



Department of
Environmental
Conservation

Responsiveness Summary

For

Public Comments Received

On the

NEW YORK STATE

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

SPDES GENERAL PERMIT

FOR STORMWATER DISCHARGES

from

CONSTRUCTION ACTIVITY

Permit No. GP-0-15-002

January 2015

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

Background

Pursuant to Section 402 of the Clean Water Act ("CWA"), stormwater discharges from certain construction activities are unlawful unless they are authorized by a NPDES (National Pollutant Discharge Elimination System) permit or by a state permit program. New York's SPDES (State Pollutant Discharge Elimination System) is an EPA, NPDES-approved program with permits issued in accordance with the New York State Environmental Conservation Law ("ECL").

The SPDES General Permit for Stormwater Discharges from Construction Activity, GP-0-15-002, issued pursuant to Article 17, Titles 7, 8 and Article 70 of the ECL, will replace the current SPDES General Permit for Stormwater Discharges from Construction Activity, GP-0-10-001. The new permit is effective on January 29, 2015. An owner or operator may obtain coverage under this new general permit by submitting a Notice of Intent ("NOI") to the Department.

An owner or operator of a construction activity that is eligible for coverage under this General Permit must obtain coverage prior to the commencement of construction activity. Activities that fit the definition of "construction activity", as defined under 40 CFR 122.26(b)(14)(x), (15)(i), and (15)(ii), constitute construction of a point source and therefore, pursuant to Article 17-0505 of the ECL, the owner or operator must have coverage under a SPDES permit prior to commencing construction activity. They cannot wait until there is an actual discharge from the construction site to obtain permit coverage.

Introduction

The New York State Department of Environmental Conservation has prepared this responsiveness summary to address the comments that were received on the draft SPDES General Permit for Stormwater Discharges from Construction Activity, GP-0-15-002.

The draft general permit was published for public review and comment in the Environmental Notice Bulletin (ENB) on July 30, 2014 with comments being due by September 2, 2014.

The responsiveness summary generally addresses all comments received, with the exception of comments dealing with editorial or formatting changes. The comments have been organized to follow the format of the draft general permit with general comments addressed at the end of the responsiveness summary.

Part I. PERMIT COVERAGE AND LIMITATIONS**A. Permit Application****Comment 1: Part I. A. Permit Application:**

"Larger common plan of development or sale": The draft Permit provides that it applies to "Construction activities involving soil disturbances of less than one acre that are part of a larger common plan of development or sale that will ultimately disturb one or more acres of land. . . ."

The City acknowledges that DEC's proposed changes in the draft Permit do not alter the existing treatment of "larger common plans of development or sale," and the City is familiar with DEC's Frequently Asked Questions about Permit Requirements of the SPDES General Permit for New York City Comments on the Draft SPDES General Permit for Construction Activity Stormwater Discharges from Construction Activities (FAQs). However, based on the City's experience, particularly in the City's watershed, the City recommends that DEC supplement the section of the FAQs defining "larger common plan" to account for projects that span time as well as space.

When development projects occur across multiple properties and potentially over several years, unless the project is determined to be a "larger common plan of development or sale," the cumulative development eventually may exceed the one-acre threshold without triggering the requirement to prepare a Stormwater Pollution Prevention Plan (SWPPP). DEC should clarify that the term "larger common plan of development or sale" includes all properties developed under the same commercial activity, even if additional adjacent properties are purchased or a commercial project expands after the development project begins. Similarly, on occasion developers may repeatedly subdivide properties in order to avoid reaching the one-acre threshold for preparing a SWPPP. DEC should clarify that when properties in a "larger common plan of development or sale" are subdivided and later reach the one-acre disturbance threshold, the owner or operator should be required to prepare a SWPPP that includes post-construction stormwater controls adequate to manage stormwater from the full acreage of disturbed land, even if portions of the land have previously been disturbed.

Finally, DEC should also clarify that when construction activities require Permit coverage, the owner or operator should include spoils areas in an erosion and sediment control plan, even if the spoils area is not adjacent to the disturbed land.

Response: The language in Part II.B.5 addresses the issue of projects that span time, therefore, the Department has not changed the general permit.

With regards to your requests for clarification on the term “larger common plan of development or sale” for the different construction projects, the Department cannot address this comment without knowing more about each of the scenarios. The Department recommends that the commenter contact us when they have questions regarding which construction activities are subject to coverage under the general permit.

Finally, regarding your last comment on including spoil areas in the erosion and sediment control plan, Part III.B.1.b requires an owner or operator to show material, waste, and borrow areas located on adjacent properties. The Department does not require the owner or operator to identify spoil areas that are located on parcels of land that are not adjacent to the project site. Instead, the Department requires the owner or operator of that off-site parcel to also develop a SWPPP and obtain coverage under the general permit if the disturbance associated with the placement of the spoil is one or more acres of land (5000 SF in NYC East of Hudson Watershed).

Comment 2: Applicability to Areas Served by Combined Sewer Systems - We strongly recommend that DEC use its existing legal authority to apply post-construction standards under the Draft Permit to new development and redevelopment activities within areas serviced by combined sewer systems. This would be a huge boon to municipalities facing billions of dollars of investments to reduce combined sewer overflows, as it would reduce the volume of runoff (and pollutant loads) into combined sewer systems, placing more of the burden for managing that runoff where it appropriately belongs – in the hands of the property owners generating it.

DEC possesses the same legal authority, both by virtue of its federally-delegated NPDES permitting authority under the Clean Water Act and its broader authorities under the state Environmental Conservation Law. DEC has a tremendous opportunity to reduce CSO pollution – and improve the affordability of CSO compliance for dozens of municipalities statewide – by requiring SPDES permit coverage, via the construction general permit, for post-construction stormwater discharges from new development and redevelopment into combined sewer systems. We urge DEC to do so.

Response: Conveyances that discharge stormwater runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of 40 CFR 122.21 and are not subject to the stormwater regulations (see 6 NYCRR Part 750-1.4(b) and 40 CFR 122.26(a)(7)). In New York State, CSOs are authorized by separate individual SPDES permits that contain the requirements for the users of the combined system. CSO Long Term Control Plans (LTCPs) may also specify requirements that address actions necessary to control the volume of runoff into the CSO. Municipalities with both CSO and MS4 discharges may elect (and many have done so) to adopt their

local laws to require SWPPPs that meet the requirements of the CGP on a jurisdictional- wide basis. It is beyond the scope of this permit to dictate those controls as the federal rule only applies to dischargers to surface waters.

B. Effluent Limitations Applicable to Discharges from Construction Activities

Comment 3: Part I.B.1.a.iv and vi: EPA suggests that additional specificity be added to these parts. Part I.B.1.a.iv does not specify what qualifies as a steep slope nor are steep slopes defined in Appendix A definitions. Part I.B.1.a.vi does not specify what size buffer will be sufficient to meet the requirements of this part. The EPA CGP requires a 50 foot buffer at 2.1.2.1.

Response: The following definition for “steep slope” has been included in Appendix A. “Steep Slope” means land area with a Soil Slope Phase that is identified as an E or F, or the map unit name is inclusive of 25% or greater slope, on the United States Department of Agriculture (“USDA”) Soil Survey for the County where the disturbance will occur.

With regards to providing a specific buffer size, the Department is in the process of updating the New York State Standards and Specifications for Erosion and Sediment Control (Blue Book), dated August 2005, to include a standard and specification for a buffer filter strip that will address this comment. As required in Part I.B.1. of the general permit; the owner or operator must select, design, install, implement and maintain control measures in accordance with the Blue Book to meet the effluent limitations. Therefore, once the buffer strip filter standard is finalized and included in the Blue Book, it will provide an owner or operator of a construction project with another control measure that can be used to meet the effluent limitations.

The Department expects to have the updates to the technical standard finalized in the next few months. Once finalized, the Department would modify the general permit to reference the updated technical standard.

Comment 4: Part I.B.1.a: Please add your Erosion and Sediment Controls requirements equivalent to EPA CGP 2.1.2.5 pertaining to minimizing dust or please explain how the NYSDEC CGP addresses the minimization of dust.

Response: Changes to the general permit were not necessary since the New York State Standards and Specifications for Erosion and Sediment Control (August 2005 version) already includes a standard and specification for dust control (See page 5A.87 of the Blue Book). As required by Part I.B.1, the owner

or operator must select, design, install, implement and maintain control measures in accordance with the Blue Book to meet the effluent limitations.

Comment 5: Part I.B.1.b: What length of time qualifies as “temporarily ceased”? EPA suggests that referencing criteria for meeting temporary and final stabilization in this part would be helpful. For example, NYSDEC should consider referencing the “New York State Standards and Specifications for Erosion and Sediment Control,” dated August 2005, for the technical standards a permittee must meet for stabilization.

Response: Temporarily ceased means that existing disturbed areas will not be disturbed again within 14 calendar days of the previous soil disturbance. A definition for Temporarily Ceased has been provided in Appendix A of the final general permit. The language in Part I.B.1 already includes the reference to the New York State Standards and Specifications for Erosion and Sediment Control, therefore, no changes are needed.

Comment 6: Part I.B.1.d.i: Please add the follow language required by the Construction and Development ELG (CFR Part 450): “Wash waters must be treated in a sediment basin or alternative control that provides equivalent or better treatment prior to discharge.”

Response: The Department does not want to limit an owner or operator’s options for addressing this effluent limitation, therefore, no changes are proposed. The New York State Standards and Specifications for Erosion and Sediment Control includes several equivalent options for addressing this requirement. For example, Section 5A.47 includes a standard and specification for a Portable Sediment Tank that can be used to manage wash waters. In addition, the standard and specification for a Stabilized Construction Entrance (see page 5A.75) also includes measures for addressing wash waters.

Comment 7: Part I.B.1.e: To the NYSDEC list of prohibited discharges please add “Part 1.B.1.e.v: toxic or hazardous substances from a spill or other release.” As per the EPA CGP part 2.3.1.5.

Response: The Department has revised the final general permit to address this comment.

Comment 8: Part I.B.1.f: Please be more specific that outlet structures that withdraw water from the surface must be used as the Construction and Development ELG (CFR Part 450) requires.

Response: As discussed in the response to comment 3, the Department is currently in the process of updating the New York State Standards and Specifications for Erosion and Sediment Control. As part of this update, the standard and specification for Sediment Basin (see page 5A.49) will be updated to include a surface skimmer as one option for dewatering the basin. However, the Department intends to keep the current dewatering methods in the technical standard also. The current measures have been in the technical standard since 1997 and have demonstrated that they function equivalent to the surface skimmer in preventing sediment laden runoff from leaving the basin. Based on this assessment, the Department did not making any changes to the permit language.

Comment 9: While we understand that legal challenges stayed EPA's interest in establishing a numeric effluent limit for turbidity, as MS4s, the use of non-numeric effluent limitations does however, raise other questions. In particular, how will these guidelines be integrated into the enforcement process by DEC and what is expected of MS4s?

Response: The process for ensuring compliance with the general permit will not change. The review authority will first review the SWPPP and determine if the selection and design of the erosion and sediment was done in accordance with the New York State Standards and Specifications for Erosion and Sediment Control (Blue Book), dated August 2005 and sound engineering. They would then ensure that the control measures are installed, implemented and maintained in accordance with the Blue Book during site inspections.

Comment 10: Part 1.B.1- Effluent Limitations Applicable to Discharges from Construction Activities- *Where control measures are not designed in conformance with the design criteria included in the technical standard, the owner or operator must include in the Stormwater Pollution Prevention Plan ("SWPPP") the reason(s) for the deviation or alternative design and provide information which demonstrates that the deviation or alternative design is equivalent to the technical Standard.*

In order to make a case for deviation, what would be suitable documentation that the Effluent Limitations will be met? Has NYS DEC developed a guidance document for this deviation?

Response: As required by Part 1.B.1, the selection, design, installation, implementation and maintenance of the erosion and sediment control measures must be in accordance with the New York State Standards and Specifications for Erosion and Sediment Control, dated August 2005. Where control measures are not designed in conformance with the design criteria included in the technical standard, the owner or operator must include in the Stormwater Pollution Prevention Plan the reason(s) for the deviation or alternative design and provide

information which demonstrates that the deviation or alternative design is equivalent to the technical standard. Equivalent means that the practice or measure meets all the performance, longevity, and maintenance objectives of the technical standard and will provide an equal or greater degree of water quality protection.

Comment 11: Part I.B.1 - This section states the application of the Blue Book standards, dated August 2005, will meet the ELG requirements. However, it is our understanding the Blue Book itself is currently being revised and will be issued soon for comment. It is possible that Blue Book revisions could affect this section of the permit, and thus additional comments or questions may result.

Response: The Department does not expect that the updates to the Blue Book will affect the requirements in this section of the final general permit. Once the Blue Book update is finalized, the Department would modify the general permit to reference the updated technical standard. This will provide individuals with an opportunity to comment on the changes.

Comment 12: Part I. B. 1. b. Soil Stabilization:
The draft Permit refers to timeframes for soil stabilization for both temporary and permanent soil stabilization. DEC should define how much time passes before soil disturbance has "temporarily ceased." The City recommends that DEC consider soil disturbance to "temporarily cease" after seven days of inactivity.

Response: Temporarily ceased means that existing disturbed areas will not be disturbed again within 14 calendar days of the previous soil disturbance. A definition for Temporarily Ceased has been provided in Appendix A of the final general permit.

Comment 13: Part I, B.1.b, I recommend that the 14 day allowance period for disturbed soil to be stabilized be changed to 7 days. Water quality risk is dramatically greater for this extended period and should be shortened.

Response: The Department feels that the 14 day stabilization period is protective of water quality for projects that will disturb less than 5 acres at any one time. The stabilization period is 7 days for projects that receive authorization from the Department or regulated, traditional land use control MS4 to disturb greater than 5 acres at any one time (see Part II.C.3.b.), and for projects that directly discharge to one of the 303(d) segments listed in Appendix E or is located in one of the watersheds listed in Appendix C.

Comment 14: Part I.B.1.a.viii, The term "sufficient" is vague. Suggest replacing text "preserve a sufficient amount of topsoil to complete soil restoration" with a hierarchy for compliance and a minimum depth, such as: "1.preserve sufficient topsoil to provide a uniform minimum depth of four (4) inches of topsoil across all permanent vegetation areas, or 2. If topsoil is lacking, establish a growing medium (using compost, or other soil amendments) to complete soil restoration ...".

Response: An owner or operator should refer to the "Standard and Specifications for Topsoiling" on page 3.27 of the New York State Standards and Specifications for Erosion and Sediment Control, dated August 2005 to address this effluent limitation. As required by Part I.B.1, an owner or operator shall select, design, install, implement and maintain control measures (including best management practices) that are in accordance with the New York State Standards and Specifications for Erosion and Sediment Control, dated August 2005.

C. Post-construction Stormwater Management Practice Requirements

Comment 15: Given the interest by EPA in encouraging the use of green infrastructure DEC might consider including a more direct branding of green infrastructure within this section of the permit. For example, Channel Protection Volume, Overbank Flood Control Criteria, and Extreme Flood Control while technical terms, simultaneously suggest to the non-technical reader that these needs (channel protection and flood management) are addressed in the permit.

A similar reference to say, Green Infrastructure Runoff Reduction Volume ("RRv") would highlight the actual role green infrastructure now plays in stormwater management. There is currently no mention of green infrastructure in the actual Construction Activity Permit. This would address that problem.

Response: Although the general permit does not use the terminology "green infrastructure", there are numerous references to this terminology in the NYS Stormwater Management Design Manual. Since the Design Manual must be used when preparing a SWPPP, we expect that individuals involved with the preparation, review and approval of a SWPPP will become very familiar with the role of green infrastructure in stormwater management.

Comment 16: Part I.C. 1, *Post - construction Stormwater Management Practice Requirements*

The concern we have with this section specifically has to do with your

definition in Appendix A for *Performance Criteria*. Performance Criteria means the design criteria listed under the "Required Elements" AND "Design Guidance" sections in Chapters 5, 6 and 10 of the technical standard, New York State Stormwater Management Design Manual, dated (pending).

Requiring the owner or operator to have to conform with the Design Manual requirements for both the "required elements" and "design guidance" for each stormwater management practice will drastically add to the cost of construction projects throughout the State of New York. While most, if not all, designers made every effort to incorporate the "design guidance," it could very well hold up a project from conforming to the Design Manual if the "guidance" elements could not all be achieved.

The wording in the Design Manual ("may" and "should") implies that the design guidance is still optional. The permit, however, will require the guidance elements to be implemented. If the intent is to require both, we ask that Chapter 6 be revised to consolidate them into a single list of required elements.

Response: The definition for "Performance Criteria" in Appendix A of the final general permit has been modified to address this comment. The definition now only refers to the "Required Elements" in the Design Manual.

Sizing Criteria for New Development

Comment 17: Part I.C.2.a. - In Chapters 3 and 4 if a project cannot achieve 100% WQv reduction or treatment due to site limitations, how do we quantify in the SWPPP that the infeasibility is "not technologically possible" or "economically practicable and achievable in light of best industry practices"? The verbiage is extremely subjective and vaguely defined. For example, we have run into situations in the past where an MS4 will not accept our infeasibility justifications noted in our SWPPP regardless of whether there is high groundwater, shallow bedrock, or compacted soils with no infiltration. Is a statement like "raising the entire site grades by 6 feet above the high groundwater table and bedrock elevation in order to accommodate a bioretention practice is not feasible" enough of a justification, or do we have to quantify in dollars how much economic loss will be incurred within the SWPPP?

Response: The permit requires the owner or operator to identify and document in the SWPPP the specific site limitations that prevent the reduction of 100% of the Water Quality Volume (WQv). Allowable site limitations are

defined in Appendix A. If reduction of 100% of the WQv cannot be achieved, the owner or operator must make a concerted effort to direct runoff from all newly created impervious area to a RR technique or standard SMP with RRv capacity unless infeasible. For impervious areas that cannot be reduced using a RR technique or SMP with RRv capacity, the designer must show that all options were considered and for each option explain the technical reasons the option is not possible (not technologically possible) or that the cost would be wholly disproportionate to the benefit (not economically practicable and achievable). However, the owner or operator must still ensure that the runoff reduction achieved from newly constructed impervious areas is greater than or equal to the Minimum RRv. In the example provided, so long as the planning components considered and maximized the opportunities for incorporation of the green infrastructure (GI), the need to raise the entire site by 6 feet to accommodate a bioretention practice would be considered to be an acceptable justification for not providing that practice for pavement areas. However, all other options such as tree planting, open swales, filter strips would need to be considered and if rejected, the technical or economic reasons described. This would not be sufficient justification for roof top runoff as the elevation differences would still make bioretention a technically and economically feasible for this area.

Comment 18: I.C.2.b.(ii) - This section is worded in a manner that make the requirements unclear. The first paragraph states that if a new development cannot meet the minimum RRv because it is found to be infeasible for the site, and this is documented in the SWPPP, the MS4 can accept the SWPPP.

However, the second paragraph states that a new development project must meet the minimum RRv. This does not allow for site limitations, and will make some development not practical or possible. It appears that the proposed changes are stating that even if a SWPPP documents site limitations and the minimum RRv cannot be met then the SWPPP would not be able to gain coverage under the general construction permit.

Response: The first paragraph in Part I.C.2.b.(ii) applies to construction activities that cannot reduce 100% of the RRv, not the minimum RRv as indicated in the comment. At a minimum, the runoff reduction achieved must greater than or equal to the Minimum RRv. If a construction project does not meet the sizing criteria, the SWPPP cannot be accepted and the design professional must redesign the project.

Comment 19: Will MS4's have the ability to accept a SWPPP that cannot meet the minimum RRv requirements due to site limitations if they are adequately documented? It would be beneficial if a process for inclusion of the NYSDEC regional office of consultation and input in an approval

process to be included in the MS4 approval for projects that document site limitations. The current language in the draft construction permit does not include this coordination in the MS4 Approval.

Response: MS4s are required to review SWPPPs for conformance with the SPDES General Permit for Stormwater Discharges from Construction Activity (CGP) or equivalent. The CGP allows for deviation from the “performance criteria”. Deviations from the sizing criteria are not allowed. Since the Minimum RRv is specified as part of the Post Construction Sizing Criteria, projects that cannot meet the Minimum RRv are not eligible for coverage under the CGP. As such, the MS4 should not sign the MS4 SWPPP Acceptance Form for projects that do not meet the minimum RRv or any other sizing criteria listed in Part I.C.2. Designers or MS4s that are having difficulties in achieving the minimum RRv should contact the Department for assistance.

Comment 20: Part I.C.2.a through d, contain design criteria specifically detailed in the NYS Stormwater Manual. Specific criteria should be removed from the General Permit. Criteria may change in the near future. The manual can be updated periodically to reflect changes while the GP is locked in for 5 years.

Response: The Department does not expect the design criteria to change during the next 5 year permit cycle. If there were to be changes to the sizing criteria, the Department would address them through a modification to the general permit. Deviations from the sizing criteria included in Part I.C.2.a through d are not allowed and therefore they are considered to be limitations. It is appropriate to include all limitations within the SPDES general permit to allow for due process.

Comment 21: Our concern is the Runoff Reduction Volume (RRv) requirement with a high ground water table and seasonal fluctuations in response to changes in recharge from precipitation, which is not an unusual occurrence in upstate New York. We would like to have the ability to waive this requirement for sites with a high ground water table (i.e. less than 3’) and implement best practices that have proven performance. Without this local control, which would allow for more traditional storm water practices to be implemented, the potential to move pollutants downstream can be greater. Local engineers, who know and understand the watershed are able to design the best practice for each particular site.

Response: The Department does not allow deviations from the required sizing criteria, including the RRv criteria. However, the general permit includes provisions that allow a designer to reduce less than the total Runoff Reduction Volume (RRv) if there are site limitations like seasonal high groundwater (see Appendix A for definition of Site Limitations). In these cases, the owner must

include documentation in the SWPPP as to why it is infeasible to direct specific impervious areas to a RRv practice. In addition, the Design Manual includes a number of RRv techniques that may still be used if there are site limitations like high groundwater. Some examples include: non-infiltrating bioretention, planters, vegetated filter strips, rain barrels/cisterns and green roofs.

Comment 22: The infeasibility exception should be more narrowly defined. While the Draft Permit incorporates the runoff reduction sizing criteria from the current Manual for new development, the Draft Permit uses a much less stringent “infeasibility” standard. The Draft Permit (and Manual) should provide that achievement of the full runoff reduction standard cannot not be considered “infeasible” unless, among other things, site-specific soil testing has been conducted, soil amendment has been utilized wherever possible, and opportunities for rainwater harvesting and evapotranspiration (as well as infiltration) have been fully exhausted.

Response: The new language strengthens the requirements by clarifying the expectations for demonstrating compliance with the runoff reduction sizing criteria. This change was made in response to feedback received from the regulated community for clear direction as to how to demonstrate compliance with the runoff reduction requirements. The definition of “site limitations” provides direction on when a project can do less than 100% of WQv. The runoff reduction sizing criteria has been satisfied if all impervious area is directed to a runoff reduction practice, provided the minimum runoff reduction has been achieved. For projects where all impervious areas cannot be directed to a runoff reduction practice, there must be a showing, for each impervious area not reduced, that all options were considered and shown to be either technologically impossible or the cost of the practice was wholly disproportionate to the benefit (such as elevating the entire site to achieve separation distances). Although a designer could make the claim that the cost of a green roof might not be economically practicable and achievable, this would not be sufficient to justify not treating roof tops as there are other practices available that would provide runoff reduction. The language provided is expected to push projects closer to meeting the objective of runoff reduction (i.e. 100% of the WQv) than the previous language. The Department agrees that one option for determining site limitations can be site specific soils testing/borings, however, the Department feels that the use of the most current United States Department of Agriculture (USDA) Soil Survey is also an acceptable source to determine the existing soil conditions/information. The Department has updated the definition of “Site Limitations” in Appendix A to clarify this important point. The Department also agrees that when evaluating the feasibility of runoff reduction, soil amendments, opportunities for rainwater harvesting and evapotranspiration must be considered and shown to be either technologically impossible or the cost of the practice is wholly disproportionate to the benefits before they can be discarded.

Comment 23: Infeasible, this seems like an open ended definition. What is economically practicable and achievable for one entity is not economically practicable and achievable for another. Who determines if something is economically practicable and achievable?

Response: The design professional would typically determine if something is economically practicable and achievable. See response to comment 22 also.

Comment 24: For any portion of the RRv that is discharged due to “infeasibility,” the Draft Permit should be revised to require both on-site treatment (not including extended detention) and off-site mitigation of runoff volume.

The Draft Permit (and Draft Manual, as noted below) should require that, if a convincing, site-specific demonstration of infeasibility can be made, any remaining quantity of WQv greater than zero (i.e., any portion of the RRv that cannot be retained on-site):

- (i) Receive treatment – not merely extended detention – prior to discharge; and
- (ii) Be offset by performing or contributing to an off-site project, within the same watershed, to prevent discharge of an equal or greater volume of runoff from such other site.

Because “treatment” of runoff before discharge is less effective at reducing pollutant loads than reduction of runoff volumes, permitted projects that cannot meet the RRv onsite should be required not only to “treat” any runoff they discharge, but also to offset their remaining discharges by performing or contributing to a runoff reduction retrofit at another site. Stormwater permits in many other jurisdictions have adopted this approach.

Response: The general permit includes a requirement for the owner or operator to provide on-site treatment of the portion of the RRv that cannot be reduced using treatment practices in Chapter 6 that have proven track record for pollutant removal (see Part I.C.2.a.(ii) and b.(ii).). With regards to providing off-site mitigation of the RRv that cannot be reduced on-site, the Department allows for off-site mitigation through the Banking and Credit system in the SPDES General Permit for Stormwater Discharges from Municipal Separate Stormwater Sewer Systems to meet the no net increase requirements for non-negligible land use changes within sewersheds discharging to impaired waters.

Comment 25: The new draft Manual indicates that “site limitations” that may excuse non-compliance with the full runoff reduction standard are based on challenges achieving infiltration into native soils. In particular, section 4.3 of the Draft Manual identifies “typical” site limitations as “seasonal high groundwater, shallow depth to bedrock, and soils with an infiltration rate less than 0.5 inches/hour.” This is inconsistent with the approach taken elsewhere in the Manual, where DEC indicates that runoff reduction techniques include not only infiltration, but also evapotranspiration and rainwater harvesting; and, at least in some instances, makes reference to the potential for “soil amendment” to improve infiltration capacity.

Response: The Department defined “site limitations” to be site conditions that prevent the use of an infiltration technique because it is unreasonable to expect 100% WQv can be managed without some type of infiltration. The existence of site limitations shall be confirmed and documented by actual field testing (i.e. test pits, soil borings, and infiltration test) or using information from the most current United States Department of Agriculture (USDA) Soil Survey for the County where the project is located. The definition of “site limitations” provides direction on when a project can do less than 100% of WQv. However, in order to meet the runoff reduction sizing criteria, there must be a concerted attempt to reduce runoff from all impervious areas. For impervious areas that cannot be reduced using a RR technique or SMP with RRv capacity, the designer must show that all options were considered and for each option explain the technical reasons the option is not possible (not technologically possible) or how the cost would be wholly disproportionate to the benefit (not economically practicable and achievable).

Comment 26: The sizing criteria for “CPv” should be revised to re-define CPv and to require use of runoff reduction methods to manage the full CPv, except where technically infeasible. To ensure adequate environmental protections and take full advantage of the capabilities of green infrastructure practices, DEC should re-define CPv as the difference between a site’s pre- and post-development runoff from the storm that represents the ‘channel forming event’ for NY State (or as the 1-year 24 hour storm, as currently defined, if that design storm is larger), and should require the use of runoff reduction to manage the entire CPv, subject to the same infeasibility provisions as recommended above for the RRv standard (except that detention, rather than “treatment,” would be appropriate for any portion of the CPv that cannot be managed through runoff reduction).

Response: The feedback received from qualified professionals through implementation is that this is an unrealistic goal to unilaterally require at this time.

The requirements set forth in the Design Manual are in line with, and in some cases more stringent than other state requirements. The Department feels that the current criteria represents what is technologically achievable and is protective of the environment, therefore, no changes were made. Although the RRv criteria is the minimum requirement that a designer must meet, the Design Manual encourages designers to reduce the Cpv if possible.

Comment 27: Sec 4, page 4-7, change the S coefficients to HSG A= 0.38, HSG B= 0.26, HSG C= 0.13. and HSG D= 0.07. These values are based on scientific analysis and calculation done by Horsely in 1996 and formed the basis for the previous numbers used in various states for runoff reduction. In fact these values (or values close to these) are currently used in Vermont, Maryland, Connecticut, Georgia, and Virginia. The July 2013 Virginia SWM Manual, Appendix 10-A, documents this approach to runoff reduction. To my knowledge there is no existing documentation to support the current requirements. In addition, runoff reduction volumes are generally the volume of runoff from impervious areas only and not considered as the traditionally accepted Water Quality Treatment Volume, WQv. Using the WQv for RRv can mean a dramatic increase in volume when using a 1 year storm runoff versus a 90% runoff. A differential volume is a more practical approach but it also must be recognized that if impervious areas now cover recharge areas, remaining area on a site may not be capable of taking all the additional local infiltration, or may take too much in some soils.

Response: The Specified Reduction Factors (S) listed in Chapter 4 of the Design Manual reflect the Department's best professional judgment of what could technologically be achieved based on available literature at the time of the Design Manual updates in 2010. Over the past 4.5 years since the updates to the Design Manual have been in effect, experience has indicated that the Minimum RRv is technologically achievable. The Department has not received a single NOI which indicates that the Minimum RRv criteria could not be achieved. Through training and implementation, the design community has been encouraged to contact the Department in cases where a project could not meet the Minimum RRv yet there has not been a single project that has been unable to achieve the minimum reduction required. Based on the discussion above, the Department has determined that changes to the S factors are not warranted at this time.

The Department will continue to evaluate the criteria and if information shows that the current S factors are not appropriate, the Department will consider updating the factors accordingly.

Comment 28: The Specified Reduction Factors (SRFs) set forth in Chapter 4, which define the “minimum RRv,” are derived based on a methodology that is fatally flawed and have no valid technical justification. As a result, the SRFs are too low – *i.e.*, they require far less runoff reduction than can practicably be achieved. DEC should revise the Draft Permit to require a thorough, site-specific analysis of the feasibility of achieving the full RRv.

Response: The Specified Reduction Factors (S) are used to calculate the Minimum RRv that must be achieved at a construction project with site limitations. A designer must first attempt to reduce 100% of the WQv. The Department feels that the current criteria represents what is technologically achievable and is protective of the environment, therefore, no changes were made. See responses to comments 22, 24 and 27 also.

Sizing Criteria for Redevelopment Activity

Comment 29: Part I.C.2.c.i (2) "*.. or reduce this WQv by the application of RR techniques or standard SMPs with RRv capacity*" needs clarification on by what percent the WQv must be reduced (the Design Manual also isn't clear on this point). "Reduce WQv" needs to be defined.

Response: For redevelopment activity where the treatment objective is satisfied using runoff reduction techniques, the SWPPP must include RR techniques (see Table 5.7 in Chapter 5 of the Design Manual) or standard SMPs with RRv capacity (*i.e.* infiltration practices, bioretention practice or dry swales) to reduce, at minimum, 25% of the WQv from the disturbed, impervious areas on the site. The final general permit has been updated to address this comment.

Comment 30: Redevelopment activities should be subject to the same performance standards [sizing criteria] as new development activities, subject to the same exceptions for infeasibility. For redevelopment in MS4 areas, [the alternate sizing criteria for redevelopment] violates the CWA requirement to ensure reduction of stormwater pollution to the maximum extent practicable. Many jurisdictions around the country have successfully adopted post construction requirements in highly urbanized areas that are both more stringent than DEC's proposed sizing criteria for redevelopment activities and are as stringent as those jurisdiction's own requirements for new development. A strong performance standard for newly developed sites can be achieved practicably by redeveloped sites as well—subject to the same exception for cases of true infeasibility. New York must adopt such a standard that controls stormwater to the MEP on both new and redeveloped sites.

Response: The Design Manual sets forth the minimum requirements for redevelopment and clarifies that the alternate sizing criteria applies only to areas where existing impervious cover is disturbed and reconstructed. Any expansion of impervious area is considered to be new development subject to the sizing criteria in Parts I.C.2 (a) or (b). The alternate sizing criteria for redevelopment is intended to encourage redevelopment within the existing developmental footprint while still achieving a reduction in pollutant load. This approach provides a necessary balance between environmental protection and economic revitalization of urban communities. Feedback from the regulated community (as noted in comments submitted) indicates that any increase in stringency to the redevelopment criteria will discourage redevelopment. Others agreed that there should be a net reduction in pollutant loads in the same watershed but urged the Department to include flexibility in meeting the objectives of this provisions. Municipalities should take local conditions into consideration to determine if MEP is satisfied and may elect to adopt more stringent requirements after considering the land value and pressures for redevelopment in the context of local water quality. The redevelopment requirements are a reasonable and rational means of controlling stormwater runoff from these sites.

Comment 31: The changes to the redevelopment criteria/design requirements will take away some of the incentive for a developer to redevelop an existing site. There is a large environmental and social advantage to redeveloping existing sites as opposed to developing on green fields. It is recommended that the DEC consider this prior to reducing the benefits of redevelopment.

Response: The changes to the redevelopment criteria/design requirements corrects an error in the definition of redevelopment projects and removes the obstacles that require the showing of a physical constraint or lack of space to be able to use the alternate sizing offered in Chapter 9. The definition of redevelopment projects in the current version of the Design Manual would allow projects that expanded into green space to increase pollutant discharges by application of the alternate sizing. The intent of Chapter 9 is to recognize the opportunities of redevelopment to achieve a net reduction in pollutant load and encourage development to stay within the existing footprint. The removal of obstacles that require the showing of a physical constraint or lack of space is expected to encourage redevelopment. The Department does not agree that the revisions will take away the incentive to develop on sites with existing development but rather provides clear, objective and enforceable requirements that provide the necessary balance between environmental protection and economic development.

Comment 32: Design Manual, Chapter 9 Redevelopment Activity, 2. Scope and Applicability, I. Sizing Criteria, B. Water Quality, II (p. 9-7): The draft

updates to Chapter 9 of the Design Manual would require that if a construction project includes both new development and redevelopment, treatment would be required for 25% of the existing, disturbed impervious area, whereas the stormwater management practices for the new development portion of the project would be designed in accordance with the sizing criteria in Chapter 4 of the Design Manual.

This section of the Design Manual should provide flexibility in meeting the goals of this provision. For example, rather than adhering to strict percentages for redevelopment and new development, an owner or operator should be able to apportion the areas from which stormwater runoff is managed so long as the owner or operator manages the same total volume of stormwater.

Response: The Department agrees that there needs to be flexibility in meeting the treatment objectives for redevelopment and has updated the language in Part I.C.2.d. of the general permit and Chapter 9 of the Design Manual to allow for this flexibility.

Comment 33: As stated in the webinar, we agree that the intent of the Redevelopment requirements should be the creation of a net reduction in pollutant loads in a given watershed. However, current language in Chapter 9, as well as the revised definitions of “redevelopment” and “new development,” does not fully embrace this concept. The new definition of redevelopment, taken in a strict literal manner, could be interpreted as every square foot within a former grass parking lot island now being converted to impervious, requiring treatment in accordance with Chapter 4. As design engineers, we have received numerous comment letters from review engineers that have applied this definition in that strict literal sense. In doing so, this application can create obstacles for redevelopment, instead of encouraging it. We believe that the intent of the redevelopment requirements should be clarified to focus on this “net reduction in [pollutant loads] in the same watershed.”

Response: The Department feels that the existing General Permit (Part I.C.) and Design Manual (Chapter 9) language address this comment. See response to comment 32 also.

D. Maintaining Water Quality

Comment 34: The addition of permit language which acknowledges the temporal nature of water quality issues is very helpful. If it’s not raining, an owner-operator can rightly claim there’s no water quality violation.

However, later it might start to rain and the same site goes into failure causing a water quality violation. At this point, stormwater practitioners responsible for enforcement are well aware of which site conditions might trigger a water quality violation. The new permit language which reads, “If there is evidence indicating that the stormwater discharges authorized by this permit are causing, have the reasonable potential to cause, or are contributing to a violation of the water quality standards; the owner operator must take appropriate corrective action and document in accordance with Part IV.C.4 of this permit.” provides important legal standing for regulators such that water quality violations can be prevented.

A related question for MS4s is whether or not this pre-emptive, proactive language applies to MS4s responsible for enforcement action as described in local laws adopted in ~2007 or 2008. Will MS4s need to amend their existing laws? Or does wording in these local laws already sufficiently address construction activity permit updates? This same question applies to all other changes to the Construction Permit. Has a threshold been reached such that existing local laws need to be updated to more explicitly match language in the new Construction Permit? Presumably this question will be addressed in the updated MS4 Permit.

Response: The questions in this comment apply to the requirements of the SPDES General Permit for Stormwater Discharges from Municipal Separate Stormwater Systems (MS4), therefore, they will be addressed as part of the renewal of the MS4 general permit.

Comment 35: Part 1.D. of the draft permit states: “If there is evidence indicating that the stormwater discharges authorized by this permit are causing, have the reasonable potential to cause, or are contributing to a violation of the water quality standards; the owner or operator must take appropriate corrective action and document in accordance with Part IV.C.4. of this permit.” Part IV.C.4 refers to the qualified inspector’s report requirements. Please provide clarification on the intent of this statement. If an incident falls within this description, does a qualified inspector need to provide documentation of the incident to be maintained in the SWPPP or is the documentation to be submitted to the NYSDEC?

Response: The language in the final general permit has been updated to address this comment. Part I.D now references the requirements in Parts IV.4 and 5 of the general permit. Part IV.4. requires the qualified inspector to document any required corrective actions in the inspection report (see part Part IV.4.j.) and Part IV.5 requires the owner or operator to begin implementing any corrective actions that have been identified by the qualified inspector.

Comment 36: DEC must include in the SPDES permit sufficient limitations [set at the water quality standard] to control all pollutants or pollutant parameters which [a reasonable potential analysis determines] “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.

Response: It is a recognized fact that construction activities that disturb one or more acres of soil, if left uncontrolled, have the potential to discharge silt, sediment and nutrients at levels that could cause, or contribute to adverse water quality impacts. Therefore, as required by 40 CFR 122.44, effluent limits (numeric or non-numeric) must be established for any pollutant that may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above a water quality standard including narrative water quality standards. The Department addressed this requirement in Part I.B.1 of the general permit. Part I.B.1 requires the owner or operator to select, design, install, implement and maintain control measures to meet the new source performance standards (narrative effluent limitation guidelines -ELGs) that EPA promulgated in 40 CFR 450.21 and be in accordance with the New York State Standards and Specifications for Erosion and Sediment Control (Blue Book), dated August 2005.

The non-numeric effluent limits contained within 40 CFR 450.21 “are what EPA has determined are the required controls necessary to minimize, control or prohibit discharges of pollutants from construction sites [and] ... represent[s] a level of control that is technologically available and economically practicable and represents the average of the best performance of construction sites.” Additionally, when EPA promulgated 40 CFR 450, they performed an environmental assessment to quantify the surface water quality improvement by requiring these non-numeric effluent limits. This quantitative analysis focused on TSS, nitrogen, and phosphorous, the pollutants most commonly found in stormwater discharges from active construction sites. The modeling study predicted that the ambient water quality for TSS, nitrogen and phosphorous would be decreased by 83%, 75%, and 96% respectively compared to sites that did not implement these controls.

These ELGs apply primarily to the selection, design, and implementation of the erosion and sediment controls (i.e. during construction controls) to be used on the site. These are technology based effluent limitations that represent the degree of reduction attainable by the application of best practicable technology currently available. These non-numeric effluent limits require an owner or operator to ensure that water quality standards are being met and the discharge of pollutants are minimized through the selection, design and implementation of erosion and sediment control measures. As newly defined in the permit, the

term “minimize” means to reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically achievable (BAT) and practicable (BPT) in light of best industry practice. The control measures specified in the Blue Book have been determined to be technologically available and economically achievable and practicable.

The Blue Book provides the minimum standards and specifications for meeting criteria for minimizing erosion and sediment impacts from construction activities involving soil disturbance. These standards and specifications were developed in cooperation with the USDA NRCS, NYS Soil & Water Conservation Committee and other state and local agencies. The Blue Book has been the technical standard since 2003. Experience through implementation over the past 10 plus years has indicated that proper use of these standards will protect ALL waters of the state from sediment loads during runoff events. The general permit establishes effective control measures for these pollutants to address the reasonable potential for water quality impacts and has been demonstrated to be protective of water quality. Therefore, the permit meets the legal requirements.

Based on the experience gained through implementation of the Blue Book Standards, EPA’s statements in 40 CFR 450, and the information presented in the referenced study, the Department expects that by implementing the required effluent limits specified in Part I.B. of the permit, discharges from active construction sites will not violate the narrative water quality standards for TSS, nitrogen, and phosphorous

Comment 37: Where construction sites are located in watersheds identified as impaired by construction-related pollutants, DEC cannot issue coverage under the Draft Permit without first ensuring that discharges will not cause or contribute to a violation of WQS or cause or contribute to further violations of WQS or pollutant load allocations under Total Maximum Daily Loads.

Response: The Department expects that compliance with the conditions and effluent limitations in the general permit will result in stormwater discharges being controlled as necessary to meet applicable water quality standards for ALL waters. However, at the request of EPA, the permit now requires more frequent inspections by a qualified inspector and shortened timeframes for stabilization of exposed soils to ensure that discharges to impaired waters are in compliance with the terms and conditions of the permit. The Department believes that this additional oversight will provide the protection necessary for impaired waters that will allow construction activities to be covered under the General Permit rather than excluding them from eligibility. This is consistent with how EPA addressed this issue in their 2012 Construction General Permit (CGP). See Parts 1.2.2 (Water Quality Standards – Eligibility for New Sources) and 3.2.2 (Requirements for Discharges to Sediment or Nutrient Impaired Waters) of their CGP (<http://water.epa.gov/polwaste/npdes/stormwater/EPA-Construction-General->

Permit.cfm).

Comment 38: Post-construction stormwater discharges regulated by the Draft Permit must comply with TMDL Waste Load Allocations and WQS.

All discharges countenanced by SPDES permits are allowable only if they comply with water quality standards or load allocations where TMDLs have been established. Post-construction discharges allowed pursuant to the Draft Permit are no exception. To prevent further degradation of water quality in impaired waters, the draft permit must be revised to require full SWPPPs (*i.e.*, including post-construction stormwater management measures) for new development and redevelopment within all TMDL watersheds that are impaired for pollutants associated with post-construction runoff and within all impaired watersheds lacking TMDLs that are listed in Appendix 2 of the current MS4 General Permit as impaired for pollutants associated with post-construction runoff. (Appendix E of the Draft Permit improperly provides a narrower list of impaired watersheds than Appendix 2 of the MS4 General Permit. The former is limited to silt, sediment, or nutrients, but the latter includes pathogens, floatables, metals, and oil and grease, which are also pollutants of concern associated with post-construction stormwater runoff.)

Response: The projects exempted from post construction requirements consists of single family homes disturbing less than one (1) acre and subdivisions disturbing less than 5 acres with less than 25% impervious cover at total build out. This type of development makes up less than 8% of construction activities, therefore, the Department has decided not to make this change at this time. There are other programs in place that would address pollutants associated with post construction associated with this type of development.

Comment 39: Issuance of coverage under the Draft Permit must not contravene New York's Anti- Degradation Policy.

Response: Under the Department's Water Quality Anti-Degradation Policy (Organization and Delegation Memorandum 85-40, September 9, 1985), water quality based effluent limitations derived for SPDES permits provide for the protection and maintenance of attained higher uses above those included in standards currently assigned to waters receiving the effluent discharge. Variations in numerical water quality criteria that are not significant and do not interfere with the attained higher use are permitted.

The Department expects that compliance with the terms and conditions of the permit will control discharges necessary to meet applicable water quality standards. The permit requires compliance with Water Quality standards and

therefore, is in compliance with ECL §17-0501 and New York State law. The general permit also includes specific requirements for TMDL watersheds and 303(d) segments. If there is evidence indicating that the stormwater discharges authorized by this general permit are causing or are contributing to an excursion above an applicable water quality standard, the general permit (Part I.D.) provides that the owner or operator must take appropriate corrective action and notify the Department of corrective actions taken. The Department may require the owner or operator to provide additional information, include and implement appropriate controls in the SWPPP to correct the problem, may require the owner/or operator to obtain an individual permit, and/or may take appropriate enforcement action.

Pursuant to 6 NYCRR 750-1.21(e), the Department may also require any discharger authorized to discharge in accordance with a general permit to apply for and obtain an individual SPDES permit or apply for authorization to discharge in accordance with another general permit

Department staff have concluded that discharges from construction activities authorized and in compliance with the general permit will not result in significant variations from water quality criteria. Such discharges are subject to all of the best management practice requirements of the permit, by their nature are dilute stormwater discharges, and occur during wet weather when stream flows are higher.

E. Eligibility Under This General Permit

No comments were received on this section.

F. Activities Which Are Ineligible for Coverage Under This General Permit

Comment 40: Part I.F.4: EPA suggests that NYSDEC change the following sentence from “Discharges from construction activities that may adversely...” to “*Construction activities, discharges from construction activities, or discharge related activities* that may adversely...” Adding these words includes the actual construction and not just discharges from the site as needing to conform with endangered/threatened species provisions. The EPA CPG phrase “discharge related activities” is considered more inclusive of the Endangered Species Act provisions.

Response: The Department has revised this section of the general permit to address this comment.

Comment 41: Coverage for Discharges from Construction Activities that May Affect Endangered or Threatened Species (Part I.F.4)

DEC should amend Part I.F.4 of the Draft Permit to reinstate protection for critical habitat. Part I.F.4 provides that discharges from construction

activities that may affect endangered or threatened species are not eligible for coverage under the Draft Permit unless the owner or operator has obtained a permit pursuant to 6 NYCRR Part 182 (otherwise known as an “Incidental Take Permit”) or been issued a letter of non-jurisdiction by DEC. Under the Current Permit ineligibility for discharges from construction activities that may directly affect endangered or threatened species also extended to critical habitat; however, this provision has been removed from the Draft Permit.

While an Incidental Take Permit typically regulates the direct taking of endangered or threatened species, the Part 182 requirements for Incidental Take Permits do not explicitly require protection of critical habitat. As written, the Draft Permit would allow coverage for discharges directly affecting endangered or threatened species only with the extra protection afforded by an Incidental Take Permit, but would subject critical habitat, necessary for the survival and propagation of endangered or threatened species, to less stringent requirements. The Draft Permit should be amended to provide equivalent protection to critical habitat.

Response: There is no regulatory definition of critical habitat under New York State law. Critical habitat, in respect to listed species, is a federal term that applies only to species listed under the federal Endangered Species Act, and as such is designated by the Federal government, not the Department. The only area of critical habitat designated within New York is located along a 17 mile stretch of Southeast Lake Ontario shoreline. However, under Part 182, adverse modification of occupied habitat is included under the definition of “take.” Incidental take permits are required if a project will result in adverse modification of habitat that is known to be utilized by listed species. Part 182 and the permit process addresses concern over impacts to habitats utilized by listed species.

Comment 42: Part I.F.6 and 7: Clarification: Are the discharges mentioned in these two parts covered by individual permits; are they not covered by any permit?

Response: The owner or operator of a construction project that meets either of the ineligibility criterion would have to modify their plan so that the project is eligible for coverage under the general permit or apply for coverage under an individual SPDES permit.

Comment 43: In Part I.F.8, the word “affect” is italicized, but a definition is not provided in Appendix A.

Response: The word “affect” has been used to mean “to have an effect on or

make a difference to” and should not have been italicized as this is the common use of the word. Construction activities that have the potential to have an effect, either positive or negative, on a property that is listed or eligible for listing on the State or National Register of Historic places (including archeological sites) are not eligible for coverage unless there has been a consultation with OPRHP and written agreements are in place to mitigate the effects.

Comment 44: Please more precisely define/clarify what is meant by the phrase “occur in an area that includes” in Part I.F.8.

Response: The permit has been clarified to better define when a project has the potential to affect cultural resources and the documentation needed to demonstrate eligibility. The Department has developed a flow chart that will assist owners/operators in screening a project to determine if there is a potential to impact a cultural resource. (See following webpage for the flowchart: <http://www.dec.ny.gov/chemical/43133.html>)

Comment 45: Please more precisely define/clarify the “documentation” that would be acceptable under the third bullet in Part I.F.8.

Response: The permit has been clarified to identify the documentation necessary to demonstrate eligibility. The Department has developed a flow chart that will assist owners/operators in determine the appropriate documentation necessary to demonstrate eligibility (See following webpage for the flowchart: <http://www.dec.ny.gov/chemical/43133.html>)

Comment 46: The intent of the sixth bullet in Part I.F.8 is unclear. Does this bullet only apply to construction activities undertaken by or on behalf of a federal agency?

Response: If the project requires federal permitting, funding or approval, then the project must comply with the National Historic Preservation Act, Section 106. Projects may use the documentation resulting from the NHPA § 106 consultation (Letter of No Affect, Letter of No Adverse Affect, Executed Memorandum of Agreement) to demonstrate eligibility under the construction general permit, provided the areas of potential effect are basically the same.

Comment 47: The draft permit provides language which states which documents are necessary to demonstrate the status of a particular construction project relative to requirements embedded in the National and State Register of Historic Places. This is helpful. We hope that these documents can be obtained with relative ease and that future updates to the Notice of Intent and related coordination with the NYS Office of Parks,

Recreation, and Historic Preservation (NYS OPRHP) will promote an efficient, compliant submission of information.

Response: Agreed. The process set forth in the Letter of Resolution between the Department and OPRHP is intended to maintain the efficiency of the general permitting process for owners/operators engaged in construction activities while providing the necessary protections to New York State's cultural resources.

Comment 48: Also, when reading the new draft CGP, something to consider is potential confusion regarding the word eligibility. For a construction project, the site itself may be eligible for a historic designation, and therefore ineligible for Construction Activity Permit coverage. Paying close attention to wording within this portion of permit could be useful. We are easily confused and wording here is important. Finally, it is very likely that MS4s will need training in this topic.

Response: If the site itself is listed or eligible for listing on the National or State Registers of Historic Places, consultation with OPRHP is needed. Depending on the nature of the construction activity, OPRHP may issue a letter of no adverse impact or will consult with DEC's Agency Preservation Officer (APO) and the owner/operator to come to some resolution as to how the impacts may be mitigated. If resolution cannot be made, the project would not be eligible for coverage under the general permit. The Department agrees that significant outreach and training for design engineers, project sponsors, planning boards and other review authorities is needed. The Department will provide this outreach and training across the state as part of the roll-out of the renewed general permit (anticipated January 29, 2015).

Comment 49: Part 1.F.8- SHPA/OPRHP Documentation Requirements - Has NYS DEC developed a Notice of Intent (paper and electronic) that requests this new required documentation?

Response: Additional questions have been added to the Notice of Intent (both paper and electronic) regarding the potential impacts to cultural resources as well as the documentation that will be maintained at the construction site.

Comment 50: Who determines if a project has "the potential to affect a property or place (buildings, sites, structures, districts or objects) that is listed or determined to be eligible for listing on the National or State Registers of Historic Places or occur in an area that includes or is adjacent to a building or buildings that are more than 50 years old"?

- Office of Parks Recreation and Historic Preservation (OPRHP) staff?

- **The Department?**
- **Others?**

Also, how will this be determined? 50 years old is really not an old building and we question why this would be considered historic.

Note: The addition of the phrase “have the potential” to the permit language is concerning.

Response: The fifty year threshold is what was identified by the state legislature as the point where a building, structure or object would require a closer look if it might be impacted by a project. This does not mean that such things are automatically historically significant just that they need to be evaluated. The owner/operator is expected to consult the EAF Mapper or OPRHP website to determine if the construction activity will occur in an archeologically sensitive areas or on a property that is listed or determined to be eligible for listing on the National or State Register of Historic Places. Buildings, structures or objects that are greater than 50 years of age that have not been evaluated for eligibility for listing on the State or National Registers of Historic Places that are within a specified distance of a proposed permanent building must be evaluated by OPRHP, a Historic Preservation Commission of Certified Local Government, or a qualified preservation professional to determine historical significance. The Department has developed a decision tree that will assist the owner/operator in making the determination as to whether there is the potential to affect cultural resources.

Comment 51: OPRHP has its interactive map on its website that is very helpful at identifying historic and archeologically sensitive areas. But does it also include a listing of “eligible” properties, districts and/or structures?

Response: OPRHP is updating their interactive map to include “eligible” properties, districts and/or structures. The EAF mapper will also include this data layer.

Comment 52: Section I.F.8. The permit draft has a change that includes “adjacent to a building or buildings that are more than 50 years old” as a trigger for requiring a written agreement with NYSOPRHP. Many structures in the Syracuse Urban area are more than 50 years old, and it seems this requirement is going to put a burden on redevelopment projects. The Stormwater Design Manual and Development Plan for Onondaga County encourage redevelopment, and this requirement may have the opposite effect.

Response: The general permit requires evaluation of any building, structure or

object that is greater than 50 years of age that has not already been evaluated for listing on the State or National Registers of Historic Places if the project proposes to construct a new permanent building within the following distances of any building, structure or object that is more than 50 years old: projects with 1-5 acre disturbances = 20 feet, projects with 5-20 acre disturbances = 50 feet, and projects with greater than 20 acre disturbances = 100 feet. The evaluation may be conducted by OPRHP, a Historic Preservation Commission of a Certified Local Government or a qualified preservation professional. An owner/operator may also elect to avoid evaluation of such properties by adjusting the project layout to increase the distances of proposed permanent buildings from the unevaluated properties.

Comment 53: Part I, F – Activities Which Are Ineligible for Coverage Under This General Permit – Item #8 has several elements we have questions about. This section states that “Construction activities that have the potential to affect a property or place (buildings, sites, structures, districts or objects) that is listed or determined to be eligible for listing on the National or State Registers of Historic Places or in an area that includes or is adjacent to a building or buildings that are more than 50 years old.....”. We seek clarification on the following related to this section:

- **The above statement does not say anything about potentially archeologically sensitive resources. Although it may be understood that this is the case, perhaps it should be made clear.**

Response: The general permit has been clarified to better define when a project has the potential to affect cultural resources (including archeologically sensitive resources) and the documentation needed to demonstrate eligibility. The Department has developed a flow chart that will assist owners/operators in screening a project to determine if there is a potential to impact a cultural resource (See following webpage for the flowchart <http://www.dec.ny.gov/chemical/43133.html>).

- **It is unclear what is considered adjacent. Please provide additional clarification as to the limits of what this would apply to.**

Response: The general permit has been revised to state projects “immediately adjacent to” and defines “immediately adjacent” to mean sharing a property line.

- **While we understand that certain overhead or aboveground facilities could potentially have an impact, certainly this should not apply to underground facilities. Please clarify what, if any consultation would be required for underground facilities (e.g. replacement of gas pipeline,**

underground electric)? Presumably the intent of this section of the permit is to include archeological resources, and for that we understand the potential concern for underground archeological resources.

Response: These projects typically require other UPA permits (WQ Cert/USACOE Wetland Permit) or discretionary approvals at the State or Federal Level (FERC or PSC) that would trigger SHPA review or 106 consultation. Documentation resulting from consultation conducted by a State or Federal Agency would satisfy the documentation requirements. The owner or operator shall certify that the 14.09 consultation has been done and the resulting documentation will be maintained on site.

• Similarly, for replacement in kind of existing facilities (eg. rebuild of electric transmission lines on an existing ROW), what consultation would be required?

Response: Repair or replacement of utilities in the same trench where the proposed excavation will not exceed the width and depth of previous disturbance appear on the list of categorical exclusions and would not require consultation. Transmission lines and utilities that require permits from another State or Federal Agency may use the documents resulting from consultation by the other State or federal agency.

• Would consultation be required for the installation of new mid span poles on a ROW?

Response: If the soils disturbance associated with the project triggers the need for a SPDES General Permit for Stormwater Discharges from Construction Activity and does not require other UPA permits or discretionary approvals at the State or Federal level, then the project would need to follow the screening and consultation process.

• In general, if there is no change in existing above grade facilities, we feel that no consultation should be required.

Response: If there are no changes to above ground facilities it is unlikely that there would be potential impacts to buildings and structures however SHPA also addresses impacts to archaeological resources, which can be impacted by ground disturbing activities.

• For many of our projects, such as larger linear projects, it would not be practical to document that every structure is less than 50 years old, therefore our options for documenting compliance may be limited.

Response: The documentation of the age of structures is only required if the construction activity proposes to construct a new permanent building within the following distances of any building, structure or object that is more than 50 years old:

Total Project Disturbance Area	Distance
1 to 5 acres	20 feet
5 to 20 acres	50 feet
20+ acres	100 feet

• In the fourth bullet under item #8, there is a reference to a “DEC Agency Preservation officer”. We are not familiar with this term or position. Is this a new position within NYSDEC? Who is this person?

Response: Under SHPA, each State Agency has a preservation officer. The DEC APO is Chuck Vandrei (or designated successor), 625 Broadway, Albany, NY 12233.

• In the same section, there is reference to sending a “DEC Form”. What DEC Form does this refer to?

Response: The DEC consultation form has been developed to indicate to OPRHP that DEC is the State Agency responsible for SHPA compliance and that consultation is being initiated for a project to demonstrate eligibility for coverage under the general permit. The consultation form is included as Attachment C.

• In the fifth bullet there is reference to a “Letter of Resolution” to be signed by the owner or operator, OPRHP and the DEC APO – Is there an example of this?

Response: The Letter of Resolution is prepared by the State Agency and outlines the agreements made between the Agency and the owner/operator to mitigate the unavoidable impacts.

• Finally, if a map shows no impact, we feel that no photos should be necessary.

Response: The map does not provide information on unknown resources. The photos for 50+ year old buildings, structures and objects are to make a determination of historic significance for those buildings, structures and objects that have not already been identified. If the project does not propose any

permanent buildings to be constructed within the specified distances (see below), documentation of the age of the buildings, structures or objects is not required.

Total Project Disturbance Area	Distance
1 to 5 acres	20 feet
5 to 20 acres	50 feet
20+ acres	100 feet

Comment 54: Part I.F.8 SHPA Review Process: It is our understanding NYSDEC is developing a tool to assist in satisfying this requirement; what is the status of its completion?

Response: OPRHP has completed their mapping tool that provides information related to archeologically sensitive areas and properties listed or determined to be eligible for listing on the National or State Register of Historic Places. NYSDEC's EAF mapper may also be used to screen for potential impacts. These tools are currently available (<http://www.dec.ny.gov/eafmapper>). NYSDEC has also developed a flow chart to assist owners/operators in screening for potential impacts (Attachment A).

Comment 55: It is our understanding that DEC and OPRHP are jointly working to develop a listing of categories of projects that would be exempt. Will this list be made available for public comment?

Response: The listing of categories of projects that would be exempt from the SHPA screening/consultation process is included in the Letter of Resolution between NYSDEC and OPRHP and included in this Response to Comments as Attachment C.

Comment 56: Will information from the Department's EAF mapper tool satisfy the criteria of "A map demonstrating that the construction activity is not within the archeological sensitive area indicated on the sensitivity map?" We had a singular experience where this was not accepted and the applicant was required to contact OPRHP. It seems logical that if the DEC's EAF mapper provides the answer to this question on the EAF, that the same answer should apply to the NOI.

Response: The EAF mapper may be used to determine if a project is within an

archeologically sensitive area.

Comment 57: I am a member of the New York Archaeological Council (NYAC), an association of professional archaeologists in New York State. I have reviewed the draft renewal documents for the State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity (GP-0-15-002). I notice that compliance with the New York State Historic Preservation Act (SHPA) is not included in any of the documents that I read. These permits are often the only chance that archaeologists within the field of cultural resources management (CRM) have to identify, evaluate, and protect significant archaeological sites in New York. The understanding of New York's rich historical heritage is dependent on new discoveries, and the interpretation of these sites within emerging regional contexts. This not only advances knowledge, but it also allows descendant communities, including Native Americans, neighborhoods, and direct descendants, an opportunity to take pride and ownership in a part of their past not known before. In downtown Binghamton alone, several urban projects needed small Stormwater permits and if it was not for these permits, no compliance with SHPA would have occurred. Because archaeological surveys were conducted, major new discoveries were made: foundations associated with the early nineteenth century beginnings of the City of Binghamton (hidden under asphalt); a Late Woodland village that dated to about AD 1300; a large ancient camp that was over 5,000 years old; and the remnants of Native American cemetery that was lost from the memory of descendant groups. Compliance with SHPA did not delay or cancel these projects. Compliance did allow many voices to be heard and compromises to be crafted that allowed developments to move forward while preserving areas with cultural features, or final excavations to recover information.

I strongly urge you to reconsider the omission of compliance with SHPA in these permits. I request specific details on how compliance with SHPA will be achieved. Our archaeological community members are stakeholders in the process of understanding and preserving cultural resources and we are aware when the process is not followed. We are not reluctant to voice our concerns to legislators and agency heads.

Response: The permit requires SHPA compliance to be eligible for coverage under the construction general permit. A Letter of Resolution between DEC and OPRHP describes the process to be followed to satisfy the State Historic Preservation Act for both the issuance and implementation of the CGP. The Letter of Resolution is available for review on the Department's webpage (see <http://www.dec.ny.gov/chemical/43133.html>).

Comment 58: The draft Permit states that the following activities are ineligible for coverage under the draft Permit: "Construction activities that have the potential to affect a property or place (buildings, sites, structures, districts or objects) that is listed or determined to be eligible for listing on the National or State Registers of Historic Places or occur in an area that includes or is adjacent to a building or buildings that are more than 50 years old, unless there are written agreements in place with the NYS Office of Parks, Recreation ('OPRHP') or other governmental agencies to mitigate the effects, or there are local land use approvals evidencing the same," This creates a presumption that construction activities that occur in an area that includes or is adjacent to a building more than 50 years old are ineligible for coverage under the draft Permit.

Response: The general permit requires evaluation of any building, structure or object that is greater than 50 years of age that has not already been evaluated for listing on the State or National Registers of Historic Places if the project proposes to construct a new permanent building within distances specified in the permit. The evaluation may be conducted by OPRHP, a Historic Preservation Commission of a Certified Local Government or a qualified preservation professional. An owner/operator may also elect to avoid evaluation of such properties by adjusting the project layout to increase the distances of proposed permanent buildings from the unevaluated properties. It is important that the eligibility screening be done early in the project design to allow flexibility for such adjustments.

Comment 59: New York City contains thousands of buildings that are more than 50 years old, but certainly not all of them are of historic significance. The proposed presumption is overly broad, and would render a tremendous area of New York City ineligible for coverage under the draft Permit. Age alone is not dispositive of a site or building's historic significance. The City supports efforts to protect sites of historic significant, but believes that expansion of the presumption of ineligibility to construction sites adjacent to buildings more than 50 years old is unnecessary, arbitrary, and burdensome. The City recommends that DEC not include the presumption that construction activities occurring in areas that includes or are adjacent to buildings more than 50 years old in the draft Permit. Instead, DEC should limit this category of ineligibility for general permit coverage to sites that are listed or determined to be eligible for listing on the National or State Registers of Historic Places, which is consistent with the current general permit (GP-0-10-001). (26)

Response: It is agreed that age alone does not define a site or building's historic significance. However, it is an indicator that further evaluation is needed. If OPRHP, a Historic Preservation Commission of Certified Local Government or a

qualified preservation professional evaluates such properties and determines them not to be historically significant, the project is eligible for coverage under the general permit. If they are determined to be historically significant, the project may still be eligible for coverage but will require further consultation with OPRHP. The owner/operator may elect to avoid further consultation by adjusting the project layout to increase the distances of proposed permanent buildings from the historically significant site or building. It is important that the eligibility screening be done early in the project design to allow flexibility for such adjustments.

Comment 60: Part I.F.8. Consultation with Native American tribes should be addressed in the SHPA process.

Response: Agreed. The Letter of Resolution between NYSDEC and OPRHP specifies when consultation with Native American tribes will occur.

Comment 61: First paragraph: "... or occur in an area that includes or is adjacent to a building or buildings that are more than 50 years' old" -Why should proximity to 50-year-old buildings require OPRHP agreements? For example, highway rights-of-way abut countless parcels with homes older than 50 years but construction activities don't extend beyond the ROW. This requirement would necessitate needless OPRHP review.

Response: The fifty year threshold is what was identified by the state legislature as the point where a building, structure or object would require a closer look if it might be impacted by a project. This does not mean that such things are automatically historically significant just that they need to be evaluated. The documentation of the age of structures is only required if the construction activity proposes to construct a new permanent building within the following distances of any building, structure or object that is more than 50 years old:

Total Project Disturbance Area	Distance
1 to 5 acres	20 feet
5 to 20 acres	50 feet
20+ acres	100 feet

Comment 62: Please clarify what is meant by "an area".

Response: The permit has been clarified to better define when a project has the potential to affect cultural resources and the documentation needed to demonstrate eligibility. The Department has developed a flow chart that will

assist owners/operators in screening a project to determine if there is a potential to impact a cultural resource (see Appendix A).

Comment 63: The age of a building is not easily determined by anyone other than an architect or historian unless property records for each parcel are searched. Photographing newer buildings does not serve a purpose.

Response: Typically tax map inventories provide information on the age of structures. The EAF mapper provides information on the tax map numbers for adjacent parcels. Photographs may be useful to obtain a determination of historical significance from OPRHP, a Historic Preservation Commission of Certified Local Government or a qualified preservation profession. If they are determined to be historically significant, the project may still be eligible for coverage but will require further consultation with OPRHP. The owner/operator may elect to avoid making a determination of historical significance or further consultation by adjusting the project layout to increase the distances of proposed permanent buildings from the historically significant site or building. It is important that the eligibility screening be done early in the project design to allow flexibility for such adjustments.

Comment 64: The "circles and squares" map should be acceptable on its own for projects that are outside of the gray areas.

Response: The "circles and squares" map (commonly referred to as the map of archeological sensitivity) does not address buildings, sites and structures or objects that are listed or determined to be eligible for listing on the National or State Registers of Historic Places. Use of this tool on its own would not be protective of historic properties and would not satisfy the Department's obligation under SHPA.

Comment 65: Under bullets 1, 3, 4 and 5 DEC would themselves be in-fact determining or approving the determination under Section 14.09- a role that would add major work load to the DEC APO or staff.

Response: The involvement of the DEC Agency Preservation Officer (APO) would only be required for projects where a Letter of Resolution is needed to resolve impacts to cultural resources.

Comment 66: Under the existing wording, bullet 6 seems to indicate

that any applicant can skip all of the 5 prior bullets and just provide a statement that the project is not being undertaken by or on behalf of a federal agency. Or to say that the project does not require a federal permit, approval or funding. While these are reasons that the project would not be subject to NHPA section 106, I don't think they absolve DEC of involvement under Section 14.09. Suggest re-wording to have applicant indicate whether or not NHPA Section 106 applies and then say that the Section 106 determinations can be used to demonstrate eligibility with this requirements.

Response: The general permit language has been revised to clarify the intent of this bullet. If the project requires a federal permit, approval or is receiving federal funds, it must comply with Section 106 of the National Historic Preservation Act. The Section 106 determinations may be used to demonstrate eligibility with the requirements provided that the owner/operator certify in the NOI, the documentation resulting from the Section 106 consultation will be maintained at the construction site.

Comment 67: Bullet 6 uses incorrect or incomplete listing of the possible Determinations under NHPA, section 106. Correct language is "No Historic Properties Affected", "No Adverse Effect" or "Adverse Effect". It should be rephrased to say ... "an Adverse Effect with an executed memorandum of agreement". Another circumstance that comes up a few times a year at least is a project specific Programmatic Agreement under Section 106. Programmatic Agreements are made when enough information cannot be gathered prior to design approval to determine whether the project will have an adverse effect. Programmatic Agreements stipulate minimization and avoidance measures and often include monitoring and data recovery efforts that must be done during construction rather than prior to. We recommend providing a bullet to include "an executed Programmatic Agreement" as one of the options for documentation to demonstrate eligibility with this requirement.

Response: Programmatic Agreements are a type of Memorandum of Agreement (MOA), therefore, no changes are necessary.

Comment 68: Under current NYSDOT and OPHRP/ SHPO signed procedures- NYSDOT only sends SHPO Finding Documentation if a survey has been conducted. If there is no potential to affect resources, then NYSDOT does not send any information to SHPO. If NYSDOT finds that the project has NO impact or No Adverse Impact under Section 14.09 (for state funded projects) OPHRP/SHPO does not need to

respond if they agree with the finding determination. Under the allowable documentation listed in Part I.F.8 these common practices would not be sufficient to for DEC. Suggest a bullet be added:

“For parties with written agreements in place with the OPHRP, a statement concerning how the project meets the existing written agreement and appropriate documentation as stipulated by said agreement can demonstrate eligibility with this requirement.”

Response: As a State Agency, NYSDOT is responsible for performing the consultation with OPRHP and ensuring compliance with SHPA 14.09. Projects that satisfy SHPA 14.09 through DEC (other UPA permits) or another State Agency (such as NYS DOT) are eligible for coverage under the general permit provided that they certify in the NOI, that documentation demonstrating SHPA Section 14.09 has been completed by NYSDEC or another state agency will be maintained at the construction site.

Comment 69: In order to obtain coverage under the General Permit and prove that there will be no adverse effects on endangered or threatened species, is a letter from DEC Fish, Wildlife, & Marine Resources indicating that they have no records of rare or state listed animals or plants in their database sufficient?

Response: Yes, provided the letter from the Department (Division of Fish, Wildlife & Marine Resources) is obtained within a calendar year of the commencement of construction.

Part II. OBTAINING PERMIT COVERAGE

A. Notice of Intent (NOI) Submittal

Comment 70: Has NYS DEC developed a Notice of Intent (paper and electronic) that requests information in regards to the new Effluent Limitation guidelines?

Response: The current Notice of Intent (NOI) requires an owner or operator to certify that the SWPPP has been prepared in conformance with all the requirements of the general permit, including the new effluent limitations. Therefore, no modifications to the NOI are needed.

Comment 71: Part II.A: EPA suggests that NYSDEC require that the NOI list both the owner and the operator. Currently only the owner or the operator need file an NOI. EPA believes that listing both the owner and the operator

on the NOI regardless of which files the NOI could ease inspection and enforcement.

Response: The current process of requiring the owner or operator to be the covered entity and file the NOI has not created any enforcement or compliance issues for the Department, therefore, no changes were necessary.

Comment 72: Part II.A.1: EPA believes that the sentence “An owner or operator of a construction activity that is not subject to the requirements of a regulated, traditional land use control MS4 must first prepare a SWPPP...” could potentially leave gaps in the permitted coverage of construction discharges. Please explain how all construction activities are covered between the CGP and the MS4 general permits.

Response: The language in this Part goes on to say “and then submit a completed NOI form to the Department in order to be authorized to discharge under this permit.”. Therefore, even though some projects may not be subject to the local MS4’s permitting requirements, the owner or operator of that project must still obtain coverage under the Department’s SPDES General Permit for Stormwater Discharges from Construction Activity so that there are no gaps in coverage.

Comment 73: Part II: Please include or identify the equivalent state requirements found in the following sections found in the EPA CGP:

- a. 1.4.3 (Your Official End Date of Permit Coverage)**
- b. 1.4.5 (Procedures for Denial of Coverage)**
- c. 1.5 (Requirement to Post a Notice of Your Permit Coverage)**

Response: With the exception of requiring a new NOI for projects that are continuing coverage after the general permit has expired, EPA’s requirements in Section 1.4.3. are addressed in Parts V and VII.K of the Department’s general permit. The Department does not require the owner or operator of a construction project with coverage under a previous general permit to submit a new NOI to continue their coverage under the new general permit.

EPA’s requirements in Section 1.4.5 are addressed in Part VII.K of the Department’s general permit.

With regards to EPA’s requirements in Section 1.5, the Department does not require the owner or operator to post their NOI at the project site. Instead, Part II.C.2 of the general permit requires the owner or operator to maintain a copy of the General Permit (GP-0-15-002), NOI, NOI Acknowledgment Letter, SWPPP, MS4 SWPPP Acceptance form, inspection reports, and all documentation

necessary to demonstrate eligibility with the permit at the construction site until all disturbed areas have achieved final stabilization and the NOT has been submitted to the Department. The documents must be maintained in a secure location, such as a job trailer, on-site construction office, or mailbox with lock. The secure location must be accessible during normal business hours to an individual performing a compliance inspection.

B. Permit Authorization

Comment 74: The EPA CGP (1.4.2 Table 1) requires that a permittee submit a NOI 14 days prior to discharge. Please include this requirement in the NYSDEC CGP.

Response: The Department has established alternative time frames in part II.B.3 for the owner or operator to submit their NOI and be authorized to discharge. The current process for authorizing permit coverage has not created any problems for the Department, therefore, no changes were necessary.

Comment 75: While the 5 business day turnaround time for permit coverage for eNOI submissions provides an incentive to use the eNOI system, the related 14 day turnaround time for paper submissions, may be too punitive. In practice, 14 business days represents close to 3 weeks until receiving coverage. While this is a very practical way to encourage the transition to the EPA mandated electronic filing of SPDES permit information, in the interim the 14 business day threshold may need to be relaxed.

Response: The time frame for permit authorization has been changed to ten (10) days in the final general permit.

Comment 76: Part II, B.3.a. (i) and (iii), changing the former 5 day authorization period to 14 days for paper filing is an unwarranted penalty to try to encourage electronic filing. Keep the existing 5 day period for paper and reward electronic filers with a shortened 2 or 3 day period. This doesn't incur any additional workload for the Department and will fit better with current operations.

Response: See response to comment 75.

C. General Requirements For Owners or Operators With Permit Coverage

Comment 77: Part II, C.3.b, I recommend that soil stabilization be initiated on steep slopes within 3 days instead of the current 7 day period.

Disturbed soil on steep slopes provides a much higher risk of erosion and should be protected within a shorter time span.

Response: Comment noted. The current stabilization time frame for steep slope projects that are eligible for coverage under the general permit is 14 days not 7 days as indicated in the comment. The stabilization period is 7 days for projects that receive authorization from the Department or regulated, traditional land use control MS4 to disturb greater than 5 acres at any one time (see Part II.C.3.b.), and for projects that directly discharge to one of the 303(d) segments listed in Appendix E or is located in one of the watersheds listed in Appendix C. The Department will consider making this change as part of the next update.

D. Permit Coverage for Discharges Authorized Under GP-0-10-001

Comment 78: For those seeking continuation of permit coverage for discharges authorized under the Current Permit, DEC must revise the Draft Permit to require compliance with all new provisions. In accordance with 6 NYCRR § 750-1.21, the Draft Permit would allow owners and operators covered under the Current Permit to continue coverage under the Draft Permit as of its effective date. Owners and operators granted continuing coverage are properly directed to comply with most of the new requirements of the Draft Permit, including new ELGs, as of its effective date; however, they are improperly exempt from compliance with Part III.B of the Draft Permit, which governs required contents of a SWPPP. Further, even for those new permit provisions with which the Draft Permit does require compliance, the Draft Permit fails to require the permittee to demonstrate compliance (e.g., by submitting an updated NOI). DEC must fix both of these defects.

Under 6 NYCRR § 750-1.21, upon renewal and/or modification of a general permit, those permitted to discharge under the previous permit are required to comply with the provisions of the renewed and/or modified general permit. There is no basis for exempting these owners or operators from compliance with portions of a renewed and/or modified permit, as Part II.D of the Draft Permit proposes. DEC must require owners or operators continuing coverage under the Draft Permit to comply with all new requirements, including revisions to required SWPPP contents.

An exemption from compliance with required SWPPP contents in Part III.B of the Draft Permit is particularly unfounded given that owners or operators continuing coverage under the Current Permit are required to comply with all other provisions of the Draft Permit, including the new ELGs. Specifically, the new ELGs, as well as post-construction stormwater

management practices contained in Part I.C of the Draft Permit, are required to be included in the SWPPP, along with documentation of control measures and practices that will be used to meet those standards. See Draft Permit, Part III.A. The SWPPP requirements in part III.B of the Draft Permit must be subject to the same standard.

Response: It has been the Department's policy at each of the construction general permit renewals to allow an owner or operator of a construction activity with coverage under the previous general permit (GP-0-10-001) to continue to implement the technical/design components of the SWPPP (see Part III.B.) that were required by the previous permit. However, they must comply with the other, non-design provisions of the new general permit (GP-0-15-002). When establishing this policy, the Department recognized that the post-construction stormwater management practices designed in conformance with the previous version of our technical standard(s) are protective of the receiving waters, therefore, requiring an owner or operator to redesign the practices and incur additional cost could not be justified. The Department did not change this process as part of this permit renewal.

Comment 79: Further, given the new requirements contained in the Draft Permit, those seeking continuing coverage must be required to submit documentation, in the form of an updated NOI, revised SWPPP, and/or comparable information, showing compliance with those new requirements, including the new ELGs. Otherwise, DEC will be unable to ensure that those seeking continuing coverage under the Draft Permit are actually complying with its requirements, as instructed in Part II.D. Allowing permittees to continue coverage under the Draft Permit without documenting compliance with its new requirements amounts to self-regulation, as DEC will have no way of knowing if the new requirements of the Draft Permit are actually implemented.

Response: Pursuant to Part II.D. of the general permit, an owner or operator's coverage under the permit is automatically transitioned over to the new permit as of the effective date, unless otherwise notified by the Department. Based on this language and the fact that the Department typically does not require an owner or operator to redesign the SWPPP when the technical standards change, the completion and submittal of a new Notice of Intent is not necessary.

E. Change of Owner or Operator

No comments received on this Part.

Part III. STORMWATER POLLUTION PREVENTION PLAN (SWPPP)**A. General SWPPP Requirements**

Comment 80: Part III: NYSDEC does not appear to allow for SWPPP modifications addressing the EPA CGP requirements at 7.4. Please add similar language.

Response: Parts III.A. 4 and 5 of the general permit address the SWPPP modification requirements in Section 7.4 of EPA's CGP, therefore, no changes were made.

Comment 81: Part III, A.5, The 14 day response period for SWPPP deficiencies noted by the Department is very general. If there is a high potential for a water quality violation i.e. no protective lining or check dams in a steep ditch, would not a shorter response time limit be appropriate, i.e. 5 calendar days?

Response: The 14 day response period is the maximum time frame for correcting deficiencies. The qualified inspector is expected to use their best professional judgment and take into account the potential for water quality violations in directing corrective actions such that a water quality violation does not occur. The current language in Part III.A.5 of the general permit allows for a shorter response time. Specifically, Part III.A.5 states "Within fourteen (14) calendar days of such notification, or as otherwise indicated by the Department, the owner or operator shall make the required changes to the SWPPP...".

Comment 82: Part III, A.6, In the certification statement I recommend the language change at the end to state "knowingly" submitting ... rather than "that I do not believe to be true".

Response: Comment noted.

B. Required SWPPP Contents

Comment 83: Part III.B.1.b, insert "or nearby properties that are integral to the construction activity" after adjacent boundaries.

Response: The Department does not typically require the owner or operator to identify spoil areas that are located on parcels of land that are not adjacent to the project site. Instead, the Department requires the owner or operator of that off-site parcel to also develop a SWPPP and obtain coverage under the general permit if the disturbance associated with the placement of the spoil is one or more acres of land (5000 SF in NYC East of Hudson Watershed).

Comment 84: Compliance with Future Revisions to the Design Manual (Part III.B.2)The Draft Permit should include a requirement that owners or operators comply with the most recent version of the Design Manual, and, if the Design Manual is revised during the permit term, that they begin using the revised manual within 6 months. Under the Current Permit, post-construction stormwater management practices must be prepared in accordance with the most recent version of the Design Manual, and owners/operators must begin using any revised version of the Manual within 6 months of its effective date. See GP-0-10-001, Part III.B.2. Part III. B.2 of the Draft Permit inexplicably removes this requirement, instead mandating compliance with a dated version of the Design Manual and omitting the language instructing owners or operators to comply with any revisions to the Design Manual within 6 months. Excusing compliance with revisions to the Design Manual undertaken during the term of the Draft Permit undermines the use of the Design Manual as a technical standard for the design and implementation of stormwater management practices. To the extent that new information, technology, and/or standards require revisions to the Design Manual, owners or operators discharging or seeking permission to discharge under the Draft Permit must be required to adhere to the most recent technical standards. Six months is an ample time period for owners or operators to become familiar with any new requirements that may be necessary for maintaining water quality and ensuring that the best controls are implemented throughout the term of the Draft Permit. DEC can easily ensure that owners or operators comply with the most recent technical standards by reinstating the requirement to comply with the most recent version of the Design Manual, including any revisions undertaken during the term of the Draft Permit.

Response: Experience with the referenced language in the permit has indicated that it is unfair to issue a permit with future requirements. It was unreasonable and unrealistic to presume that a 6 month transition period was sufficient for projects to redesign given the established planning, design and review processes in New York State. Feedback from the regulated community informed the Department that 6 months did not fully consider the economic impact to projects that had already started the planning, design and review process with another review authority. The Department will not incorporate future requirements into an existing document to allow for due process and provide the owner or operator the ability to comment on the substance of the requirement. Incorporating something that may be required in the future does not achieve that goal.

C. Required SWPPP Components by Project Type

No comments received on this Part.

Part IV. INSPECTION AND MAINTENANCE REQUIREMENTS**A. General Construction Site Inspection and Maintenance Requirements**

Comment 85: Part IV.A.1: EPA suggests that NYSDEC include pollution prevention activities as part of the requirements for inspection.

Response: Parts IV.A., C.3 and C.4 of the general permit have been updated to address this comment.

B. Trained Contractor Maintenance Inspection Requirements

Comment 86: "Part IV.B has been updated to specify that the "Trained Contractor" shall perform the required maintenance inspections of the erosion and sediment controls being used on the site. This inspection requirement applies to all construction projects that are subject to the general permit."

While it's required for the contractor to have a NYSDEC trained individual on site at all times during soil disturbance activities, they are not careful to ensure that the site is maintained in accordance with the SWPPP. Usually when they are told to maintain or fix a practice, they see nothing wrong with it. It is understandable that cost is a factor to hire an outside trained individual to perform the required inspections, but it may be the only way to ensure it is done correctly. Policing oneself is a challenge, and have found that it doesn't achieve the required results.

Response: There are existing requirements in the general permit that address the concerns expressed in this comment. For instance, Part IV.C requires the owner or operator to hire a Qualified Inspector to perform, at a minimum, weekly inspections for the majority of construction projects subject to the general permit. As part of this weekly inspection, the Qualified Inspector is required to identify corrective actions that must be taken to install, repair, replace or maintain the erosion and sediment control practices; and to correct deficiencies with the construction of the post-construction stormwater management practices. If deficiencies are identified, the Qualified Inspector must then notify the owner or operator and appropriate contractor of any corrective actions that must be taken.

Comment 87: Requiring the Trained Contractor to conduct Maintenance Inspections instead of the Owner/Operator seems to be a good idea. However without a tracking mechanism (daily log, daily report, checklist, etc.) this requirement seems idealistic. How does the Department intend to

enforce, or at least track this requirement? Please note that a qualified inspector is only on site once or at most twice a week.

Response: The inspection performed by the Trained Contractor does not require the preparation of a formal inspection report. This inspection is performed as part of a good site management plan with the contractor checking on the erosion and sediment controls to determine if they need to be repaired, replaced or maintained.

Comment 88: Part IV,B. 1, Inspection and Maintenance requirement "If deficiencies are identified, the contractor shall begin implementing corrective actions within one business day and shall complete the corrective actions in a reasonable time frame" should refer to the contractor fixing the "currently maintained" erosion and sediment control practice, not actually changing and implementing a new practice without a Qualified Inspectors approval.

We ask that the words "currently maintained" or similar language be added to the draft permit so Qualified Inspectors will still be the only individuals that approve corrective actions to the SWPPP. A contractor's responsibility is only to maintain and fix any issues with the current control practices, unless new control measures are added by the SWPPP's Qualified Inspector or Designer.

Response: Part IV.B.1 has been revised to address this comment.

Comment 89: Part IV, B., Delete "Trained" from the titled inspection since a trained employee is a criterion for this inspection.

Response: Part IV.B. has been revised to address this comment.

C. Qualified Inspector Inspection Requirements

Comment 90: Part IV.C.2: Please include a mechanism to increase inspection frequency for dischargers to sensitive waters as per the EPA CGP requirement found at 4.1.3.

Response: The Department has included a requirement for the qualified inspector to conduct at least two (2) inspections in accordance with Part IV.C of this permit every seven (7) calendar days (see Part IV.C.2.e.). The Department feels that this is more protective than EPA's Construction General Permit which requires the owner to conduct inspections once every seven days and after a storm event of 0.25 inches or greater.

In addition, as requested by EPA, the Department has included the following heightened requirement on stabilization for a construction site that directly discharges to one of the 303(d) segments listed in Appendix E or is located in one of the watersheds listed in Appendix C (see Part I.B.1.b.):

“For construction sites that directly discharge to one of the 303(d) segments listed in Appendix E or is located in one of the watersheds listed in Appendix C, the application of soil stabilization measures must be initiated by the end of the next business day and completed within seven (7) days from the date the current soil disturbance activity ceased.”

Comment 91: IV.C.2.d. The owner or operator is required to notify the DEC or MS4 in writing of shut down with partial project completion (SDPPC). This starts a 2 year period where weekly inspections can be ceased before construction begins again or a NOT and final inspection needs to be submitted. The actions required, and timeline that the MS4 needs to perform in order to accept the SDPPC should be added to the permit. These additions would give the MS4’s a clear understanding of their responsibilities and the time frame associated with a SDPPC. Upon submission of the SDPPC, the DEC or MS4 should have a review period (30 days) to inspect the site, provide written response, and inform the owner / operator of deficiencies at the project that need to be addressed prior to acceptance of SDPPC. The SDPPC should go into effect at the end of the review period if the DEC or MS4 does not respond. The MS4 should be required to copy the DEC regional office on all correspondence and acceptance of a SDPPC. If language to this affect was added to the construction permit it would more clearly communicate to the MS4’s what responsibilities they have in the SDPPC process, and would include the DEC in the process.

Response: The Department feels that the current general permit language addresses the changes requested, therefore, no revisions were made. If an MS4’s construction site inspector has additional questions on this provision they can contact the Regional Office stormwater contact person for clarification.

Comment 92: Part IV.C.4: Please require the qualified inspector inspection report to include a description of the pollution prevention measures not being implemented or maintained. We suggest NYSDEC also include in this part the waste and litter control practices that are not being implemented or maintained.

Response: Parts IV.C.3 and C.4 of the general permit have been updated to address this comment.

Comment 93: Part IV.C.5: Please include a signed corrective action report as per the EPA CGP parts 5.4 and 5.43 and include this report as part of the record keeping requirements.

Response: The final general permit includes a requirement for the qualified inspector to identify and report on the status of all corrective actions. See Part IV.C.4.k. of the final permit.

Comment 94: Part IV, C., Delete “Qualified Inspector” from this title for the same reason and call it “Compliance” or “SPDES Compliance” to differentiate them.

Response: Comment noted.

Comment 95: Part IV, C.2.c and d, The sentences in these paragraphs are lengthy and can be confusing. These should be shortened for clarity.

Response: Comment noted.

Comment 96: Will Qualified Inspectors be required to incorporate Effluent Limitation criteria into their inspections? Will they be required to certify that the Effluent Limitation Guidelines are being met?

Response: Part IV.C.3 of the general permit requires the Qualified Inspector to inspect the erosion and sediment controls measures to ensure that the installation, implementation and maintenance of the erosion and sediment control measures is being done in accordance with the SWPPP and New York State Standards and Specifications for Erosion and Sediment Control, therefore, this should not result in any changes to their current inspection protocol.

Part V. TERMINATION OF PERMIT COVERAGE

A. Termination of Permit Coverage

Comment 97: Part V.A: Please add a Part V.A.6 which requires permittees to submit the Notice of Termination (NOT) within 30 calendar days after any one of the triggers in NYSDEC Part V.A.2 are met as per EPA CGP 8.4.

Response: The current process of not requiring the NOT to be submitted within a specific time frame works well and has not created any issues, therefore, no changes were necessary.

Comment 98: Part V.A.4. requires owners or operators of construction activities subject to the requirements of MS4s to obtain a MS4 official’s

signature on the “MS4 Acceptance” statement on the NOT. As a representative for over two dozen MS4s, we might point out there is an apparent disconnect between different New York State departments with regard to construction site inspector training. Many MS4s have chosen to use their Building Inspectors or Code Enforcement Officers as the personnel responsible for conducting the MS4 storm water construction site compliance inspections. These Officers are required by NYS DOS to complete 24 hours of DOS-certified training annually to maintain their certification. However, the four-hour erosion and sediment control course currently required by DEC is not a DOS-certified course. Furthermore, we are not aware of any DOS-certified courses that address construction site storm water runoff control or post-construction storm water management. Officers schedules are normally very demanding, so much so that 24 hours is all they can devote to training per year. Given the importance placed on surface water quality and the storm water program by New York State, we would suggest that the DEC and DOS work together to provide certified storm water training to Officers. Officers frequently visit and inspect active construction sites and can have a major role in protecting water quality from construction site storm water discharges. We respectfully suggest the departments work together to develop a certified course that would satisfy both the DEC qualified inspector training and the DOS Officer annual certification training courses.

Response: The Department’s 4-Hr Erosion and Sediment Control and 2-Hr Site Plan Review for Code Enforcement Officers courses have been approved by the NYS DOS. Individuals that take this course are eligible for Code Enforcement Officer credits through the DOS. A number of the certified trainers that give this course have been authorized by DOS to give this course for credits. Individuals that plan on taking this course should ask the trainer if they will be offering the course for DOS credits. The course numbers are 49-5940 (4-Hr course) and 49-5884 (2-Hr course).

Comment 99: In Part V (Termination of Permit Coverage), public utilities are called out specifically in A. 5.d. We ask if this is intended to apply to linear utility facilities as well.

Response: The term “public utility” does apply to linear utilities, such as gas and electric transmission lines.

Comment 100: Part V, A.2.a, insert the following in the last sentence, ... post construction stormwater management practices have been “documented by as-built surveys that they have been” constructed in

conformance with....This will aid the QI, who is not necessarily a surveyor, in validating compliance.

Response: The Department has decided not to require as-built drawings of the post-construction stormwater management practices at this time.

Part VI. REPORTING AND RETENTION OF RECORDS

A. Record Retention

Comment 101: Currently the draft permit reads that, “The owner or operator shall retain a copy of the NOI, Acknowledgment Letter, SWPPP, MS4 Inspection form and inspection records that were prepared in conjunction with this permit for a period of at least five (5) years from the date that the site achieves final stabilization.” MS4s have been encouraged to track down owner operators to have them file a Notice of Termination, particular for open SWPPPS for completed projects. This way the site inspection obligations tied to stabilized construction sites can be dropped by the MS4 and the Construction Activity Permit SPDES Permit can be re-categorized in the CGP SPDES database as terminated. Tracking down “old” Construction Activity Permits and related contact information to close out these open SWPPPs has proven to be difficult. If stabilization occurred five years ago, than according to this language, records can be purged. The MS4s, however, may still need this CGP permit data. Therefore to make sure the necessary records are available for as long as possible, we recommend that this permit language be changed to read, “The owner or operator shall retain a copy of the NOI, Acknowledgment Letter, SWPPP, MS4 Inspection form and inspection records that were prepared in conjunction with this permit for a period of at least five (5) years from the date that the site receives a Notice of Termination from NYSDEC.” This will help to maintain a paper trail of Construction Activity Permit related activity, potentially of benefit to MS4s. The status of dormant projects and their related permit coverage is often cloudy for all involved; MS4s, owner-operators, and regulators alike. All players must contend with staff turnover, which often includes the random purging of records.

Response: Part VI.A. of the general permit has been updated to address this comment.

B. Addresses

No comments received on this Part.

Part VII. STANDARD PERMIT CONDITIONS

Comment 102: NYSDEC's Standard Conditions do not include bypasses or upsets as per EPA CGP Appendix I.13 and 14. How does NYSDEC address bypasses and upsets?

Response: The Department determined that changes to the general permit were not necessary.

A. Duty to Comply

Comment 103: If human remains are found on a jobsite is the Regional Water Engineer (RWE) the most appropriate contact?

Response: The Regional Water Engineer is just the first point of contact at the Department. The Department has established an internal policy that documents the process for addressing these situations.

B. Continuation of the Expired General Permit

No comments received on this Part.

C. Enforcement

No comments received on this Part.

D. Need to Halt or Reduce Activity Not a Defense

No comments received on this Part.

E. Duty to Mitigate

No comments received on this Part.

F. Duty to Provide Information

No comments received on this Part.

G. Other Information

No comments received on this Part.

H. Signatory Requirements

No comments received on this Part.

I. Property Rights

No comments received on this Part.

J. Severability

No comments received on this Part.

K. Requirement to Obtain Coverage Under an Alternative Permit

No comments received on this Part.

L. Proper Operation and Maintenance

No comments received on this Part.

M. Inspection and Entry

No comments received on this Part.

N. Permit Actions

No comments received on this Part.

O. Definitions

See Appendix A below.

P. Re-Opener Clause

No comments received on this Part.

Q. Penalties for Falsification of Forms and Reports

No comments received on this Part.

Comments on APPENDIX A – Definitions

Comment 104: Impervious Area, It is clear that a gravel surface is considered to be impervious. Would a driveway, road or substation pad consisting of non-compacted washed #1 and #2 stone be considered impervious?

Response: If these surfaces are maintained so that they continue to effectively infiltrate rainfall, the Department would consider them to be pervious. See definition of “Impervious Area (Cover)” in Appendix A of the general permit.

Comment 105: The definition of “impervious area” should be revised to expressly include dirt roads and all other compacted soils. The definition of impervious area in Appendix A of the Draft Permit should be revised to include dirt roads and all other compacted soils. While the

Draft Permit defines impervious area as “all impermeable surfaces that cannot effectively infiltrate rainfall,” dirt roads and other compacted soils are inexplicably excluded from examples that include paved, concrete and gravel surfaces. This is inconsistent with information on stormwater runoff provided by EPA, which includes “compacted soils” in its list of common impervious surfaces. Accordingly, DEC should revise the definition of impervious area in the Draft Permit to expressly include dirt roads and all other compacted soils. As noted in point B.2.c, below, the definition of impervious cover in the Design Manual should also be similarly revised.

Response: The Department agrees that dirt roads and other compacted soils can behave like impervious areas with regards to runoff and pollutant potential. However, the Department does not believe that there is a need to categorize them as impervious cover as this would diminish the protections currently provided and they are effectively addressed in the general permit and Design Manual as follows:

Dirt roads and compacted soils are not considered as impervious surfaces and would not be afforded the alternate sizing criteria for redevelopment. Any disturbance and reconstruction on these areas must meet the requirements of new development. Specifically:

Dirt roads would not be allowed to terminate coverage under the general permit as this would not be considered as achieving “final stabilization”. Stabilized roads would be considered to be impervious cover (unless stabilized by use of permeable pavement) for the purposes of siting and sizing post construction stormwater controls.

Compacted soils resulting from development must be restored using the soil restoration techniques in the Design Manual. Failure to apply the soil restoration techniques would require these areas to be treated as impervious when determining WQv and would be assigned a higher Hydrologic Soil Group (HSG) for estimating runoff.

Comment 106: Can DEC provide clarification as to how “utility” is defined, as used in various parts of this document?

Response: Utility, as used in this general permit, means a service such as, gas, electric, water, sewer, telephone, fiber-optic cable and cable TV.

Comment 107: Clearer qualifications restrictions for the various persons involved are needed.... the SWPPP preparer and SWPPP reviewer qualifications are especially vague and need better definition.

Response: Part III.A.3 of the general permit defines who can prepare a SWPPP that requires post-construction stormwater management practices. SWPPP review is addressed by the MS4 General Permit.

Comment 108: Include "Duly Authorized Individual" in definitions.

Response: Part VII.H.2 addresses this comment.

Comment 109: "Performance Criteria": The draft Permit defines "performance criteria" to mean "the design criteria listed under the 'Required Elements' and 'Design Guidance' sections in Chapters 5, 6, and 10 of the technical standard, New York State Stormwater Management Design Manual, dated (pending)." The feasibility matrices in Chapter 7 of the Design Manual should also be included in the definition of "performance criteria" because these matrices list physical characteristics and criteria that directly impact performance of post-construction stormwater management practices.

Response: The criteria identified in the matrices of Chapter 7 are guidance, therefore, was not included in the definition for "Performance Criteria". The final definition of "Performance Criteria" in Appendix A has been modified to only reference the "Required Elements" identified in Chapters 5, 6 and 10 of the Design Manual.

Comment 110: "Routine Maintenance Activity": The draft Permit defines "routine maintenance activity" to mean "construction activity that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of a facility," and lists several activities that meet the definition, DEC should include re-establishing vegetative or structural stabilization of roadside ditches in this list of activities.

Response: The third and fourth items in this definition address this comment, therefore, no changes have been made.

Comment 111: "Steep slopes": DEC italicizes "steep slopes" in the draft Permit at page 6, indicating that "steep slopes" is a defined term, but Appendix A does not contain a definition of "steep slopes." DEC should define this term.

Response: The term "steep slope" has been defined in Appendix A.

Comment 112: Other - "Redevelopment Activity": The draft updates to Chapter 9 of the Stormwater Management Design Manual redefine "redevelopment activity," DEC should include this definition in Appendix A. In addition, the draft updates to the Stormwater Management Design Manual define "redevelopment activity" to include restoration of impervious surfaces that had been removed within the previous five years. DEC should describe what evidence an applicant may offer to demonstrate that the impervious surface had been removed within the previous five years.

Response: A definition for "Redevelopment Activity" has been included in Appendix A. Documentation that would be acceptable to show the time frame for impervious cover removal include but are not limited to: building permits for demolition, dated survey maps, aerial images, and photographs with date stamp showing the impervious area.

Comment 113: Define 'Best Management Practices' in the permit (see Part 1.B.1) or delete the phrase.

Response: This language has been removed from the final general permit.

Comment 114: Part I, B.1.a. (vi), there is no definition for the term "buffers" noted here; this should also be added to the glossary.

Response: See response to comment 3.

Comment 115: *Qualified Professional* – please insert: "... All components of the SWPPP that involve the practice of engineering, ... or under the direct supervision of, a professional engineer or registered landscape architect licensed to practice... ."

Response: Comment noted. However, based on NYS Education Law, the Department feels that the current definition is adequate.

Comment 116: Can a more definitive definition be stated for final stabilization, specifically 80% vegetative cover. Many owners read this as 80% of the overall site, not 80% on any one specific area (Ellen used to use a hoola hoop area, we use a 1'x1' area). Having a more definitive description of the area needed 80% coverage would reduce a lot of confusion.

Response: The NYS Standards and Specifications for Erosion and Sediment Control (Blue Book) is currently being updated. The Department will consider

adding pictures to the Blue Book as part of the update that would show examples of a uniform, perennial vegetative cover with a density of eighty (80) percent.

Comments on APPENDIX B - Required SWPPP Components by Project Type

Comment 117: Appendix B Table 1: EPA believes that NYSDEC should require the following projects for post construction BMPs and included in Table 2: Installation of underground, linear utilities, such as gas lines, fiber-optic cable, cable TV, electric, telephone, sewer mains, and water mains.

Response: The Department determined that changes to the general permit were not necessary.

Comments on APPENDIX C -Watersheds Where Enhanced Phosphorus Removal Standards Are Required

No comments received on Appendix C.

Comments on APPENDIX D

No comments received on Appendix D.

General Comments

Comment 118: When will the NYS Erosion & Sediment Control Manual (“Blue Book”) be updated? The details within the manual are outdated and some reference trade products that are obsolete or deemed unacceptable practices by NRCS and IECA. Additionally, proprietary erosion control devices should be added (or allowed to be added) to this manual that better address erosion and sediment control than the practices within the current manual. We’re getting MS4s rejecting our erosion control plans because they do not contain details within the Blue Book some of which are completely inappropriate for what we are designing. Their justification for the rejection is that the Blue Book is the standard, regardless of how useless or inappropriate they know it is. (AKA blindly following beauracratc rules). Some simple common sense needs to be used when reviewing and updating this manual rather than copying another state’s manual or referencing standard details from the 1980s.

Response: The Blue Book is currently being updated. The update will include a section that addresses the review and acceptance process for proprietary practices. The Department plans on finalizing the update in the next few months. Once the draft is finalized, we will seek comments on the changes through a public notice process.

Comment 119: It appears that the Design Manual section/chapter references throughout the Draft Permit correspond with the August 2010 version of the Design Manual. Given that the Department intends to update the Design Manual, we recommend the Department match these references once the revisions to the Design Manual are finalized.

Response: The final permit has been updated to address this comment.

Comment 120: Can the Department provide a mapping tool that includes 5th order or larger streams known to exist in the State?

Response: The Department will consider this request after the general permit is issued.

Comment 121: Does the Department have a tracking system/database to help owners determine whether someone has received the four (4) hours of Department endorsed training in proper erosion and sediment control principles from a Department endorsed Entity? How does the Department expect the owner to verify contractor compliance with this requirement?

Response: The Department maintains a database of individuals that have completed the 4-Hr Erosion and Sediment Control course. You can contact the Division of Water, Stormwater Permit Section in Albany (518-402-8114) to determine if someone has completed the course. An owner or operator can also request to see a copy of the individual's wallet card or certificate that they receive after completing the course.

Comment 122: If a project is located across multiple traditional land use control MS4 jurisdictions is the applicant required to obtain a MS4 acceptance form from each traditional land use control MS4? If so, is the Department therefore requiring the Applicant to develop a SWPPP that complies with the requirements of several different MS4 entities?

Response: Yes, the owner or operator must have their SWPPP reviewed and accepted by each of the regulated, traditional land use control MS4s. As required by Parts VII.4. and 5. of the SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (GP-0-10-002), the regulated MS4 must have a stormwater program for construction activity that provides

equivalent protection to the Department's SPDES General Permit for Stormwater Discharges from Construction Activity.

Comment 123: If a project is located within a traditional land use control MS4, but no formal local review or approval is required (planning board, town board review, highway permit, etc.) does an applicant still have to obtain an MS4 acceptance form? If the answer is "no", and assuming the GP 10-001 NOI form is still applicable to GP 15-002, how would the applicant answer Question 42 on the NOI? Is it prudent to submit a cover letter with each NOI in order to explain and clarify to the Department all ramifications and owner opinions/interpretations associated with MS4 involvement?

Response: As required by Parts VII.4 and 5 of the SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (GP-0-10-002); regulated, traditional land use control MS4s are required to develop, implement and enforce a stormwater program for construction activity that provides equivalent protection to the Department's SPDES General Permit for Stormwater Discharges from Construction Activity. Therefore, they should be reviewing, with a few exceptions, the SWPPPs for all construction projects required to obtain coverage under the SPDES General Permit for Construction Activity.

Comment 124: At various locations in the draft permit the New York State Standards and Specifications for Erosion and Sediment Control, dated August 2005, is referenced. Would it be more appropriate to call for the compliance with "the most recent version" (as it is referred to in the current permit), especially given the pending update to the Blue Book.

Response: The Department does not incorporate future requirements to allow for due process and provide the owner or operator the ability to comment on the substance of the requirement. Incorporating something that may be required in the future does not achieve that goal.

Comment 125: Currently it is required that both the SWPPP preparer and the Owner/Operator have a NY.gov account to submit an eNOI. Would it be simpler to just have only the SWPPP preparer have an account.

Response: The process for completing the eNOI now allows an owner or operator's design professional to complete and submit the eNOI. Therefore, the owner or operator no longer needs to establish a NY.Gov account.

Comment 126: Post Construction Maintenance Inspections of Stormwater Management Practices: Several revisions are proposed to the GP relating to ponds including that inspection and maintenance of all safety elements

be performed annually. I would recommend that the GP be more specific with respect to inspector qualifications and documentation requirements.

Response: The Department recommends that the post-construction stormwater management controls be inspected by, at a minimum, an individual that meets the *Qualified Inspector* definition in Appendix A of the general permit. The Department did not make this a requirement of the Construction general permit because these inspections are performed after the owner or operator terminates their coverage under the general permit.

Comment 127: Has a grandfather time frame been established for both the updated Design Manual and General Permit? At a minimum, the grandfather clause that was established with the 2010 Design Manual update that stated any project that had obtained municipal preliminary approvals prior to the 2010 Design Manual update were grandfathered should remain intact and remain applicable through this current update. The economy is slowly recovering and it would be an undue burden to owners to have to re-design and re-layout projects planned and approved prior to the 2010 Manual to have to adhere to these new updates and design criteria.

Response: Pursuant to Part II.D. of the general permit, an owner or operator of a construction activity with coverage under the previous general permit (GP-0-10-001) as of the effective date of the new general permit (GP-0-15-002) shall be automatically permitted to discharge in accordance with GP-0-15-002, unless otherwise notified by the Department. An owner or operator can continue to implement the technical/design components of the SWPPP that were required by GP-0-10-001, however, they must comply with the other, non-design provisions of the new general permit, GP 0-15-002.

For construction projects where the owner or operator can meet the criteria in the New York State Stormwater Management Design Manual 2010 Update Transition Policy but never obtained coverage under the previous SPDES General Permit for Stormwater Discharges from Construction Activity (GP-0-10-001), the Department will evaluate the post-construction stormwater management controls requirements on a project by project basis and determine if the project can still apply the 2010 Transition Policy.

Comment 128: Very helpful to issue relevant updated checklists and forms with the permit (e.g. SWPPP review, Construction Inspection, SWPPP Acceptance, etc.), particularly forms that reference permit requirements directly.

Response: The Department will update all forms that are required by the general permit as part of this renewal.

Comment 129: DEC Must Revise the Draft Permit to Provide the Public an Opportunity to Comment Upon and Request a Hearing on Notices of Intent (NOIs) and Stormwater Pollution Prevention Plans (SWPPPs) for Activities Seeking Authorization to Discharge

Response: Public participation on NOIs and SWPPPs is not a requirement of the Clean Water Act or New York State law. Recent court decisions have confirmed that a general permit for stormwater discharges from construction activities does not have to provide an opportunity for public review, comment and/or hearing on any particular NOI or SWPPP. Requiring public notice and hearings on each NOI and SWPPP would represent a fundamental change to the established authorization process and would require a change to New York State law and regulation.