- The permit should include specific requirements concerning management of road salt storage facilities. For example, residents of south Brooklyn have reported repeated problems with runoff from uncovered salt piles at the City's salt storage facility at the Fountain Avenue Landfill.

d. Industrial and Commercial Sources

- In **IV.H.1.a.iii.(2)**, the DEC amended proposed permit language by adding yet another undefined standard:

"Other industrial or commercial sites/sources tributary to an impaired water segment, where the site/source generates significant amount of POCs for which the water segment is impaired."

First, this is a grammatically flawed sentence. Second, there is no test for what a "significant amount" looks like. The Permittee, the industries and commercial sources covered by this clause, the public, and the regulators cannot discern which other sources will be included on the inventory through these permit terms. The updated draft permit language changed the intent and design of this clause from being inclusive of sources that contribute to an impairment to a subset class of sources that are significant contributors to an impairment, without defining significance. The State must reverse this decision to exempt sources of pollutants which may be contributing to impairments from even being inventoried.

- In **IV.H.1.a.iii.(1).(a)**, the DEC excludes from its inventory any industrial facilities which fit the definition of construction sites as defined at 40 CFR § 122.26(b)(14)(x). DEC never explains it's rationale for, between the first draft permit and this current form, choosing to remove these sites from coverage. We object to this arbitrary exclusion.

- In **IV.H.2**, the DEC made wholesale changes to the proposed permit terms that remove from coverage, with no explanation, an entire class of sources. According to the updated factsheet, the DEC "[r]emoved [a] section requiring City to oversee and require controls for unpermitted industrial and commercial facilities not covered under MSGP."

  First, this arbitrary removal of an entire section of stormwater controls cannot stand without further explanation.

  Second, the loss of a requirement that unpermitted sources control their stormwater impacts is contrary to the clear terms of the Clean Water Act's prohibitions against discharging pollutants into the waters of the United States without permits. There is no reason to exempt unpermitted sources from stormwater control minimums. Illicit, unpermitted sources of stormwater into all waterways should be covered, whether or not the waterway is impaired – to require otherwise would be illegal.

  Finally, while the new permit does include a requirement to develop a plan to inspect and assess these unpermitted sources, the proposed language is, like the rest of the permit, exceedingly vague. The permit requires that illicit discharges be eliminated, but, given the structure of the subsection, this requirement would seem to only apply to facilities once there has been inspection by the permittee. The inspection and assessment plan would only, however, be developed via the SWMP – three years from the EDP – and contains to requirements for when inspections will begin, or when assessments must be completed. Essentially, the permit allows the permittee to develop its own plan for inspecting sources that it does not have to inventory, gives no timeframe for when the permittee must begin making assessments, provides no standards as to how to judge significance of impact, sets no minimum controls for elimination of discharges, and, perhaps most confusing of all, prohibits illicit discharges while - conversely - allowing such discharges which significantly contribute to an impairment to continue while the permittee requests that the State consider issuing a permit.

  The State should revert to its original plan – requiring the Permittee catalog unpermitted sources of stormwater pollution – and demand that the Permittee protect water quality standards by *ensuring* that any of these sources in need of permits get them, immediately.

  We also incorporate-by-reference the additional comments on industrial and commercial stormwater that we included in our comments on the Initial Draft Permit.

e. <u>Floatables and Settleable Solids</u>

- We incorporate by reference our comments on this issue from our comment letter on the Initial Draft Permit, as well as the comments submitted by EPA on the initial draft permit.

While DEC has made some changes to this section of the permit (Part IV.I), those changes do not fully address the prior comments.

- The Revised Draft Permit includes a new provision that "The Permittee shall continue the catch basin inspection, cleaning, repair, and retrofitting program that NYCDEP is currently implementing for its catch basins citywide including MS4 areas." The New York City Council Committee on Environmental Protection has raised significant concerns in oversight hearings about the adequacy of the DEP's current catch basin cleaning program.[26] DEC should fully evaluate those concerns and strengthen the permit terms concerning catch basin maintenance and cleaning as appropriate.

5. DEC should revise the permit to ensure robust public involvement in the development, approval, and implementation 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.

Most importantly, DEC must provide opportunity for public participation – including an opportunity for comment to DEC and a public hearing before DEC – in connection with the agency's review and approval 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 issued. As a result, DEC's ultimate approval of a SWMP will, therefore, amount to a SPDES permit modification and must be treated as such with regard to public participation.

As explained in our comments on the Initial Draft Permit, such opportunities for public participation are required by law. DEC's Small MS4 General Permit, which is currently under review by the New York Court of Appeals in *NRDC v. DEC*, similarly lacks the necessary opportunities for public participation. We hereby incorporate by reference the appellants' briefs in that appeal insofar as they address the failure to provide the necessary opportunities for public participation in connection with DEC's review of a permittee's SWMP. A decision from the Court of Appeals is anticipated imminently. If the Court rules for the Appellants, it will be beyond dispute that the terms of the Revised Draft Permit are unlawful with respect to public participation and must be revised. We strongly urge DEC to wait for a ruling in *NRDC v. DEC* before finalizing the NYC MS4 Permit, and to revise the draft NYC MS4 Permit as needed to comply with the Court's holding, in order to avoid further litigation over the NYC MS4 permit that our organizations would be forced to bring if DEC issues a final NYC MS4 Permit that is unlawful under the forthcoming Court of Appeals decision.

[26] *Capital New York* reported that, at a budget hearing on March 15, 2015, Environmental Protection Committee Chair Donovan Richards expressed dissatisfaction with the rate of cleanup of backed up sewers and catch basins. "According to the [federal Environmental Protection Agency] we are one of the worst cities when it comes to cleaning out our catch basins and our sewers," Richards told [DEP Commissioner] Lloyd." http://www.capitalnewyork.com/article/city-hall/2015/03/8564075/dep-chief-faces-funding-questions-budget-hearing.

Moreover, under EPA regulations applicable specifically to large MS4s such as NYC, the draft SWMP will effectively constitute "Part 2" of the City's MS4 permit application.[27] Therefore, regardless of the outcome of the *NRDC v. DEC* litigation, DEC's approval of the SWMP will constitute a permit modification and its review of the draft SWMP must be treated as an application for a permit modification.

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 SWMP plan. DEC must remedy this shortcoming in the final permit. Additionally, if DEC issues a permit that requires submission of other significant plans for approval – *e.g.*, compliance schedules and implementation plans for achieving water quality standards (see comment #2 above) – the same public participation requirements must be applied to such plans.

DEC should also improve the public participation requirements in the revised Draft Permit in the following ways:

- Availability of Comments: DEC should include a requirement that all submitted statements and comments be available, online, with other documentation the Permittee is required to share.

- Public reporting and tracking of complaints: 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. Additionally, 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.

[27] *See* 40 C.F.R. § 122.26(d)(2)(iv) ("application requirements," providing that large MS4s must submit with their application a "proposed [stormwater] management program"); *see also id.* § 122.26(e)(7)(ii) (requiring issuance of MS4 permits following submission of a "complete permit application"). We further note that DEC's arguments for why Notices of Intent under the Phase II MS4 General Permit need not be subject to public comment and an opportunity for a hearing – which are incorrect, in any case – cannot be applied to this individual MS4 permit. Whereas DEC argues that a NOI is not functionally equivalent to a permit application, the draft SWMP literally is a permit application, as made clear by EPA regulations. Moreover, DEC's concerns about the workload that could result if it had to accept comments, and potentially hold hearings, on hundreds of small MS4 NOIs, simply do not apply to New York City's single permit. (Indeed, as far as we know, this permit is the only individual MS4 permit in the state.)

6. DEC should address certain "drafting" issues in the permit, to avoid unnecessary ambiguity.

DEC should clarify the language in the following provisions, to ensure it is clear and enforceable:

- Section IV.F.h. – Since the permit must be amended to include requirements to develop compliance plans to achieve water quality standards in impaired waters (see comment #2 above), this section could be amended to refer to such plans instead.

- Section IV.M.4.a.ii. – The last line of this provision refers to "the following information applicable to their [sic] program:", but there is no text following the colon to indicate what this information is. Are provisions iii, iv and v meant to be nested beneath Section IV.M.4.a.ii?

- Table 3, which lists the deliverables in the NYC MS4 Permit schedule should be changed to fix the following mistakes
    - There appear to be a number of timing requirements within the permit, for example, those required in Part IV.d.2, Part IV.d.5 and Part IV.f.1.e, and others, that are not listed in Table 3. Those should be included so that Table 3 is complete.
    - Under III.B Legal Authority, "Development of law, ordinance or regulatory mechanism to require basic erosion and sediment controls and good housekeeping as a standard practice for all construction projects (Part III.B.1.e)" should be changed, there appears to be no Part III.B.1.e - Part III.B.1 only goes up to b.
    - Under IV.B Stormwater Management Program Plan, "Progress reports on the development of the SWMP Plan, including public involvement/ participation components (Parts IV. Introduction and IV.B.2.d)" should be changed. Neither section refers to requirements 1 year after EDP; IV.B.2.d does not refer to progress reports. Perhaps the entry should refer to IV.B.2.e, but 2.e does not contain a time requirement.
    - Under IV.B Stormwater Management Program Plan, "Submission of the complete draft SWMP Plan, including all components identified in Parts II.B, III.A through D, and IV. Intro and IV.A through J (Table of SWMP components in Appendix 3)" the referenced 3 year timeline does not appear in the referenced portion of Appendix 3, nor does it appear in IV.B. Perhaps it refers to the 3 year time line in IV.F.4.
    - You should add the 3 year EDO preliminary map requirement located at IV.C.2 to the appropriate section in Table 3.
    - You include a timeline under Part IV.D.2 under the heading for Part C in table 3; it should have its own section in table 3. You should clarify that table 3's reference to an upgraded MS4 outfall inventory and MS4 drainage map every year after EDP refers to the permit requirement that "The Permittee shall submit an updated outfall list every year as a spreadsheet that includes all MS4 outfalls." if this is what it refers to. The difference in language is confusing.
    - Annual effectiveness assessment (included in Annual Reporting Part IV.M.4.j.i) and associated review of activities or control measures (Part IV.M.4.j.iii) is listed under

IV.J in Table 3, rather than its own heading for IV.M; it is unclear were the "4 years after EDP" part of the time line comes from.

* * *

Thank you for this opportunity to comment on the Revised Draft Permit. We would welcome the opportunity to discuss these issues with both DEC and DEP. We look forward to receiving DEC's response.

Sincerely,

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