



Responsiveness Summary
For
Public Comments Received
On the
NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
SPDES GENERAL PERMIT
FOR STORMWATER DISCHARGES

From

Municipal Separate Storm Sewer Systems (MS4s)

Permit No. GP-0-10-002

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

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 a NPDES-approved program with permits issued in accordance with the Environmental Conservation Law (“ECL”).

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 MS4s, GP-0-10-002.

The draft general permit was published for public review and comment in the Environmental Notice Bulletin (ENB) on October 28, 2009 with comments being due by December 16, 2009. The Department extended the public comment period in the December 16, 2009 ENB with comments due on January 15, 2010.

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. Frequently raised issues are summarized and presented a one set of comment. The number associated with commenter appear at the end of each comment.

In preparing response to the comments the following principles have been applied:

Comments on language in MS4 general permit that has not changed and the Department does not believe warrants further response: These comments refer to a condition or language in the MS4 general permit that has not been modified in the draft GP-0-10-002. Pursuant to 6 NYCRR 750-1.18(e), “[w]hen a permit is modified; only the aspects of the permit that are modified are subject to public review.” Such comments, while being kept on the record for future consideration, are currently being addressed as: “Comment does not concern the proposed updates to the MS4 general permit.”

Comments on language/condition in MS4 general permit that has not changed but the Department believes warrant further response: This comment refers to a condition or language in the MS4 general permit that has not been modified in the draft GP-0-10-002. Pursuant to 6 NYCRR 750-1.18(e), “[w]hen a permit is modified; only the aspects of the permit that are modified are subject to public review.” However, the Department provides a response to address these comments.

Comment 1: Highways and Transportation MS4s -Major transportation agencies (e.g., NYSDOT, NYSTA) should have individual permits because highway projects and other linear transportation projects pose their own unique issues and are a major source of polluted runoff.(45)

Response: To address the requirements that apply to non-traditional MS4s the Department has developed Part VIII in the MS4 permit that addresses requirements for non-traditional MS4s including transportation agencies. The Department may further refine the permit language through improvement to the general permit to address more specific requirements in future renewals or by developing guidance documents. Where the Department believes a general permit will not protect water quality an individual permit may be required (6NYCRR 750-1.21(e)).

The commenter has not identified any Federal or State statutes and/or regulations related highway and transportation MS4s that must be met or are failing to be met. There is no legal requirement to address highway and transportation MS4s through individual permits. With respect to highway and transportation MS4s, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 2. The permit should exempt dredging activities which are already capably regulated by New York’s tidal wetland act and the US Army Corps’ Rivers and Navigation Act. (15)

Response: This comment relates to the Construction general permit and not the MS4 general permit.

Comment 3. The jurisdiction covered by the permit requirements should only cover lands (and roads) that are in the runoff watershed of a given water body. A provision for exempting lands that are storm-water isolated either by topography, recharge basins and the like from receiving water bodies should be part of the particularly so, if local laws already limit runoff via building permits and other permits, in our case, the natural resources special permit and planning board subdivision regulations that have long been in existence. (15)

Response: All areas automatically designated by Phase II stormwater regulation are required to gain coverage under MS permit. If any areas within regulated MS4s do not contribute to the waters of New York, they will be considered disconnected and no outfall for their drainage area will be identified. However, all minimum control measures still apply to those regulated areas.

Comment 4: Part II should require that the NOIs submitted by continuing MS4s contain a certification that a SWMP Plan has been prepared and indications about how and where the public may gain access to this Plan. For newly designated MS4s, further public participation in the SWMP and SWMP Plan development process is required. NOIs from these prospective permittees must contain some description of the opportunities and roles afforded to the public during the development of the SWMP and associated Plan. (45)

Response: Part V.D. requires the annual report certification. Part V.C.3.c.requires that the annual report contain: “Results of information collected and analyzed, monitoring data, and an assessment of the small MS4's SWMP progress toward the statutory goal of reducing the discharge of pollutants to the MEP during the reporting period. This could include results from required SWMP reporting, estimates of pollutant loading (from parameters such as identified illicit discharges, physically interconnected small MS4s that may contribute substantially to pollutant loadings from the small MS4) and pollutant load reductions (such as illicit discharges removed). This assessment may be submitted as an attachment;”

Part VII.A.2.b.iv states MS4 must “develop and implement a public involvement/participation program that: provide the opportunity for the public to participate in the development, implementation, review, and revision of the SWMP.” Part V.C.3.i. requires a statement that the final report and, beginning in 2009, the SWMP plans are available for public review and the location where they are available. As set forth in Part II. B. of the MS4 general permit, the department is making the location of the SWMP plans available via the Environmental Notice Bulletin by posting NOI information that includes the location of SWMP plans. Therefore, the comment regarding the SWMP Plan and public participation has been addressed.

The document cited in the comment, “Implement the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s” states that it “provides interim guidance to EPA and State NPDES permitting authorities pending a rulemaking to conform the Phase II rule to the court's order.” There is no federal regulation that would conform the Phase II rule to the court's order. Also, the memorandum clearly states that it is guidance. As supported by case law, guidance documents are not authoritative or binding interpretations. e.g., Devon Energy Corporation v. Secretary of the Interior, 551 F.3d 1030, 1040 (D.C. Cir. Court 2008). “[Agency actions do not have the force of law unless they “mark the consummation of the agency's decision-making process” and either determine “rights or obligations” or result in discernible “legal consequences” for regulated parties.” Bennett v. Spear, 520 U.S. 154, 177-78, 117 S. Ct.

1154, 137 L. Ed. 2d 281 (1997). The EPA memorandum cannot be said to “mark the consummation of the agency’s decision-making process” because a rulemaking process, which includes public participation, must be undertaken to address the court’s decision. Furthermore, Envtl. Def. Ctr. v. EPA is a 9th Circuit case, and therefore, not binding on New York, which is in the 2nd Circuit.

With respect to public participation on the SWMP Plan, the commenter has not correctly identified any Federal or State statutes or regulations that must be met or are failing to be met. Additionally, there is no legal requirement for the suggested revisions to the MS4 general permit regarding the SWMP Plan. The MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 5: The question of overlapping jurisdictions is not addressed. For example, the county owns roads which the towns manage. County Vector control has jurisdiction, either by default or past maintenance practices, and its ditches and culverts are its sole responsibility in most cases, even though they may drain stormwater from private and non-county public lands. (15)

Response: Comment does not concern the proposed updates to the MS4 general permit.

Comment 6: It is our understanding that DEC has established a policy where permit holders may move forward with a project sixty days after notification to DEC, unless DEC has submitted an objection. We believe this same standard should be applied to any review process undertaken by an MS4 authority and ask for an inclusion of this fact within the permit. (31)

Response: Comment does not concern the proposed updates to the MS4 general permit. This is a construction general permit issue. In a regulated MS4, the timeline for the review of SWPPP by MS4s is established based on the local review process.

Comment 7: To limit this certification to a principal executive officer or ranking elected official is not practical here in the Town. What training or education is required to be a duly authorized representative? I am a Registered Architect, does this meet the minimum requirements of the Permit or must I receive additional training? (20)

Response: The principle executive officers are allowed to delegate the certification. See Part VI.J.2 of the MS4 general permit. Examples are provided

in the permit and more examples will be provided in the future on the Department's website.

Comment 8. Notices of Intent (NOIs) to Obtain Coverage Under the New Permit

Part II.B.c – To obtain coverage under the Permit, a MS4 should be required to get confirmation from the Department that the NOI is not only “complete,” but also a finding by the Department that, based on the NOI, the MS4 has a legally adequate Stormwater Management Program that complies with the Permit. See *Envtl. Def. Ctr. v. EPA*, 344 F.3d 832 (9th Cir. 2003); USEPA, Memorandum from James A. Hanlon, Director, Office of Wastewater Management to Water Management Division Directors, Regions I – X, “Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s” (April 16, 2004). (45)

Response: The determination that a SWMP is sufficient is made once the SWMP is developed. The MS4 Permit provides 3 years for MS4s to develop SWMP plans, and therefore, an immediate determination upon the receipt of a complete NOI that a SWMP plan is sufficient is not practical. A complete (all sections filled out and signed by the proper official) and acceptable (appropriate management practices for the municipality have been selected) NOI can serve as the MS4's initial SWMP.

*The document cited in the comment, “Implement the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s” states that it “provides interim guidance to EPA and State NPDES permitting authorities pending a rulemaking to conform the Phase II rule to the court's order.” There is no federal regulation that would conform the Phase II rule to the court's order. Also, the memorandum clearly states that it is guidance. As supported by case law, guidance documents are not authoritative or binding interpretations. e.g., *Devon Energy Corporation v. Secretary of the Interior*, 551 F.3d 1030, 1040 (D.C. Cir. Court 2008). “[Agency actions do not have the force of law unless they “mark the consummation of the agency's decision-making process” and either determine “rights or obligations” or result in discernible “legal consequences” for regulated parties.” *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). The EPA memorandum cannot be said to “mark the consummation of the agency's decision-making process” because a rulemaking process, which includes public participation,*

must be undertaken to address the court's decision. Furthermore, Envtl. Def. Ctr. v. EPA is a 9th Circuit case, and therefore, not binding on New York, which is in the 2nd Circuit.

With respect to obtaining coverage under the MS4 general permit, the commenter has not correctly identified any Federal or State statutes or regulations that must be met or are failing to be met. Additionally, there is no legal requirement for the suggested revisions to the MS4 general permit regarding new MS4s. The MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 9: What happens if GP-0-10-002 is not effective as of May 1, 2010? Couldn't this just say coverage under GP-0-08-002 will be continued for 180 days from the effective date? (7) (35)

Response: The permit will be issued with an effective date of May 1st, 2010.

Comment 10: Municipalities with current coverage under GP-0-08-002 that originally filed the Notice of Intent to be covered under GP-02-02 years ago should not have to file another NOI. These Phase II communities should be "grandfathered". At the present time, it is our intention to review the new updated Annual Report Form when it becomes available and hope to use it for this past year's activities to avoid having to fill out another NOI. As is the case however with any new form of substantial size, there are likely to be interpretive difficulties with some of the content. (8)

Response: Submittal of the 2010 Annual Report is used as a mechanism for automatic transition under the new permit. See Part II.2.C. of GP-0-10-002.

Comment 11- This section states that covered entities may gain coverage under GP-0-10-002 by using the updated annual report form when submitting their 2009 annual reports in June 2010. Many MS4s will begin preparing their annual reports in at the end of the program year, on March9. Because the updated annual report form will reflect changes finalized in the new permit (anticipated for May 2010), it seems unlikely that the updated annual report form will be available by March10, 2010. (13) (35)

Response: Revised Annual Report forms have already been made available.

Comment 12: How will Villages within those Towns already designated as MS4s be included in the program (Villages of Dryden and Freeville within the Town of Dryden and the Village of Trumansburg within the Town of Ulysses)? (43)

Response: MS4s should consult with their own attorney regarding the process of petitioning for coverage under the MS4 general permit.

Comment 13: Is the requirement to gain coverage for any small MS4 not previously authorized only indicated by "... receiving written notification from the Department that a permit for discharges from MS4s is required..."? (32)

Response: GP-0-10-002 specifies that in order for stormwater discharges from small MS4s to be newly authorized under this SPDES general permit, an operator must prepare an NOI, using the form provided by the Department, within 180 days of receiving written notification from the Department.

Comment 14: We appreciate the equivalency of the new NOI submission requirements with the standard submission of the Annual Reporting Form. This will save MS4s time and money on the "paper pushing" aspects of their Storm Water Management Programs. (34)

Response: Comment noted.

Comment 15: What if the permit is not effective May 1, 2010? The section is not easy to read, especially the sentence "Covered entities may gain coverage under GP-0-10-002 by using the updated annual report in submission of their 2009 updated annual report in June 2010." What if the Regions don't get comments back to the MS4 before the 180 days is up (since the annual report is the NOI for this permit)? If there are any issues and the DEC determines an annual report as unacceptable, an MS4 will only be covered for another 14 days. What happens after the 14 days while the MS4 prepares an application for an individual permit and the DEC reviews the application? (36)

Response: The MS4 general permit will be issued with an effective date of May1, 2010. Department has established procedures to address compliance issues. This process is established by TOGS 1.4.2.

Comment 16:

Part II.C – MS4s with coverage under the existing permit should be required to submit actual NOIs certifying that they meet all requirements of the revised permit. These NOIs should be subject to the notice and comment provisions in Part II.B. The draft permit proposes to allow MS4s covered by the existing Permit to use annual reports in lieu of NOIs to obtain coverage under the new Permit. But annual reports – particularly annual reports on a prior year’s efforts to implement of an expired Permit – would not contain the information necessary to demonstrate that the MS4 is in compliance with all new requirements of the revised permit. (45)

Response: Part II.C. of the MS4 general permit states “For public participation purposes, the updated annual report form will be considered equivalent to submission of an NOI.” In Part VII.A.2.b. and d., the MS4 general permit does provide the public with an opportunity to review and comment on an NOI/Annual Report.

The modified Annual Report reflects the changes made for GP-0-10-002. Additionally, the modified Annual Report contains language to verify that this submittal is considered an acknowledgment of maintaining compliance with all new requirements of the revised MS4 general permit. The report is signed under penalty of perjury, thereby providing an additional safeguard in the process.

The document cited in the comment, “Implement the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s” states that it “provides interim guidance to EPA and State NPDES permitting authorities pending a rulemaking to conform the Phase II rule to the court’s order.” There is no federal regulation that would conform the Phase II rule to the court’s order. Also, the memorandum clearly states that it is guidance. As supported by case law, guidance documents are not authoritative or binding interpretations. e.g., Devon Energy Corporation v. Secretary of the Interior, 551 F.3d 1030, 1040 (D.C. Cir. Court 2008). “[Agency actions do not have the force of law unless they “mark the consummation of the agency’s decision-making process” and either determine “rights or obligations” or result in discernible “legal consequences” for regulated parties.” Bennett v. Spear, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). The EPA memorandum cannot be said to “mark the consummation of the agency’s decision-making process” because a rulemaking process, which includes public participation, must be undertaken to address the court’s decision. Furthermore, Env’tl. Def. Ctr. v. EPA is a 9th Circuit case, and therefore, not binding on New York, which is in the 2nd Circuit.

With respect to obtaining coverage under the MS4 general permit for existing MS4s, the commenter has not correctly identified any Federal or State statutes or regulations that must be met or are failing to be met.

Additionally, there is no legal requirement for the suggested revisions to the MS4 general permit regarding existing MS4s. The MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 17: *Part II.C ...For public participation purposes, the updated annual report form will be considered equivalent to submission of an NOI. The draft General Permit contains no procedures addressing how public comments will be responded to. Will the regulated MS4 submitting the NOI be notified of any comments and will the regulated MS4 have an opportunity to address comments? In addition, there is no provision in the General Permit for modification of an NOI. (33)*

Response: The NOTS and NOIs are modified to address the updates to the MS4 general permit. The public comments on the annual reports are submitted to the MS4s, but must also be submitted to the Department. MS4s will have 28 days to respond to public comments, based on which the Department will make a determination on the need for an individual permit.

Comment 18: Operators of small MS4s whose jurisdiction includes regulated and unregulated areas are encouraged to include their entire jurisdiction in their SWMP (refer to Part II.D). This statement is misleading in that it states it is still up to the MS4 to extend their program to their municipal boundaries. The Authority/Corporation suggests that this paragraph be modified to include the new requirement provided in the definitions sections. Automatically designated MS4 areas are extended to Town, Village or City boundaries, but only for Town, Village or City Implementation of Minimum Control.(41)(18)

Response: Comment noted. Part II.F. of the MS4 general permit is intended for voluntary expansion of all the MCMs. Modification has been made to clearly state that the expansion for MCMs 4 and 5 is required for traditional land use control MS4 and is not applicable for other MS4s. Part II.F of the MS4 general permit now states: "Operators of traditional land use control MS4s must extend the implementation of minimum control measures (MCMs) 4 and 5 in accordance with Criterion 3 of the Designation Criteria or apply for a waiver, if eligible"

Comment 19: Several comments focused on the formation of a single entity (SE) to represent watersheds and MS4 coalitions. While this concept was generally viewed as positive, a number of commenters asked for examples of how this is already working or could work. It was suggested that DEC should closely track the issues raised by the involved parties already attempting this during this next permit period, and if necessary, then make revisions necessary to strengthen and solidify this component of the permit. Also, Part II.E. should be revised to clarify that the SE can implement all or part of an MCM. On municipality commented that while fostering regional cooperation will benefit the MS4 program, making this a mandatory requirement is unreasonable and violates a fundamental principal of New York State - home rule. In addition, language should be included in this section of the permit to guide MS4s relative to their jurisdictional responsibilities when a municipality lies in more than one watershed and a single entity is responsible for compliance within only one of those watersheds. Coverage by a single watershed based entity may result in a permit violation if requirements are not addressed by the individual MS4 outside of that watershed area. (5)(7)(13) (14) (39) (34) (43)

Response: Formation of a single entity is not mandated by the permit. A single entity is an entity with the legal authority and capacity (financial, resources, etc.) that gains coverage under the MS4 general permit to implement MCMs or parts of the MCMs within a jurisdiction. Where a single entity is authorized under the MS4 general permit, the MS4 within that jurisdiction will be able to terminate its coverage under the MS4 general permit for the specific MCMs. Home Rule is not violated because the structure will allow a single entity to implement MCMs or parts of MCMs, and formation of a single entity is not mandatory.

While yet there are no established single entities in New York State, this provision allows the formed single entity to utilize various mechanisms to meet SWMP program requirements (e.g. certain maintenance activities, illicit discharge detection, septic system inspection, or outreach activities). Establishment of the single entity should address administrative, financial, and legal complexities facing MS4s in the absence of a single entity.

Currently the Department does not have examples of single entities to provide further guidance, however, as cases are presented, the Department will closely track the issues raised by the involved parties who undertake this option during the next permit period. The Department will document examples of issues and solutions and if appropriate, will make revisions necessary to strengthen this component of the permit.

When a municipality lies in more than one watershed, the regulated MS4 will continue its coverage in areas that are not subject to the single entity's coverage.

The commenter is correct that all authorities may not be necessary for a single entity to be responsible for some of the MCMs. The permit language is modified to add "as applicable" to the listed items. However, it is not possible at this stage to identify every listed authority required for each of the minimum control measures. The Department agrees that some of the MCMs are more adaptable for implementation by a single entity and is open to proposals, so long as the proposed plan will not result in undue complexity of the stormwater program.

Comment 20- The requirements to be considered a "Single Entity" are overly rigorous and impractical and will limit inter-municipal cooperation in the management of watersheds. As proposed, requirements such as demonstrating that the entity has the capacity to initiate and administer appropriate enforcement procedures undermine traditional municipal home rule by requiring municipalities to turn over significant authority for; zoning, construction, authority over roads, storm sewer systems, and/or municipal employees to another entity. How does the DEC propose these authorities be created without undermining home rule of the small MS4s? The new permit should allow a single entity to assist a number of MS4s without usurping home rule. This may mean that the Single Entity may handle some aspects of a minimum control measure and that the MS4s handle the remaining aspects. As long as the work is collectively accomplished, it should not matter how it is divided up. (39)(34)

Response: The comment does not specifically state how home rule would be undermined. The single entity is an option for MS4s and it is not a mandate. A single entity would be voluntarily established by/on behalf of/with participation of local governments. The permit identifies the conditions, which must be met in order for an entity to be designated as a regulated single entity. The eligibility conditions are not more rigorous than those for an individual MS4. The Department is supporting the formation of regulated single entities based on the successful models of MS4 coalitions, which have clear potential to become regulated single entities. Although, the Department agrees that there may be obstacles in advancing the process, there are no objective reasons presented in this comment as evidence of the impractical implementation of a single entity. The Department encourages the formation of single entities and will make an effort to support such initiatives.

Comment 21. A commenter asked whether “The single entity must submit a complete NOIminimum control measures the MS4 will implement.” section applies to the MS4 steering committee? (32)

Response: It is not clear what the role and responsibilities of MS4 a steering committee are. This language in the MS4 permit defines the coverage eligibility for undertaking specific MCMs.

Comment 22. Part II.E provides for MS4 requirements (all or portions of) to be implemented by a Single Entity (SE). It is unclear and confusing as to the relationship between this SE and the draft permit's requirement that the covered entities work together and may establish a RSE as discussed in Part III.C.2. Clarification of the SE and the RSE should be provided. (44)

Response: The Department will provide examples of single entities as proposals are presented. However, the concept of single entity is different from RSE. A single entity also needs to be distinguished from other types of cooperative efforts that can be formed to implement all or a part of one or more MCMs. There are many examples around the state of MS4s working together in various ways to meet SWMP program requirements. A single entity is an entity with the legal authority and capacity (financial, resources, etc.) who gains coverage under the MS4 general permit to implement MCMs or parts of the MCMs within a jurisdiction. An RSE consists of multiple MS4s that implement the MS4 general permit under a cooperative agreement, while maintaining their separate coverage under the MS4 general permit.

Comment 23. Water Quality Standards Compliance- Part III.A – The permit (in this section or elsewhere) should include a clear, direct statement that any discharge that causes or contributes to a violation of a water quality standard is a violation of the permit. A second option would be to include such a statement in the catalog of discharges not covered by the Permit found in section I.B.

We note that the Construction General Permit already includes such a provision (Part I.B.), which should be copied in the MS4 permit: “It shall be a violation of this general permit and the *Environmental Conservation Law (“ECL”)* for any discharge authorized by this general permit to either cause or contribute to a violation of *water quality standards* as contained in Parts 700 through 705 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.”

Response: Please see Part IV.A of the permit (“...in order to protect water quality and to satisfy the appropriate water quality requirements of the ECL and CWA.”) To re-enforce the need to protect water quality, permit language has been added to Part IV.A of the MS4 general permit to clearly state that “The objective of the permit is for MS4s to assure achievement of the applicable water quality standards.”

Furthermore, NYS Environmental Conservation Law section 17-0501 states “[i]t shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such water organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301.” Therefore, it is a violation of New York State law to cause or contribute to a violation of water quality standards and the Department can pursue enforcement if standards are violated.

6 NYCRR 750-1.21(e) provides that “[t]he department may require any discharges 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. (1) Cases where an individual SPDES permit or authorization to discharge in accordance with another general permit may be required include but is not limited to the following ... (vii) The discharge is in violation of Section 17-0501 of the ECL...” Therefore, if an MS4 is causing or contributing to a violation of water quality standards, the Department may enforce the violation and/or require the MS4 to apply for a individual SPDES permit. However, the department reserves its right to modify the MS4 general permit if the department determines in the future that it is necessary for protection of water quality.

Additionally, pursuant to 6NYCRR 750-2.1(b), “Upon issuance of a SPDES permit, a determination has been made on the basis of a submitted application, plans, or other available information, that compliance with the specified permit provisions will reasonably protect classified water use and assure compliance with applicable water quality standards. Satisfaction of permit provisions notwithstanding, if operation pursuant to the permit causes or contributes to a condition in contravention of State water quality standards or guidance values, or if the department determines that a modification of the permit is necessary to prevent impairment of the best use of the waters or to assure maintenance of water quality standards or compliance with other provisions of ECL Article 17, or the Act or any regulations adopted pursuant thereto (see section 750-1.24 of this Part), the department may require such a modification and the

Commissioner may require abatement action to be taken by the permittee and may also prohibit such operation until the permit has been modified pursuant to section 621.14 of this title.” The MS4 general permit is consistent with this regulatory requirement. This is true, even though the MS4s gain coverage under the general permit and are not permittees.

The commenter has not identified any Federal or State statutes and/or regulations related to water quality standards compliance that must be met or are failing to be met. With respect to water quality standard compliance, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 24. What if the Pollutant of Concern is from agricultural and/or livestock operations? The MS4 has virtually no jurisdiction over these operations. These operations are permitted and regulated by NYSDEC and it should be their responsibility to address pollutants of concern relative to these operations. (36)

Response: MS4s are responsible for discharges from the conveyance system within their jurisdictions. Agricultural discharges in a rural land use are treated as illicit discharges.

Comment 25. Several groups and government officials discussed the use of computer models to demonstrate that an MS4 has met the requirement of "No Net Increase". (Part III.C.1) DEC should develop standardized models or provide clearer guidance on the type and level of modeling required. The statement "department supported modeling" is insufficient. Many municipalities and small villages do not have the staff or funding necessary to run computer models. In most cases, MS4s will hire consultants, at significant costs, to address the modeling requirements. Concerns over implementing the modeling requirement at the local level since most local governments are not equipped to perform modeling. This should be done in conjunction with DEC on an overall watershed basis to standardize models. (1) (11) (13) (14) (7)(5)(15)(16)

Response: The MS4s discharging to impaired waters are required to incorporate enhanced measures in their SWMP plan and implementing practices that control the source of POC and reduce pollutant loading. In the process of source identification, MS4s are responsible for discharges from their conveyance system within their jurisdictions. MS4s are required to assess the sources of problems and implement BMPs to address them.

On the issues related to modeling, the Department has previously provided guidance on modeling tools in 2008 as Responsiveness Summary Appendix D to GP-0-08-002. Modeling is a common term that refers to the use of a mathematical language to describe a system. It is not the intent of the Department to require MS4s to undertake a complex modeling effort to simulate pollutant load processes. Depending on available input variables, a simple mathematical equation or spreadsheet could also be utilized as a model. The Department will establish modeling standards to assist with the development of Watershed Improvement Strategy (WIS) retrofit plans, which could also be used for modeling/assessing MS4 effectiveness in meeting the “no net increase” requirements for discharges to Impaired Waters. Please refer to the response prepared for WIS on modeling issues (comment #57). Along with establishing modeling standards, the Department will make an effort to provide training related to acceptable computer models.

Comment 26. Many comments were directed at Part III.C.1. specifically, which contains the term “**no net increase**”. Several individuals and municipalities stated that the language and policy should be changed from *no net increase* to *maximum extent possible*, and the permit should provide guidelines for achievement. Concerned that the "no net increase" standard would preclude further development within an impaired watershed and unfairly penalize downstream municipalities that may not be the most important source of the POCs. One group noted that the permit does reference two separate standards for compliance ("MEP" and "NNI" in Pollutants of Concern), and that these criteria are not equivalent, but are used almost interchangeably throughout the document. If different standards apply under different circumstances, the circumstances relative to each standard should be clearly defined. Generally, the commenters expressed opposition to no net increase requirement. (14)(5)(16)

Response: The new language in Part III. C.1. of the draft permit is intended clarify a few details of the existing requirements defined in GP-0-08-002, but there are no substantive changes to the permit requirement of no net increase.

MS4s are responsible for discharges of POCs to impaired waters from their conveyance system and their role is to address contributing problems at a local level. Setting up the program based on a watershed objective is the first step towards reaching this goal. Waterbody problems are commonly reported to the Department and documented in a statewide program. However, water quality improvement is most effectively managed

through local cross-jurisdictional watershed-based approaches and local observation, investigation, and control. The role of MS4s is to evaluate local impairments and to enhance their programs to reduce their discharges of pollutants and to improve the condition of water resources, and prevent contributing to the problem.

Both the MEP and no net increase standards apply to discharges to impaired waters. The MEP defines the extent of BMP implementation that applies to all MCMs. In implementation of all the MCMs MS4s must address the POC to the MEP. Where there is a change to impervious cover in watersheds, MS4s must demonstrate no net increase for the pollutant of concern to the impaired water.

The Department will make the best effort to assist MS4s in maintaining a system for control and tracking of pollutant load in impaired waters. The Department is not requiring extensive testing. Please be aware that the permit provides a number of options to facilitate MS4 efforts to meet no-net increase requirements, including the option to establish a banking and credit system.

Comment 27. Part III.C.1 – This section requires that MS4 dischargers to impaired but non-TMDL waters must “ensure no net increase in its discharge” of the listed pollutant of concern. This standard merely makes permanent the status quo impairment and does nothing to obligate the MS4 to take actions that will actually reduce discharges of the “pollutant of concern” (POC). It goes without saying that discharges of a POC to a waterbody already impaired for that pollutant are “caus[ing] or have the reasonable potential to cause, or contribute to an excursion above any State water quality standard.” 40 C.F.R. § 122.44(d)(1). The “no net increase” standard does not comply with the legal requirement that the permit contain effluent limits that will control discharges of the POC and assure compliance with water quality standards.

The Department must, instead, require MS4 dischargers in these watersheds to develop and implement Watershed Improvement Strategies that incorporate and implement concrete, measurable steps to reduce discharges of POCs to the level consistent with attainment of applicable water quality standards. There is no policy argument for treating these dischargers so differently than those in impaired watersheds that have the benefit of a TMDL. Doing so would indefinitely forestall progress toward the Act’s goal of ensuring water quality standards are met in all of the State’s waters, and reward MS4s for the Department’s inability to develop TMDLs (especially in this era of limited budgets for such endeavors.)

With respect to the specific language in this section, as it is proposed, there are several places where the language can be strengthened. First, rather than being required to identify “potential stormwater pollutant reduction measures” and “potential management practices that are effective for reduction of stormwater pollutants of concern,” MS4s subject to this section should be required to submit an action plan, with an implementation schedule and dedicated financial and other resources, consisting of stormwater pollutant reduction measures that the MS4 will actually undertake. Second, MS4s should be required to submit the required “assessments” to the Department for review and approval. Third, MS4s that are required to modify their SWMPs in response to the findings of an assessment should be required to submit their SWMP modifications to the Department for review and approval. (45)(40)(41)

Response: The MS4 permit requires that a POC must be reduced to the maximum extent practicable (MEP) and that there is “no net increase” of the POC for discharges to impaired waters. The MEP defines the extent of BMP implementation that applies to all MCMs. In implementation of all the MCMs MS4s must address the POC to the MEP. Where there is a change to impervious cover in the watersheds, MS4s must demonstrate no net increase for the POC to the impaired water.

The Department will make the best effort to assist MS4s to maintain a system for control and tracking of pollutant load in impaired waters. Please be aware that the Permit provides a number of options to facilitate MS4 efforts to meet no-net increase requirements, including the option to establish a banking and credit system.

The MS4 permit Part III.B.1 requires covered entities to assess potential sources of discharge of stormwater POC(s), to identify potential stormwater pollutant reduction measures, and evaluate their progress in addressing the POC(S) , as well as defining a deadline, by which MS4s must perform the above tasks, documented in the annual report due by June 1st. MS4s comply with the requirements contained in Part III.B.1 through the effective implementation of all Minimum Control Measures (MCM- Public Education and Outreach, Public Involvement/Participation, Illicit Discharge Detection and Elimination, Construction Site Stormwater Runoff Control, Post Construction Stormwater Management, and Pollution Prevention/Good Housekeeping for Municipal Operations). The Department believes that implementation of the program required by Part III.B.1 that targets the POC will result in load reduction. However, in the absence of identified sources and magnitude of load (as would be in a TMDL), requiring load reduction cannot be objectively allocated. In the absence of a TMDL, the “no net increase” requirement is a tool that enables MS4s to quantify the potential load, prevent

net increase of POCs, and maintain the discharge below the existing condition where the watershed is subject to non-negligible changes.

It must be noted that regulated MS4s have raised a concern in relation to permit requirements that involve specific load reduction for discharges to impaired waters where a TMDL is not developed yet. The Department is developing Watershed Improvement Strategy guidance to define the waste load allocations per MS4 and also to assist the MS4s with developing strategies to accomplish the waste load allocations. Please refer to comments #25, #29, and #36.

The Department did consider reasonable potential in developing permit requirements and did apply specific WQBELs (non-numeric). The WQBELs (non-numeric) take the form of specific tiered requirements for watersheds to achieve water quality standards. The approach of applying enforceable tiered requirements (more stringent to protect water quality in watersheds subject to TMDLs) in the MS4 general permit is protective of water quality standards. Therefore, the permit is in compliance with ECL section 17-0501 and New York State law. Also, EPA has approved New York's implementation of the SPDES program in New York State, in accordance with New York State law.

Furthermore, NYS Environmental Conservation Law section 17-0501 states “[i]t shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such water organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301.” Therefore, it is a violation of New York State law to cause or contribute to a violation of water quality standards and the Department can pursue enforcement if standards are violated.

6 NYCRR 750-1.21(e) provides that “[t]he department may require any dischargers 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. (1) Cases where an individual SPDES permit or authorization to discharge in accordance with another general permit may be required include but is not limited to the following ... (vii) The discharge is in violation of Section 17-0501 of the ECL...” Therefore, if an MS4 is causing or contributing to a violation of water quality standards, the Department may enforce the violations and/or require the MS4 to apply for a individual SPDES permit. However, the department reserves its right to modify the

MS4 general permit if the department determines in the future that it is necessary for protection of water quality.

To reinforce the need to protect water quality, language has been added to Part IV.A. of the MS4 general permit to clearly state that “The objective of the permit is for MS4s to assure achievement of the applicable water quality standards.”

The commenter has not identified any Federal or State statutes and/or regulations related to no net increase that must be met or are failing to be met. With respect to this comment, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 28. We ask the Department to confirm that the revised Appendix 2 includes all impaired waterbodies without a TMDL for which the Department has identified stormwater runoff as a source of the pollutant of concern. This includes waterbodies on all “parts” of the current 303(d) list, as well as those on the list of “Impaired/Delisted Waters NOT Included on the 2008 Section 303(d) List” that is appended to the 303(d) list. (45)

Response: The Department has confirmed that the revised Appendix 2 includes the most recent (2008) approved list of Impaired Waters in the State of New York. The listed segments in Appendix 2 are also consistent with “Impaired/Delisted Waters NOT Included on the 2008 Section 303(d) List” as is appropriate for the MS4 General Permit.

Comment 29. Some commenters stated that a sewershed monitoring program might generate input and calibration data needed to improve modeling results and should be considered as an alternative or phase in to modeling. A sewershed monitoring program might also help focus modeling efforts toward areas that are known to be out of compliance, thus reducing the subsequent modeling costs MS4s will incur. Local governments can supply the records - outfall locations, treatment sites, etc. - to be used in the model. Also, models are no good without calibration, so monitoring will probably be required for calibration. Also, if monitoring is performed for calibration, would it make more sense to use the monitoring data to demonstrate compliance, and only perform modeling in case of non-compliance to determine cost-effective strategies for reducing the POC?_Other commenters are concerned that "no net increase" requirement without monitoring at each stormwater discharge point is not quantifiable and that "non-negligible changes such as changes to land zoning would result in a the *theoretical* tracking of a POC. They additionally question the application of this requirement to traditional non-land use MS4s such as the County MS4s. (38) (13)(7)(26)(39)

Response: A sewershed monitoring program for calibration data needed to improve modeling results is a valid concern and the proposed initiative could be used in the future RFPs to undertake this proposal on a pilot basis.

The suggestion for a calibration effort based on the MS4 data input is also a step in a positive direction. The Department agrees that monitoring water quality data is essential in establishing a calibrated model of a watershed and will seek any monitoring efforts available that could assist with verifying the model and the water quality condition of the impaired waters. Although the Department is not currently requiring monitoring efforts from MS4s for the above objectives, MS4s may incorporate such efforts in their SWMP/WIS to enhance their basic program.

The requirement of no net increase applies to MS4 owned properties (e.g. County controlled land). MS4s are responsible only for the changes within their jurisdictions.

Comment 30. This subsection requires that the MS4 select appropriate construction Stormwater BMPs to ensure the reduction of all POCs in Stormwater discharges to the MEP. If the MS4 does not discharge POCs beyond those that are naturally present, it would seem that the MEP objective is being met and that no further action is required. Storm water, is migratory by nature. The Town of Riverhead is characterized by water bodies either originating in other municipalities, or contiguous to or located within other municipalities like Suffolk County or the Town of Southold. The Town has no jurisdiction to regulate other municipal corporation's storm water operations even though they impact Riverhead. How then can the Town of Riverhead be responsible for ensuring "no net increase" storm water discharge emanating from other jurisdictions? (14) (41)

Response: MS4s are required to assess the sources of problems and address them appropriately. Some natural background load may be attributed to sources that are not within the control of MS4s. MS4s are required to mitigate the entry/discharge of contaminants to/from their stormwater conveyance systems and to implement BMPs to reduce the causes and impacts of stormwater runoff. Polluted discharges from agricultural activities to the conveyance system in a rural area could be considered as an illicit discharge. In the case where interconnection with other MS4s is an issue, (e.g. Riverhead) downstream MS4s are not responsible for other MS4s contributing pollutants. The Department encourages MS4s to cooperate to most effectively address pollutant loading at a watershed level.

Comment 31. Modeling is a costly and time intensive exercise to undertake. Most small MS4s do not have the staffing or budgets to allow for modeling of pollutant loading. The modeling should not make use of expensive software, such as GIS, so that is it readily accessible to all regulated MS4s. The Department should be sponsoring and conducting the impaired watershed analysis, and establishing pollutant evaluation criteria, not the local governments. (5) (34) (26)

Response. The MS4 permit is not requiring MS4s to undertake costly and time intensive modeling exercises. If an advanced model of the watershed become available through a cooperative effort, it is advisable for MS4s to take advantage of that. The Department will consider the feasibility of establishing a statewide standardized evaluation system. However, MS4s are responsible for evaluation and control of discharges of POC to impaired waters from their conveyance system.

Comment 32. The metrics for determining the success or failure of decreasing pollutant inputs are not adequately covered. Testing can be very expensive and most municipalities do not have the means or the money to do extensive testing. (15)

Response: The Department is not requiring extensive testing and will make an effort to assist MS4s to maintain a system for tracking of the implementation of their SWMPP.

Comment 34. If the NYSDEC or EPA were to provide a generic model for all localities to use, the confidence of the model to satisfactorily derive accurate results throughout the State of New York where conditions are highly variable must be ascertained. Even the best models possess limitations on their use. Such a model must be tested under various field conditions, and peer reviewed. From this action the strengths and weaknesses of the model can be derived. With such draconian measures proposed, the affected communities have the right to know the efficacy of the model(s) being used to develop the numeric reduction numbers, and influence the action(s) required to meet these numeric standards. (16) (19)

Response: The Department concurs on the limitation of the computer models. The MS4 permit is not requiring MS4s to invest in highly specialized models of the watershed. If advanced models that are calibrated to variability of local condition become available, it is advisable for MS4s to take advantage of cooperation with other MS4s to utilize such tools for meeting MS4 no net increase and POC load reduction in Watershed Improvement Strategy requirements. The intent at this time is to assist MS4s to use a

simple tool to quantify evaluation of their SWMP programs' effectiveness in meeting water quality objectives.

Comment 35. Hypothetically, consider a scenario where a local MS4 determines (through the use of modeling) that a development proposal will either create a net increase of a POC to impaired waters as listed in appendix 2 of the GP, or will cause the MS4 to violate the numeric pollutant load reduction to that watershed. Further, computer modeling determines that this land (and other adjacent vacant land) must be preserved to meet the above stated mandate of GP-0-10-002. To comply with GP-0-10-002 the MS4 determines that this development proposal must be denied. The land owner then maintains that this action takes away his right to develop his property and demands compensation. A court of law agrees. Would the State of New York or federal government be liable for this “taking”, or would the local municipality be left to choose between complying with their general permit or be responsible for compensating a land owner for a taking of private property? (16)

Response: The objective here is to prevent actions that cause negative impact on waterbodies. Sensible development of the land for environmental sustainability and protection of water resources should not be in conflict with ownership rights. The Department will not opine on how a state court or federal court controlling in New York State would decide this hypothetical.

Comment 36. The Coalition strongly supports efforts to protect water quality and in particular reductions in the discharge of pollutants to impaired waters. However, as noted in previous comments (G. Benway (Coalition) to A. Eaton (NYSDEC), 7/23/09), the Coalition is concerned that the “no net increase” standard would preclude further development within an impaired watershed and unfairly penalize downstream municipalities that may not be the most important source of the pollutants of concern. The Coalition suggests that the “no net increase” standard be replaced with “maximum extent practicable” (MEP). (24)

Response: As discussed in Part III.B.1, the no net increase applies to impaired waters. The requirement can be met using management practices on site that meet no net increase. This permit also makes available the option of using a banking and credit system that allows for reductions off-site. All communities within the same watershed share the same concerns in relation to the impaired waters. The shared concern highlights yet another reason that the Department strongly encourages MS4s to develop watershed plans and cooperate in order to effectively address such scenarios. The no net increase requirements are intended to prevent the impacts that can be caused by

development. There are a number of options, including Green Infrastructure or runoff volume control that allow for development while preventing impacts. Assessment of the appropriateness and effectiveness of the BMP to the MEP is required for each MCM, when discharging to impaired waters. The no net increase is required when there is a change to the land-use and land cover. In the case of changes to imperviousness, the no net increase analysis is required.

Comment 37. Page 9, item III.C.I. - The last sentence of the second paragraph states: The assessment shall be done using Department supported modeling of pollutant loading." The general permit should include a list of "Department supported" modeling methodologies, as well, as an approval mechanism for non-listed methodologies to become "Department supported". If this information is not included, the permit should specify whether models or methodologies used by permittees need to be approved by DEC. (35) (40)

Response: The Department continues to accept the currently recognized pollutant modeling methodologies and will list those in the WIS guidance. The Department will not be able to establish an approval mechanism for non-listed methodologies to become "Department supported" in the near future.

Comment 38. Municipalities which are located in watersheds that have EPA-Quality Assurance Program Plans (QAPPs) – certified water monitoring programs should be allowed the alternative of utilizing the monitoring program in place of some or all of computer modeling. The availability of real data is preferable to assumed data in gauging progress toward satisfying “no net increase” and TMDL goals. This would save the municipalities significant time, effort and expense. (39)

Response: The Department will accept monitoring data that meets certain protocols and collected for a minimum period of time and a number of events. The Department agrees that monitoring water quality helps gauge the progress and verify modeling results. However, obtaining such information is not necessarily inexpensive or less time consuming. The Department is not currently requiring MS4s to participate in this effort.

Comment 39. In Part III.C.I of the draft permit, individual MS4s are instructed to "evaluate their SWMP" in "ensuring no increased discharge of stormwater POC(s)" by 2013. It would be useful if the final permit provided additional information to describe the implementation of this requirement in the portion of the New York City Watershed located east of the Hudson River ("EOH") because of several identified issues: The proposed continuation of the status quo (i.e.,

no *increase* in POC(s)) will not serve the goal of reducing phosphorus so that the TMDLs may be achieved. In order to attain the goal of having impaired waters no longer impaired, the permit should instead call for "reduced loading of stormwater POC(s)" by 2013; (40)

Response: This goal of achieving the TMDL is proposed to be accomplished in part by the Permit requirement that MS4s in this impaired watershed construct approved retrofits to their stormwater systems that are designed to reduce the POC. Once a TMDL is issued for an impaired water, the no net increase will be the minimum requirement. In this case, a load reduction must be demonstrated. The WIS must ensure that load reduction is applied throughout implementation of all MCMs, including where change of land cover is applied.

Comment 40. Determining the success or shortcomings of SWMPs would be more effective if the initial modeling of phosphorus loading was performed on a watershed scale rather than separately by individual MS4s. If different MS4s use different models, it will be difficult to evaluate the effectiveness of the program and make the necessary modifications to ensure future POC reductions. It is recommended that DEC use a computer model for each impacted TMDL waterbody and determine the success or shortcomings of the EOH programs on a regional scale. (40)

Response: For the EOH, waste loads were initially modeled on a watershed scale and then separated by individual MS4s. An effort is made to keep a consistent evaluation method among MS4s. Formation of RSEs help maintain consistency in proposed retrofit plans. The Department agrees that maintaining a statewide modeling system will assist establishing a tracking system to determine the success or shortcomings of the watershed improvement strategies. Accounting and tracking for load reduction needs to be performed at a scale which may be more detailed (focused on retrofit options) than TMDL modeling. Comment does not concern the proposed updates to the MS4 general permit.

Comment 41. In addition, pollutant loading targets in the EOH watershed appear to have been based on DEC's modeling of HID and LID areas. It is not clear if the assessments that are required of MS4s are to be done on the entire land area of an EOH covered entity or if the modeling is limited to the HID and LID areas that were modeled by DEC. If it is the latter, it is unclear if retrofits that are required by the permits can be installed outside the HID and LID areas since they will not be captured by the required modeling assessment. (40)

Response: Retrofits can be installed anywhere in the impaired watershed, though it is recommended that MS4s will choose to target high and low intensity developed areas of the watershed. The proposed retrofit projects must address the load from HID and LID as factored in the MS4 waste load allocation. This is a comment regarding the EOH Phosphorus Implementation Plan. Comment does not concern the proposed updates to the MS4 general permit.

Comment 42. If each MS4 has to perform their own modeling, then there will likely be three different loading values for each basin (DEC's 1999 TMDLs, DEC's 2008 TMDL Implementation Plan, and then the individual models to be completed by each MS4). Since it is possible or perhaps likely that different MS4s will use different models, it will not be possible to systematically track reductions in POCs in the impacted waterbodies. (40)

Response: The commenter is correct in stating that there will be different loading values for each basin. The method envisioned for tracking reductions in POCs in the impaired waterbodies, is to implement retrofit plans that demonstrate a reduction to the POC. The Department agrees that establishing a tracking system for watershed improvement strategies and establishing consistent load reduction values for retrofit options will help address the issue.

Comment 43-The process of determining the actual results of the required activities would be improved if a monitoring requirement was included. This monitoring could verify that some of the projected reductions in POC discharges actually occur. Previous iterations of NYSDEC's MS4 permit stated that NYSDEC "may, at its discretion, require monitoring of discharge(s) from the permitted activity". This text was not included in the draft for permit GP-0-10-002 and it is unclear why NYSDEC opted to exclude this text even though such monitoring would be an important tool to assess permit compliance. Even if NYSDEC has not found the need to have MS4s monitor in the past, such a tool will likely become more relevant once MS4s begin the implementation of their SWMP and water quality improvement projects. (40)

Response: The comment does not relate to the proposed changes to the permit. Additionally, such language was not included in GP-0-08-002. However, NYS Environmental Conservation Law section 17-0501 states "[i]t shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such water organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301." Therefore, it is a violation of New York State law to cause or contribute to a violation of water quality

standards and the Department can pursue enforcement if appropriate. Additionally, 6 NYCRR 750-1.21(e) provides that “[t]he department may require any discharges 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. (1) Cases where an individual SPDES permit or authorization to discharge in accordance with another general permit may be required include but is not limited to the following ... (vii) The discharge is in violation of Section 17-0501 of the ECL...” Therefore, if an MS4 is causing or contributing to a violation of water quality standards, the Department may require the MS4 to apply for a individual SPDES permit.

Comment 44. Please list the pollutant loading modeling programs that are supported by the NYSDEC (Department). Please provide any specific criteria such as design storm that must be used for the pollutant loading models.(40)(41)

Response: The Department establishes acceptable pollutant loading models and reasonable assumptions. A draft outline is being developed in the Watershed Improvement Strategy Guidance which is subject to discussion and improvement in collaboration with regulated entities. More detail in regards with modeling input variable will be defined depending on the selected model in the future.

Comment 45. There is a new reporting requirement to “provide an assessment of priority stormwater problems, potential management practices that are effective for reduction of storm water pollutants of concern, and document a gross estimate of the extent and cost of the potential improvements”. Why is the Department requesting an estimate of the extent and cost of the potential improvements? This requirement seems like additional effort on the part of the MS4s with no perceivable benefit. (41)

Response: This requirement is intended for keeping up-to-date documentation and plans to enable MS4s develop an understanding of watershed problems, improvement opportunities, the cost to the community, and implementation to the MEP. Availability of such documentation is the first step in taking advantage of funding opportunities that arise.

Comment 46. A proposed change to Part III Special Conditions (Section A.C.2. paragraph 2) seeks to establish automatically establish MS4 permit requirements that have not been determined to be attainable. The new language seeks to define MS4 compliance as meeting the reduction in the pollutant of concern defined by pertinent TMDLs. This requirement lacks

sufficient basis because TMDL reductions are often derived by NYSDEC without proof that the reductions are technologically attainable. Translating these TMDL reduction estimates into explicit MS4 permit requirements without demonstrating a reasonable benefit-cost ratio may be interpreted as arbitrary. Automatically incorporating required reductions which may not be feasible might not be able to be supported legally if NYSDEC is concurrently participating in negotiations with US EPA wherein NYSDEC objections include concern that NY harbor stormwater reductions attributable to MS4 efforts will yield pollutant reductions of 3-10% (i.e. nearly de minimis). (11)

Response: It must be noted that MS4 TMDL POC load reductions Waste load allocations determined by TMDLs are not in the negotiation process at this time. The Department is committed to assisting the MS4 entities to lessen the burden to and assist them in identification of effective load reduction and treatment techniques. However, the Department is not currently considering performing a cost-benefit analysis in regards to implementing TMDL waste load allocation requirements. Please also note that cost considerations are not part of the TMDL analysis.

Comment 47. It is unclear and confusing as to the relationship between this SE and the draft permit's requirement that the covered entities work together and may establish a RSE (Part III.C.2.). Clarification of the SE and the RSE should be provided. Who decides which regulated MS4's will be allowed to participate in any given RSE. Who decides which stakeholders and interested parties must be included. If five regulated MS4's create an RSE, does this section require that any party expressing an interest in joining must be allowed to join that RSE. (39) (44)

Response: The Department understands that it is not within the ability of the MS4 to compel participation by other entities. The Department encourages cooperation among MS4s. The MS4 general permit allows for the formation of a Regional Stormwater Entity (see Part III.C.2) to implement stormwater retrofits collectively, but is not a mandate. In the East of Hudson watershed the Department is working closely with three "regional stormwater entities" (RSEs) that represent coalitions of MS4s. These RSEs have submitted retrofit plans per the permit requirements. The Department participated in planning meetings with these RSEs as the retrofit plans were being prepared in an effort to guide the process toward a solution that would benefit water quality.

RSEs pool resources to attempt to achieve permit compliance cooperatively. One or more minimum control measure may be addressed cooperatively. To be considered an

RSE, the cooperating MS4s must maintain documentation, signed by all parties that describes the extent and nature of the inter-MS4 cooperation, duties, etc. The Department provided a sample Intermunicipal Agreement that was attached to the responsiveness summary to GP-0-08-002. The permit requires that RSEs make all documentations available according to VI.H, of the MS general permit (Duty to Provide Information). It should be noted that under an RSE the MS4s maintain their status as covered entities under the MS4 general permit. However, the single entity becomes the covered entity under the MS4 general permit for the MCMs or parts of MCMs for which it has the authority.

Any regulated MS4 can join an RSE, but the Department is not mandating the inclusion of any MS4s into the RSE. RSEs could encourage non-regulated entities with ability to provide reduction of pollutant of concern to participate in the RSE's effort.

Comment 48. This section indicates that for Regional Stormwater Entities (RSEs) required to undertake retrofit programs, compliance may be viewed on an overall watershed basis. However, due to the many legal and administrative issues that have to be addressed prior to establishing a regional stormwater entity, it is likely that many MS4s will be individually responsible for attaining individual load allocations. DEC should establish clear and equitable criteria for determining the percentage of the total required load reduction each MS4 in the TMDL area will be responsible for. The potential for gross inequities is significant and may place unreasonable burdens and unattainable requirements on some MS4s. The means of assigning responsibility should be determined after the watershed modeling results are available. The proportion of each MS4's responsibility should be based on the load contributions from the modeling, not area, population, or other comparative means. (5) (13)

Response: The reductions established for the East of Hudson NYC Watershed MS4s were calculated utilizing phosphorus load modeling that estimated loading on a per MS4 basis. The percentage of the total TMDL load reduction required watershed wide is judged to be unattainable in a five-year or even a ten –year permit cycle. It was decided that the most equitable method was to consider the pollutant load described by modeling and allocate accordingly. Methodologies that were considered to allocated reduction requirements included impervious acreage per MS4 and population per MS4. It is the intent of the Department to use a similar approach for other impaired watersheds.

Comment 49. The language is confusing regarding waste load allocation. Will the final TMDL assign a reduction to each MS4? How is the “fraction of the total required load reduction” to be assigned between MS4's. (7)

Response: TMDL waste load allocations are watershed based. Several TMDL waste load allocations do not provide a load reduction breakdown by MS4. The Department will provide the per MS4 allocation based on the contributing areas of each MS4, estimated time frame for compliance, the pollutant contribution from each MS4, etc...

Comment 50. The watershed improvement strategies trigger a staggering amount of work for local municipalities. Compliance with the “standard” MS4 permit requirements is already a tremendous burden for local government. This additional burden will tax systems and may also take away from the overall basic stormwater program requirements and other important environmental initiatives of local government. In most cases local government is downsizing and staff has unprecedented workloads. The NYSDEC must be cognizant of these realities. (10)

Response: The DEC has considered the burden that the regulations/requirements place on municipalities and has worked to make available funding opportunities more accessible to those municipalities. It is advisable that MS4s seek public funding opportunities for implementation of their retrofit plans. Such opportunities may vary depending on the available funding in a specific watershed and the proposed initiative. For example in the EOH phosphorous watershed the EOH WQ funds, DEP 4.5 mill, SDWA, WRDA, are all available and should be/were targeted.

Comment 51. Part IIIC Covered entities under the MS4 SPDES general permit are required to seek to participate in locally based watershed planning efforts. While fostering regional cooperation will benefit the program and also individual regulated MS4's through sharing of services and information, making this a mandatory requirement is unreasonable and violates a fundamental principal of New York State - home rule. Another commenter states that this language is weak and ineffectual and should be removed or strengthened to include criteria for establishing satisfactory participation and/or documentable evidence that an effort to participate was made. If no such watershed planning effort exists, or if participation in watershed efforts is institutionally restricted, what is the responsibility of the individual MS4s to attempt to establish formalized watershed planning efforts? The sentence structure is ambiguous on its face-“are required to seek to participate”. If the Town seeks to participate in a joint venture, but is unable through no fault of its own, to participate in a joint effort which by its definition requires mutual cooperation and consent, is the Town in violation of the permit? Moreover, this proposed joint-

venture requirement is a tacit admission by the State that effective storm water pollution remediation is best addressed at the state level, using the State's monetary, technical, and labor resources due to the migratory nature of storm water, since no single local municipality can effectively or practically control storm water pollution originating outside its borders given present fiscal constraints and the inordinate burden that would be placed upon the local taxpayer. (13) (14) (33)

Response: The Department is not forcing participation in locally based watershed planning efforts. However, the Department strongly encourages such participation and cooperation (based on NRC report). This is reflected throughout the MS4 general permit. The regulated MS4s must make their best efforts to participate in joint ventures. The Department has considered collaborative efforts by the MS4 a high priority in the funding process and will make its best effort to notify MS4s of such opportunities. This issue is best addressed regionally. Please also note that the formation of a single entity (implementing MCMs or part of MCMs) is not a mandatory requirement of the MS4 general permit but on of many options through which MS4s may cooperate.

Comment 52. *"If the aggregate number is not met, each of the participating MS4s would be deemed non-compliant... (p .11) How can an MS4 be held responsible for another MS4's non-compliance? Why would an MS4 join an RSE if it can be held responsible for another MS4's non-compliance? (14)*

Response: MS4s are responsible for their own compliance. Participation in an RSE does not relieve the MS4 of its status as a covered entity under the MS4 general permit, and therefore, the requirement to comply with all permit conditions. If the RSE that the MS4 has joined is non-compliant, that MS4 is non-compliant. MS4s are free to join or not join an RSe, and may do so when they believe it is in their interest, financially or otherwise, to do so.

Comment 53. *MS4s are required to meet the reduction of the POC defined by the TMDL program defined in Part IX of this SPDES general permit. Has any regulatory impact statement been completed assessing the cost of compliance for local municipalities and other regulated MS4's? In 2006 the Town of Patterson completed a "planning-level" assessment of the cost of providing retrofits to meet the TMDL's for the East of Hudson watershed that lies within Putnam County. In 2009 the Putnam County MS4 Coordinating Committee completed a draft retrofit program which included an assessment of the costs of providing stormwater retrofits. The draft retrofit program was supported by a study on providing stormwater retrofits prepared by*

Malcolm Pirnie, Inc. dated December 2009. The Malcolm Pirnie Study supported the conclusions reached by the Patterson assessment that the cost of providing stormwater retrofits in Putnam County to meet the TMDLs would be in excess of \$180,000,000. The stormwater retrofit component of the General Permit is just one component of the six minimum measures that must be addressed by regulated MS4s in the East of Hudson watershed, albeit the most expensive component. This cost well exceeds a cost that can be borne by taxpayers in this County. (33)

Response: There is no requirement or expectation that TMDL compliance be achieved by installation of stormwater retrofits alone. The commenter correctly notes that "the stormwater retrofit component of the General Permit is just one component of the six minimum measures that must be addressed by regulated MS4s in the East of Hudson watershed". The retrofit requirement for East of Hudson MS4s as articulated in the Croton Reservoir TMDL Implementation Plan represents a small (less than 5%) portion of the phosphorus reduction that will be required to achieve TMDL compliance. The threshold for phosphorus reduction from retrofits was determined with awareness of cost to the permitted MS4s.

Comment 54. By January 8, 2013, covered entities must assess their progress and evaluate their SWMP to determine the MS4's effectiveness in reducing their discharges of TMDL POC(s) to TMDL water bodies. At present there are no specific phosphorus load allocations, or phosphorus load reductions assigned to each municipality upon which to assess individual MS4 programs. This condition places obligation of full P reduction on municipalities. (33)

Response: Load reduction and deadlines were set in the Phosphorus TMDL Implementation plan, and now are included in the MS4 general permit.

Comment 55. The deadline of January 8, 2013 is not consistent with the Watershed Improvement Strategy deadline date of May 1, 2011 provided in Table IX.A. on page 65. (35)

Response: Permit language is modified to state: "By the deadlines defined in Part IX of this general permit."

Comment 56. Part III.C.2. and Part IX- Watershed Improvement Strategies

The Watershed Improvement Strategy Requirements specify pollutant reductions that each MS4 must obtain along with deadlines. In Suffolk County, there are approximately 40 waterbodies for which these pollution reductions must be achieved. The proposed reductions range from 12% to

100% with an average reduction of approximately 73% for each waterbody. The first problem reflects the fact that the percentages were derived through TMDL studies. These studies used water quality data to determine which waterbodies violated established pathogen standards.

However, there were no attempts to identify the sources of the pathogens, which are unique to each waterbody. In some cases, the majority of pathogens may be due to natural wildlife, so even if an MS4 were to invest large amount of resources into reducing the amount of pathogens entering a waterbody, the overall impact may be negligible which could result in a tremendous waste in resources. In these difficult economic times, municipalities cannot afford this risk.

Response: A TMDL provides an overall identification of the major sources of polluted runoff. Depending on the modeling effort conducted through TMDL development, specific sources may be identified. For evaluation of BMPs and retrofit options, MS4s need to focus on a much more detailed scale. A useful tool for source identification is illicit discharge detection. This approach can help MS4 evaluate the sources, identify hotspots, select appropriated BMPs and retrofits, and prioritize their course of action.

Comment 57. Many comments expressed concern over the effectiveness of pathogen removal BMPs. Several individuals were concerned that few of the available BMPs offer viable means of achieving the TMDL reductions being sought in the upcoming permits for Long Island watersheds. These individuals also felt MS4 regulated parties deserve more guidance from the DEC on how they should decide to invest in measures given the limited effectiveness of most BMPs for pathogen removal from MS4s. What is the baseline data for reduction of pathogens? Do the Villages have to develop this data themselves? According to item C pertaining to Pathogen Watershed MS4s under Part IX, the DEC is setting a deadline of approximately one year for the Villages to have retrofit plans and strategies for 90% pollutant reduction, and baseline data has not been developed yet. This is unreasonable for and an unfunded mandate for small Villages that have no staff. Is there currently technology to guarantee a 90% reduction in pathogens? (1) (9) (10) (12) (14) (15) (19)(20)(21)(22) (26) (34) (38) (39) (41)

Response: The Department has developed a guidance document (Watershed Improvement Strategy guidance) to assist regulated entities with initiating their Watershed Improvement Strategies. To address many of the comments in regards with Watershed Improvement Strategy requirements, the MS4 general permit is requiring the development by the MS4s of the strategy (See WIS Guidance) to start working towards meeting their TMDL POC load reductions through the use of feasible options. The Department will accept a strategy that addresses the first of 5-year phase of the strategy.

The MS4 permit requires MS4s to address beyond the first 5 years in the next permit cycle.

With respect to the effectiveness of the BMPs, the state of science related to effective pathogen treatment practices is not currently conclusive. However, there are multiple pathogen loading pathways that are easily identifiable. At this time, source control (pathogen and hydrologic) is found to be most effective approach and this is an approach that the Department encourages MS4s to focus on. The Department will make an effort to develop guidance to identify methodologies for treatment of POC.

To initiate the planning and implementation of the WIS, including the tracking of retrofit requirement, the Department will provide more detailed information on load reduction required for each ms4. The Department will provide MS4s with identification and technical support of suitable models, defining acceptable practices, identifying removal reduction for stormwater management practices, and providing training. The Department will also develop guidance to study and identify more effective practices and identify tools to improve the implementation of the program. Once again, the Department strongly encourages MS4s to develop and/or build upon formalized cross-jurisdictional working arrangements and frameworks to leverage their financial resources and technical expertise, and to establish sustainable legal and financial mechanisms that will provide for long-term watershed-based stormwater management and compliance.

The MS4 permit will rely on the base line defined by the TMDL as outlined in the WIS guidance.

The MS4 permit requires tracking of load reduction to be performed by the use of a computer model. The contributing load from each MS4, as estimated by an acceptable model, will be accepted as the assumed baseline. At this point Permit is focusing on an accounting system to track load mechanisms and control options to approach the required pollutant load reduction as specified in Part IX of the MS4 permit. The intent at this time is to facilitate MS4 use of tools that enable quantified evaluation of BMPs and the effectiveness of the SWMP programs' effectiveness in meeting water quality objectives. The Department will provide the initial state-wide data (modeling, GIS, etc.). The MS4s are responsible for supplementing and enhancement of the data at more detailed scale through system mapping, more detailed land-use analysis, local information on the sources of POC, etc.

Comment 58. Modeling is a costly and time intensive exercise to undertake. Most small MS4s do not have the staffing or budgets to allow for modeling of pollutant loading. In fact, a number of small Villages covered under the MS4 General Permit do not even have a single full-time employee on staff. ... The modeling should not make use of expensive software, such as GIS, so that it is readily accessible to all regulated MS4s. (34)(39)

Response: The Department is accepting the use of a simple method as described in response to phosphorus limited watersheds and the WIS issues in question 57. MS4s are not required to use a GIS software.

Comment 58. Part III.C.2 states that “[e]ach regulated MS4 is responsible for an individual load reduction, which is a fraction of the total required load reduction in the TMDL.’ For TMDLs where MS4s were not assigned individual WLAs, the Draft Permit should explain how this fraction is determined. (45)

Response: Further explanation will be made as the Department works with the MS4s in allocating their contribution as a part of Watershed Improvement Strategy guidance, which will be subject to public notice. This effort will be similar to the allocations assigned to the MS4s as a part of New York City Watershed East of Hudson (EOH) retrofit plan development.

The comment has not identified any Federal or State statutes and/or regulations related to wasteload allocations that must be met or are failing to be met. With respect to wasteload allocations, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 59. Section IX., concerning “Watershed Improvement Strategies” for MS4s to implement TMDL WLAs, twice repeats the statement that “the effectiveness of the load reductions in meeting water quality standards will be verified by ambient monitoring of the affected waterbody.” But there is no requirement for the permittees to conduct monitoring, nor any other discussion of how, or by whom, this monitoring is to be conducted.

The Department’s failure to incorporate sampling requirements into the Draft MS4 Permit frustrates its ability to evaluate the effectiveness of an MS4’s SWMP and, especially, its compliance with water quality standards and TMDL WLAs. Clean Water Act permit holders, including MS4s, are required to “(i) establish and maintain such records, (ii) make such reports (iii) install, use and maintain such monitoring equipment or methods..., (iv) sample such effluents... , and (v) provide such other information” as may be necessary to carry out the

objectives of the Act. CWA § 308(a)(A), 33 U.S.C. §1318(a)(A). Among the objectives of the Act, clearly, is the Act's insistence on the attainment and maintenance of water quality standards, and a prohibition on discharges that violate such standards. CWA §§301(b)(1)(C), 302(a), 33 U.S.C. §§1311(b)(1)(C), 1312(a). (45)

Response: The Department will rely on collective efforts of all monitoring activities related to the impaired waters, which may include ambient monitoring conducted by the Department, special projects for monitoring, watershed monitoring efforts, other agencies monitoring, academic monitoring, and publicly funded monitoring projects. One need only look to the Long Island embayments to see that this strategy provides a comprehensive picture of the state of MS4 discharge receiving waters. All of the Long Island waters include department monitoring stations that can be used as an indicator of MS4 compliance. It is not necessary to include MS4 monitoring requirements to obtain this data.

Pursuant to 6 NYCRR 750-1.21(a),” the [D]epartment may issue a general permit to cover a category of point sources of one or more discharges within a stated geographical area that” ... among other things, “(4) require the same or similar monitoring...” 6 NYCRR 750-1.21(e) provides that “[t]he department may require any discharges 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. (1) Cases where an individual SPDES permit or authorization to discharge in accordance with another general permit may be required include but is not limited to the following ... (vii) The discharge is in violation of Section 17-0501 of the ECL...” NYS Environmental Conservation Law section 17-0501 states “[i]t shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such water organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301.” Therefore, if an MS4 is causing or contributing to a violation of water quality standards, the Department may enforce the violation and/or require the MS4 to apply for an individual SPDES permit, which could include specific monitoring and sampling. However, the Department reserves its right to incorporate MS4 sampling and laboratory analysis into the general permit if the Department determines in the future that it is necessary for protection of water quality.

With respect to monitoring and sampling, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations. There is no legal requirement for the MS4 to conduct monitoring and/or sampling.

Comment 60. Part III.C.3. – The last sentence of the first paragraph is framed as an obligation to *modify a SWMP* for the purpose of implementing a TMDL. It should also include a clear and simple statement of an obligation to *actually achieve the pollutant load reductions* specified in the TMDL, by the dates specified in the TMDL or associated implementation plan. The Draft Permit should also be revised to require that, for future phosphorus and pathogen TMDLs, respectively, MS4s discharging to such TMDL watersheds shall be required to adopt and implement Watershed Improvement Strategies pursuant to Part IX.B (for phosphorus) or IX.C (for pathogens). (45)

Response: In Part III.B.3 the permit refers to the enhance requirements for MS4s preparing revised SWMPs. The commenter has not identified any Federal or State statutes and/or regulations related to the suggested revisions that must be met, or are failing to be met. However, the permit has been modified to insert the following language into Part III.B.3. “It will be the MS4’s obligation to meet the waste load allocations specified in the TMDL through modification of its SWMP plan according to the schedule of Part IX of the MS4 general permit.” Also, please note that Part III.B.3 only addresses future TMDLs. With respect to modification of the SWMP, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 61. Part III.C.2 – The language referring to “satisfactory first steps towards achieving compliance with TMDL requirements” should be deleted. The revised Part IX. of the Draft Permit now includes deadlines for the submission of Retrofit Plans and implementation of Watershed Improvement Strategies; timely compliance with these and other requirements of Part IX should be the litmus test for adequate progress toward achieving compliance with TMDLs. (45)

Response: The Department has removed the word “first” from Part III.B.2 to eliminate confusion. Part III.B.2 of the permit is intended to provide a generic overview of Watershed Improvement Strategy requirements, define MS4 roles in relations with TMDL requirements, and distribution of waste load reduction when regulated entities form a Regional Stormwater Entity (RSE). Part IX of the MS4 general permit covers these requirements at a much more detailed level. It defines the Pollutant Load Reductions reduction necessary in total MS4 discharge loads to meet water quality

standards, the deadlines for submittal of plans, and management practices suitable for specific a POC.

Comment 62. “*CE must develop, implement, and enforce a SWMP designed to reduce POCs...to the maximum extent practicable...*” Again, if the goal is effective state-wide storm water pollution remediation it is incumbent upon the State to provide education, training and resources and an effective criteria and protocol regarding an ”MEP” standard, and its effective implementation. This comment is applicable to all sections of the proposed permit that address development and implementation of a SWMP. (14)

Response: The Department provides guidance and training opportunities for the regulated MS4s and defines and supports technologies for effective implementation of the program. MS4s are encouraged to visit the Stormwater websites (<http://www.dec.ny.gov/chemical/8468.html>) for training opportunities and educational material and attend periodic information sessions staffed by the Department or other stormwater experts to keep up-to-date on the issues.

Comment 63. SWMP Plans - Part IV.A. – Revise the following sentence to make clear that the purpose of a SWMP is not only to meet that MEP standard, but also to ensure achievement of WQS: “*Permittees must develop, implement, and enforce a SWMP designed to reduce the discharge of pollutants from small MS4s to the maximum extent practicable (MEP) and ensure that such discharges do not directly or indirectly cause or contribute to the violation of a water quality standard in order to protect water quality and to satisfy the appropriate water quality requirements of the ECL and the CWA.*” (The new language proposed here is identical to language in Part III.A., which addresses the remedial measures that must be taken if a permitted discharge causes or contributes to a WQS violation.)

Response: The department believes that the language in Part IV.A of the draft permit (“The objective of the permit is for MS4s to assure achievement of the applicable water quality standards”) provides water quality protection suggested by the commenter. Please also see response to comment # 23 on water quality standards compliance.

The commenter has not identified any Federal or State statutes and/or regulations related to water quality standards compliance that must be met or are failing to be met. With respect to water quality standard compliance, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 64. Part IV.A. & D. – The Permit should provide a deadline for newly-covered MS4s to prepare a SWMP Plan. This Permit should also require continuing permittees to update their SWMPs and SWMP Plans as necessary to conform to the new permit requirements; such permittees should be required to certify in the NOI submitted to gain coverage under this Permit that such updates have been made (see comment on Part II, regarding the need for all MS4s to submit an NOI to obtain coverage under the Permit).

There should be a requirement that any changes to the SWMP (made pursuant to any section of the permit – see, e.g., Part V.A.) must be simultaneously documented in an update to the SWMP Plan. Also, Part IV.D allows previously covered MS4s to modify their SWMPs if necessary to improve implementation of their SWMPs. The circularity of this statement is confusing; the Department should provide objective language to guide MS4s in a meaningful evaluation of their SWMPs, the effectiveness of these plans in actually reducing stormwater discharges to the MEP, and attaining water quality standards compliance, and then require modifications if this evaluation reveals that changes are necessary. Furthermore, any evaluation and revision process must include opportunities for public participation; a statement to this effect should be added.

(45)

Response: Part IV.E. of the MS4 general permit provides the deadline for new MS4s to develop of a SWMP plan is 3 years from submittal of a completed NOI.

With respect to updating the SWMP, language has been added to Part V.A to clarify the compliance deadline is for existing MS4s, which states:

- a. *“...BMPs, meeting new permit requirements, and...”*
- b. *(at end of the 2nd paragraph)“Update to the SWMP and the SWMP plan must be completed within a year from the annual evaluation of their SWMP with an implementation schedule no later than 3 years from the annual evaluation.”*

Based on the above changes to Part V.A, the language in Part IV.D. is clear in regard to modification of the SWMP. Part VII.A.2.b.iv states MS4 must “develop and implement a public involvement/participation program that: provide the opportunity for the public to participate in the development, implementation, review, and revision of the SWMP.” The Department has revised the Annual Report form to include specific output (see response to comment # 70.) for evaluation of the effectiveness of each MCM. Part V.D. requires annual report certification. With respect to the comment regarding certification of the NOI, please see the response to comment # 4.

With respect to the SWMP Plan, the commenter has not identified any Federal or State statutes or regulations that must be met or are failing to be met. There is no legal requirement for the suggested revisions to the MS4 general permit regarding the SWMP Plan. However, see also the response to comments #8 and 16 regarding public participation. The MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 65. Will mapping of stormwater outfalls and illicit discharges be required throughout those expanded MS4 areas at the same level required previously under the program? If so in what time frame and how will those be paid for? With state funding less than reliable and now with those impacts reaching local municipalities, they will not have the resources to complete the work required. If this is required and the state provides no funding it will be perceived as another unfunded mandate. (43)

Response: Outfall mapping and illicit discharge detection and elimination are minimum requirements of the MS4 program. Funding opportunities are continuously provided to encourage system mapping. The MCM related to IDDE is not subject to the mandatory expansion to the borders of the MS4 jurisdiction.

Comment 66. Regulated MS4s municipalities will now be responsible for signing off on the NOT for permits. We believe this is logical and should be included in the final permit. (43)

Response: Comment noted, and such a requirement is included in the final MS4 general permit.

Comment 67. Annual Reports: The current schedule is difficult as it falls in the spring when construction activities are beginning for the year. The Stormwater Coalition of Tompkins would like to see a time change on annual reporting. They propose the reporting period coincide with the calendar year, with reports due to DEC by March 1 of the following year. (43)

Response: Comment noted. Change to the annual report (AR) deadline is not possible for this reporting period but will be considered for future modifications.

Comment 68. With regards to certification, the state DEC should publish a standard form, such as is used for Flood Plain compliance inspections so that each MS4 unit is using the same form for reporting purposes. (15)

Response: The Department has defined specific requirements for certification. There are provisions in the AR forms that allow third party reporting, which may be conducted by using the same forms as has been used by the coalition entities in the past.

Comment 69. Under “Annual Report” the possible penalty for not submitting a “Complete” annual report and MCC Form needs clarification and appears to be excessive. The failure to submit a complete annual report conceivably can result in imprisonment of up to 15 years. This is excessive. Penalties should be revised so as to be commensurate with the offenses that apply to them. (10)(14) (39) (21) (22)(26) (29) (34)

Response: Comment does not concern the proposed updates to the MS4 permit. However, The Department has guidance for penalty assessment. See TOGS 1.4.2.”

Comment 70. Annual Reports -Various provisions require that permittee’s annual reports include assessments of progress towards meeting the “measurable goals” in the SWMP. The Department must, before the first annual report under the new permit comes due, revise the annual report form to make sure this critical information (and all other information required in MS4’s annual report) is required to be reported on the annual report form; right now, the forms ask for certain “indicators,” but does not require reporting framed in terms of progress toward the “measurable goals” in the permittee’s SWMP. We note that the federal Phase II regulations require reporting on “measurable goals” and do not refer in any fashion to “indicators” as a substitute or equivalent for this requirement. See 40 C.F.R. §§ 122.34(d)(1), (d)(2), (g)(1).

Additionally, the second paragraph of Part V.A should be re-written as follows:

The *permittee* must conduct an annual evaluation of its program compliance, the appropriateness of its identified *BMPs and other elements of its SWMP*, and progress towards achieving its identified *measurable goals*, which must include reducing the *discharge* of pollutants to the *MEP and ensuring that such discharges do not directly or indirectly cause or contribute to the violation of a water quality standard*.

Where the evaluation shows that the SWMP is not achieving its measurable goals, reducing discharges to the *MEP*, or ensuring that such discharges do not directly or indirectly cause or contribute to the violation of a water quality standard, the SWMP shall be revised to achieve the MS4s measurable goals, reduce discharges to the *MEP* and ensure that such discharges do not directly or indirectly cause or contribute to the violation of a *water quality standard*.

The permit should also require permittees to demonstrate in their annual that the MS4 has adequate funding to implement the requirements of the permit, including all provisions of its SWMP. (45)

Response: After the draft MS4 general permit was publicly noticed in October 2009, the Department modified the Annual Report form to clearly identify the performed tasks, evaluation of the progress, and plans for future tasks. Please note that the permit specifies requirements (e.g. defining dates for public involvement, frequency of dry weather monitoring, frequency of construction site inspection) that are more definitive than measurable goals and must be contained in the Annual Report. See below as an example of the revised the Annual Report form:

Evaluating Progress Toward Measurable Goals MCM (applicable to all MCMs)

Use this page to report on your progress and project plans toward achieving measurable goals identified in your Stormwater Management Program Plan (SWMPP), including requirements in Part III.B.1. Submit additional pages as needed.

A. Briefly summarize the Measurable Goal identified in the SWMPP in this reporting period.

B. Briefly summarize the observations that indicated the overall effectiveness of this Measurable Goal.

C. How many times was this observation measured or evaluated in this reporting period?

D. Has your MS4 made progress toward this measurable goal during this reporting period?

E. Is your MS4 on schedule to meet the deadline set forth in the SWMPP?

F. Briefly summarize the stormwater activities planned to meet the goals of this MCM during the next reporting cycle (including an implementation schedule).

With respect to the remainder of this comment, see response to comment #73 regarding water quality standards compliance.

With respect to measurable goals, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

With respect to the suggested language changes for the second paragraph of Part V.A. (i.e. water quality standard compliance), the commenter has not identified any Federal or State statutes and/or regulations that must be met or are failing to be met.

With respect to water quality standard compliance, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

The commenter has not identified any Federal or State statutes and/or regulations related to funding that must be met or are failing to be met. There is no legal requirement to address funding as permit condition. With respect to funding, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 71. “All NOIs shall be signed by either a principal executive officer or ranking elected official.” (p.21) Language should be added to include their “designee”. In the absence of an intent to defraud why wouldn’t you simply advise the respective MS4 to execute the subject document by the proper party? (14)

Response: The proper authorized representatives are described in the permit and signatory are contained in the permit and must be followed (see Part VI.J. of the MS4 general permit). The list of authorized representatives is available on the Department’s website.

Comment 72. Part VII.A.1.i: (page 29) should also include a reference to post construction training as required by Part VII.A.5. (13)

Response: Comment noted. Please visit Department’s website for the training opportunities on the Stormwater Calendar.

Comment 73. The Coalition believes that the provision requiring an open meeting if requested by two (2) members of the public is too few to justify the burden on limited staff time. A more appropriate threshold for a public meeting would be requests from ten (10) members of the public. (24)

Response: Comment does not concern the proposed updates to the MS4 general permit.

Comment 74. It is not clear as to what mechanisms are acceptable for providing the opportunity for the public to participate in the *development, implementation, review, and revision* of the

SWMP. Please be more specific about what mechanisms will be acceptable. For example: are public meetings / hearings, posting information on internet, notice boards, legal notices sufficient? (39)

Response: The Department intends to utilize the previous annual reports submitted to the Department to develop an inventory of the examples of mechanisms used by MS4s and enhance the list of tasks to assist MS4s.

Comment 75. *"iv. Provide the opportunity for the public to participate in the development, implementation, review, and revision of the SWMP."* The above requirement is generic and open to personal interpretation. Although we fully agree with the intent of this requirement, we feel that public involvement/participation in the SWMP should be guided by a formal process that is developed by the MS4 itself. It is requested that the above requirement be replaced with the following. *iv. Develop and implement a process/procedure to involve the public in the SWMP development.* (42)

Response: Comment does not concern the proposed updates to the MS4 general permit. The Department agrees that MS4s should develop this process themselves.

Comment 76. Several comments suggest that the term "Sewershed" needs to be modified to something like "Watershed" or "Storm-Water Catchment Area" to allow for a better understanding of the MS4 Program by the General Public. (34) (20)

Response: The "sewershed" terminology was not modified from the previous permit. In urban areas, stormwater is collected by a network of sewers and drains collectively termed the sewershed. "Sewershed" is a commonly accepted terminology. "Watershed" is a term used to refer to drainage area in which flow pattern is dominated by surface topography. Water that falls onto impervious area, roof and parking lots is often connected directly to storm sewers. Water that used to run through overland flow into the streams, rivers and underground flow is instead directed into conveyance system. "Storm-Water Catchment Area" conveys a similar concept. The Department's goal is to identify drainage areas of contributing stormwater conveyance systems. If MS4s have a local/professional terminology to address the boundaries of their conveyance system, Department does not find any problem with them using their terminology, so long as such is clearly defined as a component of any document required by the MS4 general permit.

Comment 77. Clarification should be made in the General Permit as to whether NYSDEC's intention is to use their definition of an outfall (e.g., any point where a municipally owned and operated separate storm sewer system discharges to either surface waters of the State or to another MS4) instead of the end-of-pipe outfalls described in the required Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment for the ORI. The Guidance Manual describes the ORI as a stream and channel walk to find all outfalls. If it is NYDEC's intent for the ORI to include outfalls to another MS4 system, written procedures/guidance should be provided on how to handle these outfalls during an ORI. An accessible manhole is not always at the exact point of discharge from one MS4 to another. (34)

Response: The Department is not currently considering revising the definitions established in regards to outfall mapping.

Comment 78. As discussed at the Long Island MS4 Annual Report Briefing Meeting on April 9, 2009, many attorneys representing MS4s are uncomfortable "certifying" that the adopted laws are equivalent to the State's model laws because the term "equivalent" is inherently subjective. (34)(18)

Response: The MS4 permit was modified to further clarify explain how equivalence must be documented. The MS4 general permit provides several options that could be utilized in relation to adoption of a local law. Only the equivalency option requires a certification by an attorney.

Comment 79. Part VII A. 3.b.ii - The proposed deadline date of March 2010 for mapping is before the permit becomes effective and it is recommended that the permit clarify this requirement. (40)

Response: The deadline defined by GP-0-08-002 is kept in this MS4 general permit for enforcement purposes.

Comment 80. “- covered entities must perform an NOT inspection and complete the “MS4 Acceptance” certification statement according to the requirements of the GP-0-10-001.” This certification is currently provided by the qualified inspector (employed by the owner/operator) and by the owner/operator. MS4s do not have the resources to observe and document

implementation of the SWPPP. The owner/operator and its representative must maintain this responsibility per current NYSDEC requirements. (14)

Response: Under the MS4 general permit, the MS is allowed to accept the Qualified Inspector certification at its discretion. However, there are instances where the MS4 would want to check or spot-check terminations. The MS4 authority would be undermined by NYSDEC accepting a termination prior to the MS4 accepting the termination. Part VII.A.4.a.ix. and Part VII.A.5.a.ix. of MS4 general permit are modified to state the following: covered entities must determine that it is acceptable for the owner or operator of a construction project to submit the Notice of Termination (NOT) to the Department by performing a final site inspection themselves or by accepting the Qualified Inspector's final inspection certification(s) required by the SPDES General Permit for Stormwater Discharges from Construction Activity (GP-0-10-001). The principal executive officer, ranking elected official, or duly authorized representative from the covered entity shall document their determination regarding the termination of coverage by signing the "MS4 Acceptance" statement on the NOT.

Comment 81. *Attorney certification regarding adoption of a modified version of the sample law as equivalent to one of the sample local laws (p. 35) Attorneys may only affirm or certify those matters based upon "personal knowledge" or "upon information and belief", in which event the source of the information and the ground for the belief must be provided. (14)(18)*

Response: A certification stating that a legal review has been performed. "Personal knowledge" or "upon information and belief" that the law is equivalent would meet this requirement.

Comment 82. Will the trained individuals or knowledgeable personnel within the Town be allowed to train additional support staff? Please keep in mind that what may work for the Town of Southold may not be the same for other Townships. Will the Department of State Codes Division coordinate training for Code Officials and include MS4 Training in their annual requirement? (20)

Response: MS4 permit does not require the Town to provide training to contractors, but training town staff is advisable. Depending on the requirements in the permit for a particular obligation, certain qualifications may be required for the instructor (e.g. qualified trainer for Qualified Inspector and Trained

Individual (contractor). For other types of trainings, MS4s may use their resources to train others within their municipality (e.g. public outreach). Please visit the Department's training calendar or DOS training program for future opportunities and assistance.

Comment 83. The Coalition suggests that language be added to the General Permit clarifying the meaning of MS4 "acceptance" of a SWPPP. The revisions to the Acceptance Form could provide the necessary language. (24)

Response: Comment noted.

Comment 84. Part VII.AA.a.vii. states that the individuals performing SWPPP reviews for the MS4 need to be adequately trained; and **Part VII.A.4.a.ix.** states that the individuals performing the construction site inspections for the MS4 need to be adequately trained and that adequately trained means receiving inspector training by a Department-sponsored or approved training. As a result, the qualifications for the MS4 SWPPP reviewer are unclear. (34)

Response: Construction and MS4 general permits provides definition for qualifications for inspection, design, and review process. Part VII.A.5.a.v. states the qualification for post construction SWPPP review.

Comment 85. Part VII.AA.a.ix. states that the individuals performing the construction site inspections for the MS4 need to be adequately trained and that adequately trained means receiving inspector training by a Department sponsored or approved training. However, the draft of GP-0-10-001 Appendix A states that a qualified inspector means a person that is knowledgeable in the principles and practices of erosion and sediment control.(34)

Response: The qualification in the MS4 permit apply to the MS4 inspector. The qualified inspector, as defined in the construction permit is the inspector that the owner of a construction project needs to hire.

Comment 86. Performance Standards for Post-Construction Stormwater Management

The most prominent, and welcome, change the Department has proposed in its stormwater regulatory scheme is to re-frame its post-construction stormwater management requirements around principles of sustainable stormwater management, by proposing revisions to the Design Manual. These Design Manual changes establish requirements to use green infrastructure practices to reduce, manage, and treat stormwater and maintain and restore natural hydrology by

infiltration, evapotranspiration, capture, and reuse. We will be submitting separate comments on the proposed revisions to the Design Manual.

The Draft MS4 Permit relies heavily on the Manual. Rather than specifying post-construction stormwater management requirements that satisfy the Clean Water Act's "maximum extent practicable" requirement,¹ the Draft MS4 permit cross-references standards in the Manual. It states that an MS4's post-construction stormwater program must include "a combination of structural or non-structural management practices (according to standards defined in the most current version of the NYS Stormwater management Design Manual) that will reduce the discharge of pollutants to the MEP"; it further provides that "if a stormwater management practice is designed and installed in accordance with the . . . Manual or has been demonstrated to be equivalent and is properly operated and maintained, then MEP will be assumed to be met for the post construction stormwater discharged by the practice." (Parts VI.A.5.iv; VII.A.5.iv.)

Unlike the Draft Permit, the Manual itself includes some quantitative performance standards for managing post-construction stormwater runoff, including requirements to retain a specified volume of rainfall on-site, using green infrastructure techniques. If the Draft MS4 Permit is intended to incorporate these standards by reference, as enforceable terms of the permit, that may be an acceptable way of establishing binding, substantive requirements in the permit. However, the permit's use of the phrase "in accordance with the . . . Manual or . . . demonstrated to be equivalent" undermines any such intent, by making compliance with the standards in the state Design Manual optional; it impermissibly allows the permittee to self-regulate by choosing some other standard it deems to be "equivalent" (while providing no guidance as to what "equivalence" would mean in this context). This permit language must be modified to ensure that the permits actually incorporate-by-reference the standards in the Manual as enforceable requirements of the permits. The permit must be clear that the core requirements of the Manual are mandatory; at most, where the Manual itself so allows, deviation from the Manual's technical specifications for particular stormwater management measures may be acceptable, if an alternative design is demonstrated to be equally effective at satisfying the performance standard that the measure is intended to meet – but the permit must be clear that the underlying performance standard (*e.g.*, RRv, WQv, CPv, etc.) must still be met. 45

Response: This comment is similar to the issue raised in relation to deviation from the technical standards in NRDC/Waterkeepers' January 15, 2010 comments on the draft 2010 construction stormwater general permit.

The New York State Stormwater Technical Standards are presented in the NY Standards and Specifications for Erosion and Sediment Control (for during construction) and the New York State Stormwater Management Design Manual (for post-construction) (collectively "technical standards"). The Design Manual defines two sets of criteria: "Sizing Criteria" (e.g. WQv, RRv, CPv, etc...included in Chapter 4) and "Performance Criteria" (reduction level, design specifications, required elements, design guidance, etc...included in Chapters 5 and 6).

Performance criteria are defined by the Design Manual into two parts: Design Guidelines and Required Elements. Design Guidelines are features that enhance practice performance, but may not be necessary for all site specific applications. Required Elements are features that should be used in all design applications.

The construction general permit clearly requires that an owner or operator must develop a SWPPP that is in conformance with the technical standards. If they do not do so, the owner or operator must demonstrate to the Department that an equivalent mechanism will be utilized that ensures that the design specifications of the erosion and sediment control practices (see Part III.B.1.e.,f.,l) and performance criteria, and the sizing criteria of post construction practices (see Part III.B.2) are met. The NOI form contains several questions related to conformance with the technical standards, including: 1) whether the SWPPP has been developed in conformance with the Design Manual (question 23 of the NOI); 2) if the practices are listed as standard technical practices (questions 27 and 28 of the NOI), and 3) in the case of deviation from technical standards, provide a description of the deviations (question 28 of the NOI). Additionally, question 26 of the NOI specifically asks the applicant to identify each practice as set forth in the list of standard practices. Non-standard practices are noted as "other" under question 26, which allows the Department to identify proposed alternative practices. If the collective responses in the NOI indicate that the SWPPP has not been developed according to the technical standards and the project has not been reviewed by a regulated traditional land use control MS4, the applicant will be required to submit a full SWPPP to the Department.

Through its review of the NOI, the Department confirms that each owner or operator seeking coverage under the construction stormwater general permit has complied with the technical standards. For projects not in a regulated MS4 area, that do not meet the technical standards, the Department requires a minimum 60 days processing time for the Department to review the SWPPP to determine if all design considerations, sizing criteria and performance criteria, have been met. During this time period, the Department also determines the significance of the deviations from the technical standards.

With respect to post-construction stormwater controls, in order to be in compliance with the technical standards (Design Manual), projects must meet both sets of criteria; performance and sizing. In general, the Department will only accept deviations from the technical standards that involve the use of an alternative post-construction stormwater management practice or a modification to one of the standard practices from the Design Manual, provided the owner has demonstrated that the deviation is equivalent to the Design Manual.

The alternative post-construction stormwater management practices that are accepted are those that meet Performance Criteria, as verified by sources identified by the Department and appear on the Department's website. Modification(s) to the standard practices are only acceptable if the proposed modification(s) meet the Required Elements of the Design Manual and do not result in neglecting the principles of the design and performance criteria. Additionally, all designs must comply with the Sizing Criteria and be verified in the NOI review process

It must be noted that the process for creating stormwater management practices that are not described in the Design Manual was designed with consideration of the fact that new and effective technologies for stormwater management become available at a rate that is faster than the Department is able to update the Design Manual. The Department believes that it is essential to allow for alternative stormwater management practices.

For projects located in the regulated MS4 areas, traditional land use control MS4s review the SWPPP to determine if all design considerations have been met. The MS4 is required to follow the same principles in the review of the SWPPP to ensure the equivalency of the design specification to the erosion and sediment control practices and performance criteria and the sizing criteria of post construction practices (see Part VII.A.5. of the MS4 general permit).

The comment also states “... it impermissibly allows the permittee to self-regulate by choosing some other standard it deems to be ‘equivalent’...” It is unclear what the commenter means by “permittee.” If the commenter is referring to the covered entities under the construction general permit, please refer to the above explanation about development of a SWPPP in conformance with the technical standards or demonstration of equivalency. Such entities are clearly not allowed to self-regulate.

If the commenter is referring to the covered entities under the MS4 general permit, there is no self regulatory role assumed by regulated MS4s. In fact, as required by Part VII.A.5. “Post-Construction Stormwater Management-SWMP Development/Implementation” of draft 2010 MS4 general permit:

“At a minimum, all covered entity must develop, implement, and enforce a program that:

- a stormwater management practice is designed and installed in accordance with the New York State Stormwater Management Design Manual or has been demonstrated to be equivalent and is properly operated and maintained, then MEP will be assumed to be met for post-construction stormwater discharged by the practice*
- ensure that the individuals performing the reviews are adequately trained and understand the State and local post construction stormwater requirements;*
- ensure that the individuals performing the reviews for SWPPPs that include post construction stormwater management practices are qualified professionals or under the supervision of a qualified professional;”*

Therefore, all construction activities submitted to the regulated MS4s are evaluated against the technical standards, the same as in non-regulated MS4 areas. Deviation from the technical standards is only allowed where an equivalent mechanism ensures the performance criteria and the sizing criteria are met. Please also note that Part IV.A. of the MS4 general permit requires the reduction of stormwater pollution to the Maximum Extent Practicable (MEP).

The commenter has not identified any Federal or State statutes and/or regulations related to the MS4 general permit and the Design Manual that must be met or are failing to be met. The MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 87. The Draft MS4 Permit also references the Manual by way of cross-reference to the Draft Construction Stormwater General Permit. Part VII.A.5.i provides that a minimum requirement for an MS4's post-construction program is to provide protection equivalent to the Construction General Permit; in turn, the Draft Construction Stormwater General Permit (Part III.B.2.) states that development and redevelopment projects that are subject to post-construction stormwater management requirements "shall prepare a SWPPP that includes practices designed in conformance with the . . . technical standard, New York State Stormwater Management Design Manual . . ." The Draft Construction Permit further authorizes "elements of [a] design that are not in conformance with the Design Manual, [if the SWPPP includes a] . . . demonstrate[ion] that the deviation or alternative design is equivalent to the technical standards." (Part III.B.2.d.) Any permittee submitting a NOI for coverage under the Construction Permit accompanied by a SWPPP that does not comply with the Manual must wait 60 days before beginning construction but need not receive affirmative sign-off from the agency to which the NOI and SWPPP are submitted. (Part II.B.3.a.ii.) And the Construction Permit provides no guidance as to what it means for a design to be "equivalent" to the standards in the Manual. As with the "equivalence" language in the Draft MS4 Permit, this language in the Draft Construction Permit must be corrected, because this weakness in the Draft Construction Permit results in a weakness in the MS4 Permit, since the MS4 Permit requires a level of protection for post-construction stormwater that is equivalent to that in the Construction Permit. The Construction Permit must be clear that the core requirements of the manual are mandatory; at most, where the Manual itself allows, deviation from the Manual's technical specifications for particular stormwater management measures may be acceptable, if an alternative design is demonstrated to be equally effective at satisfying the performance standard that the measure is intended to meet -- but all permits must be clear that underlying performance standards in the Manual (*e.g.*, RRv, WQv, CPv, etc.) must still be met.

As a related matter, if the Department is relying on incorporation-by-reference of the Manual to satisfy requirements to include objective, enforceable standards in the Draft MS4 Permit that reduce polluted runoff to the maximum extent practicable – or to satisfy any other legal standards that the Draft Permit, without reference to the Manual, cannot satisfy – the Department must be sure to issue a revised Manual at the same time (or before) it issues the new permit; otherwise, the permit, read in conjunction with the *existing* manual, would fail to satisfy the minimum legal requirements.

Response: This comment is on the construction general permit, and, therefore, not applicable to this response. However, see the response provided to comment# 86 on equivalency.

The Department is making every effort to release the updates to the Design Manual within a few weeks from the issuance of GP-0-10-002. As stated in GP-0-10-001, the transition period for meeting the updated requirements to the Design Manual is six months from the release of the final version of the Design Manual. The engineering community is aware of the updates and integration of the green infrastructure and other updates to the Design Manual. A few weeks time difference is insignificant in the planning and design process for SWPPPs.

Please also note that Part IV.A. of the MS4 general permit requires the reduction of stormwater pollution to the Maximum Extent Practicable (MEP).

The commenter has not identified any Federal or State statutes and/or regulations related to the MS4 general permit and the timing of the issuance of the Design Manual, that must be met, or are failing to be met. The MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 88. Part VII.A.6 discusses incorporating the use of green infrastructure practices in routine upgrades of stormwater drainage and conveyance systems. Several groups commented that the exact language used is weak and unenforceable as written ("Consider and incorporate"). If upgrades are completed without incorporating green infrastructure, the permit should require MS4s to document which practices were "considered" and the reasons why they were rejected. Several counties stated that DEC should not attempt to influence local land use laws through this permit and the weak and non-enforceable language in this section should be removed. If green infrastructure practices are required, then covered entities should be "required" not "encouraged to" review and revise local codes and laws that preclude these techniques. Can this be accomplished through a change in the state issued, model stormwater ordinance already adopted by the majority of MS4s? Requiring MS4s to commit at this time to including these principles in watershed and open space plans, local laws, and ordinances is premature. It is requested that the following language be utilized: "iv. In the development of environmental plans such as watershed plans, open space preservation programs, local laws, and ordinances covered entities must consider the incorporation of principles of Low Impact Development (LID), Better Site Design (BSD) and other Green Infrastructure practices to the MEP." Through their land use authority granted under Town Law Article 16, municipalities have the right to establish the areas

where conservation design may or may not be permitted. Land use controls required by the General Permit may conflict with local land use controls, placing designers in a difficult situation. (5)(13)(39)(44)

Response: The Part VII.A.5.a.iv. of the permit requires that MS4s consider the green infrastructure approaches . The Department believes that MS4s have the tools to promote green infrastructure approaches. The Department is requiring the consideration of these approaches as a first step towards enhancing their environmental planning. Additionally, consideration of green infrastructure approaches will allow the MS4s the greatest flexibility in implementation of such approaches.

In regard to enforceability of green infrastructure requirements, the Department is using a multi faceted approach to promote green infrastructure- MS4s through their planning tools and the Department through the Construction general permit and the Design Manual. The process established in the Design Manual requires that developers document which practices were "considered" and the reasons why they were "rejected." The Construction general permit does not require specific land use controls.

If MS4s identify local laws that are inconsistent with green infrastructure approaches, the MS4s are encouraged to revise their local law to eliminate obstacles in achieving green infrastructure approaches. The Department has chosen not to make the proposed revision to Part VII.A.5.a.iv. of the MS4 permit. The Comprehensive Plan serves as a "road map" so to speak for a community. The comprehensive plans can be reviewed periodically and amendments made as necessary, which could include LID/BSD/GI.

Comment 89. The Municipal Home Rule Law is a provision in the New York State Constitution that gives municipalities an independent source of authority to regulate their own affairs, the State has a substantial interest in preventing water quality degradation due to stormwater runoff. Thus, municipal regulation must yield to State law where the State has a substantial interest in the matter. Inclusion of the new provision for mitigation banking of MS4 load reduction credits is commendable. A few lessons from mitigation banking nationally might make this approach more palatable and flexible. I trust you've studied the EPA/Corps' 2008 rule which serves as the standard for similar programs. <http://www.epa.gov/wetlandsmitigation/> (1)

Response: Comment noted.

Comment 90. Sequencing should be noted as a prerequisite in order to ensure that there has been an exhaustive attempt to avoid and minimize the detrimental runoff impacts for which

mitigation is an available recourse. I assume you don't mean to allow developers to make a mess unnecessarily simply because it'd cost less to pay for mitigation elsewhere. (1)

Response: The Department may provide input in the process of the development of a banking and credit systems by the MS4s. Applications for development whose approvals are dependent upon a banking and credit allowance must be justified and adequately demonstrate that physical constraints impede the implementation of stormwater mitigation practices on site. Cost is not, in and of itself an adequate justification for a banking and credit allowance.

Comment 91. Since your banking scenario requires DEC engagement, I suggest you state the credit ratio more broadly than an absolute value of 2. Best practices have shown that site conditions, and completeness of mitigation, and severity of impact are a few examples which may warrant more than a one-to-one replacement. In other cases, if loads can be quantified well as commensurate with mitigation, then a developer probably has basis for a claim if they would be otherwise forced to pay for twice as many betterments, which the regulator is already required to achieve. A closely related part of the banking scenario which seems unaddressed pertains to additionality, especially where a construction permit applicant faces a GP requirement and, simultaneously, a municipality faces a separate MS4 requirement. Offset credit trading is sometimes constrained by additionality clauses which mean "But for the credit purchase, the mitigation would not have occurred." It might be advisable to clarify how private investments will be distinct from municipal betterments. It all boils down to the ratio. If the ratio is derived based on engineering calculations, then the private developer is compensating for unavoidable impacts. If the ratio is derived otherwise, then municipalities could be subject to an Article 78 based on the perception that they are coercing developers to pay for a disproportionate amount of the municipalities MS4 requirements. (1)

Response: Comment noted. In regards with ratio, please refer to Comment

Comment 92. Given that MS4s unanimously claim not to have enough funds to invest in MS4 measures, it is unduly burdensome to insist that the mitigation credits be accumulated BEFORE an offset can be purchased. In Lieu Fee programs are inherently based on accumulating funds into a trust until a sufficient amount enables the preferred large scale, well-designed mitigation favored over artificial onsite attempts. Performance standards are common, but in practice, banks often need some credit sales in order to get underway. That will likely be the case for MS4s. (1)

Response: Based on the Department's previous experiences with mitigation projects, this sequence is considered to be essential. The Department is not considering the In Lieu Fee program in the Banking and Credit system at this time. It must be noted that off-site credit will be at the expense of the developer and not the MS4.

Comment 93. 2. Green Infrastructure Requirements Applicable to Municipal Plans, Codes, and Projects. In order to take the utmost advantage of the benefits of green infrastructure approaches, the Department needs to use its regulatory authority to compel more widespread adoption not only by private property developers, but also by the permitted MS4s themselves. Other states, particularly West Virginia and Washington State, have adopted Phase II MS4 permits that include provisions mandating the review of local ordinances and codes and foster the use of these practices in public projects and retrofits.

The Department should not miss this significant opportunity to take similar progressive steps. Specifically, the language in Part VII.A.5.a.iv. requires municipalities merely to “consider” incorporating green infrastructure principles into their land use plans and related local laws, and only “encourages” them to review local codes and revise them as appropriate to remove provisions that inhibit the use of green infrastructure techniques. This language needs to be tightened in order to create binding obligations, with deadlines for compliance, on the part of MS4s. As we have on prior occasions, we again encourage the Department staff to review the “Watershed Protection” sections of the June 2009 West Virginia Phase II MS4 General Permit (Part II.C.b.5.a.i (pp. 13-14)), and to adopt significant portions of both its phrasing and substantive requirements.³ Likewise, a provision similar to Part II.C.5.b of the West Virginia MS4 Permit, which requires review and updating of street design standards, should be added to the New York Draft MS4 Permit to require permittees to incorporate green infrastructure approaches into the design of all projects in the public right of way; such language could be used to further strengthen the provision found in the Draft MS4 Permit at Part VII.A.6.b.3.

The W.Va. permit is available at

www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Pages/default.aspx. (45)

Response: In the first 5 years of implementation of the Phase II stormwater regulations, the Department required the regulated MS4s to review the local laws and ordinances for compliance with the state requirements and to ensure that such local mechanisms are not in conflict with MS4 general permit requirements. Part VII.A.5.a.iii clearly requires regulated entities to develop, implement, and enforce a program that “includes a law,

ordinance or other regulatory mechanism to require post-construction runoff controls from new development and re-development projects to the extent allowable under State or local law that meet the State's most up-to-date technical standards." Many building codes may be in conflict with the principles of green infrastructure. The building codes stem from international building codes adopted universally by municipalities. Changes to building codes would need to be made by different organizations other than the Department , (e.g. USEPA). There is no legal authority for the Department to require changes to the international building codes.

The commenter has not identified any Federal or State statutes or regulations related to green infrastructure that must be met or are failing to be met. There is no legal requirement to address green infrastructure in the MS4 general permit. However, New York State has been proactive in developing standards for post-construction controls, and recently incorporated green infrastructure requirements into the MS4 general permit and the draft Design Manual. With respect to green infrastructure, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 94. Part VII. A.5.a.v: (page 40) This section discusses utilizing training from available sources. To address enforceability, a reference to MCM 1 should be included. (13)

Response: The training related to MCM5 should be performed according to the requirements defined in MCM1. Training opportunities are made available on the website.

Comment 95. Part VII. A.5.a.vii: With regard to the sentence, "MS4s must have an existing watershed plan based on which offsite alternative stormwater management in lieu of or in addition to on-site stormwater management in redevelopment projects is evaluated for pollutant reduction greater than required treatment by the state standards" – this sentence is excessively complex and very difficult to follow or understand. It should be clarified and simplified, perhaps as more than one sentence. (13)

Response: Note the following changes: "MS4s must have an existing watershed plan based on which offsite alternative stormwater management in lieu of or in addition to on-site stormwater management practices are evaluated. Redevelopment projects must be evaluated for pollutant reduction greater than required treatment by the state standards"

Comment 96. "- utilize available training from sources such as Soil and Water Conservation Districts, Planning Councils, The New York State Department of State, USEPA, and/or the

Department to educate the Town Board and Planning and Zoning Boards on low impact development principles, better site design approach, and green infrastructure applications.” Due to limited available resources training is typically attended by personnel directly responsible for implementation of the SWMP. It is incumbent upon the State to provide the educational and technical resources to effectively implement all of the proposed permit requirements at the State’s own cost. DEC should conduct Low impact Development (LID) and Better Site Design (BSD) training sessions on Long Island and/or develop and host internet-based training workshops (such as webinars). (14) (39)

Response: Please visit Department’s website, Stormwater Calendar, for training opportunities.

Comment 97. The Town feels that training should lie with support staff. In Babylon, site plans are presented to the various Boards upon meeting code/site plan review requirements which is administered by technical staff under the direction of a department head. This is a mandate that in essence will not have a great impact on local decision making. (10)

Response: The intent is to provide training to those in decision making capacity and those who are responsible for the review and approval of development plans.

Comment 98. PartVII5.a.iv.(page 58): the County agrees with encouraging Green Infrastructure and LID practices, however, the chapters in the design manual associated with this need to reflect that infiltration to storm water basins and drywells are an included practice. (19)

Response: The Design Manual refers to infiltration basins and drywells as acceptable practices for runoff reduction.

Comment 99. Banking and Credit Many comments were made about the new provision for mitigation banking of MS4 load reduction credits. Several individuals and associations stated that the potential for a banking and credit system for stormwater is very positive. It was suggested that the NYSDEC should establish a task force to develop guidelines for establishing and implementing this innovative concept, before it is broadly encouraged in the permit. Also, that the standard reduction factor of 2 for a POC was excessive, without any theoretical foundation, and would act as a disincentive to developers. Finally, several individuals and associations questioned whether this program would apply to retrofits and was applicable to redevelopment projects. Can credit for past projects or changes within a watershed that

effectively provided offsets be claimed. The problems will be in establishing a legal framework. If attempted to be enforced on re-developments by a municipality, it could be construed as an impact fee which is illegal in New York. (13) (24) (7) (40)(35)(39)(33)(41))(42) (44)

Response: The banking and credit is a system that could be developed by the MS4s. There are examples of such systems that were initiated and implemented in other states. The Department will welcome development of guidelines for banking and credit systems.

It must be noted that banking and credit systems cannot be developed or implemented without first preparing a watershed/waterbody management plan. Past projects or changes within a watershed that effectively provided offsets cannot be claimed as offsets to new projects.

Banking and credit systems are important tools in achieving water quality goals. Offsite controls can be used to mitigate impacts when site constraints do not allow for cost effective controls on site. Setting a factor of 2 is based on best professional judgment and is close to the most current requirement approaches taken by other states. Banking and credit systems serve as regional and/or watershed-wide mechanisms for reducing the cumulative impacts of development as opposed to strictly addressing impacts at the single site level. One of the reasons behind the banking and credit approach is that once it's determined that adequate runoff control cannot be provided at a specific site, additional controls must be applied elsewhere in the same watershed to offset downstream damages.

The banking and credit system is not applicable to retrofit projects. This system is applicable to redevelopment projects due to potential pre-existing constraints on the site.

It is the MS4's choice to develop a banking and credit system and ensure the legality of the mechanism to implement it. The comment does not explain how a possible legal framework for a banking and credit system for re-development could be construed as an impact fee. The Department will not opine on how a state court or federal court controlling in New York State would decide the legality of an impact fee.

Comment 100. Can credit for past projects or changes within a watershed that effectively provided offsets be claimed? For example, if nutrients were a pollutant of concern for a watershed, could the pollutant reduction for the agricultural and rural projects be "banked" as an offset?

Response: Credit is applied to urban runoff control that are designed and installed according to the standards defined in the Design Manual. Previous improvements cannot be counted towards offset of new projects. Credit cannot be claimed for agricultural projects.

Comment 101. New development could be stifled in certain situations, if an opportunity to participate in a "banking and credit system" is not provided. For example, consider a new "hotspot" facility/development proposing to develop an undeveloped, well-drained site that currently does not have runoff leaving the site. (42)(41)

Response: In the development of a banking and credit system MS4s may consider all options that follow the principles defined in the stormwater technical standards.

Comment 102. VII.A.5.a.vii: The potential for a banking and credit system for stormwater is very positive. I can imagine a properly functioning trade program can lead to more effective regional treatment measures applied where they can be most effective. However, there are many nuances, details, and legal issues of such a program that are not addressed in the permit language. I would like to suggest that the Department establish a task force to develop guidelines. (5)

Response: Comment noted. The banking and credit should be developed and proposed by the MS4s. Please refer to comment # 115.

Comment 103. A number of proposals in the proposed General Permit require clarity. This includes references to green infrastructure, modeling and a banking/credit system. Details on green infrastructure were not available until the New York State Stormwater Design Manual was recently released for public review. Meanwhile, few details are available for modeling and the banking/credit system. It is difficult to prepare substantive and specific comments on an idea or premise that has not been well defined. Requiring comment on these issues that will encumber an MS4 for 5 years without offering additional clarity is unfair. (16)

Response: References on green infrastructure are provided in the Design Manual. Guidance on modeling tools are provided through WISs and GP-0-08-002 responsiveness summary. The Department may not be able to develop guidance on banking and credit, but may be able to provide references to interested parties. The Department extended the comment period on both the general permits and updates to the Design Manual from December 16, 2009 (12/23/09 for Design Manual) to January 15, 2010. Therefore, the

Department believes there was adequate time for reviewers to develop comments on the proposed green infrastructure requirements and the banking and credit system criteria.

Comment 104. Given the demands of the proposed new Permit, better guidance on more advanced technologies, computer modeling, “banking and credit systems”, etc. should be provided—but in material a lay-person can utilize, not a 100-plus page tome that only an engineer can comprehend and that buries information relevant to the small municipality in a blizzard of material suited for the City of Buffalo. (Just wading through the 110 page “Draft General Permit”—and related documents—to which this letter is directed is more than should be demanded of a small village volunteer Trustee. One size does not fit all!) (17)

Response: The banking and credit could be developed by the MS4s. There are examples of such systems that were initiated and implemented in other states. Such plans typically encompass multi-jurisdictional boundaries and necessitate that municipalities work together in a formalized arrangement to advance their shared waterbody/watershed objectives. Such arrangements capitalize upon expertise and services that are not generally available within a single small municipality.

Comment 105. The principles of Low Impact Development, Better Site Design and Green Infrastructure practices are just beginning to be learned and understood at this time by municipalities in our area. As such, the advantages and disadvantages of these practices are not fully understood at this time. Furthermore, the applicability of these principles, given a MS4's particular circumstances, has not been fully evaluated at this time. As such, it is felt that requiring the MS4s to commit at this time to including these principles in their watershed and open space plans, local laws, and ordinances is premature. (42)

Response: Although this field of stormwater management is relatively new, it has been practiced in other states with positive results. For training opportunities please refer to the stormwater calendar on the Department's website.

Comment 106. Although the application of the principles of low Impact Development, Better Site Design, and Green Infrastructure may have merit in our region, we feel that if an appropriate foundation of understanding of these principles is not built, the long-term acceptance of them would be jeopardized. Simply mandating that the principles of LID, BSD, and Green Infrastructure be incorporated into development plans, local laws, and ordinances is not expected to be an effective way to build wide-based acceptance. A phased approach regarding the

evaluation and potential implementation of LID, BSD, and Green Infrastructure principles may prove more effective (42)

Response: The permit requires that MS4s consider incorporating GI language into local law and ordinances and other planning documentation. The Department agrees and has taken a phased approach. Green infrastructure approach needs to be evaluated collectively with consideration of training and educational efforts and in relation with the Construction general permit and Design Manual.

Comment 107. There are still no monitoring requirements in the permit, either for end-of-pipe discharge monitoring or ambient water quality monitoring in receiving water bodies. MS4s must be required to collect data that can be used to evaluate the actual effectiveness of their programs in terms of pollutant loadings and resulting water quality. (45)

Response: As set forth below, a monitoring requirement that relies on sample collection and laboratory analysis is not the only option for determining the actual effectiveness of the program.

Effluent monitoring is critical to determine compliance with the Water Quality Based Effluent Limits (WQBEL) that are commonly used in individual processed wastewater permits. However, EPA does not require WQBELS to be included in stormwater permits in the same manner as they would be included for traditional point source dischargers. EPA's Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits (09/01/1996) states that:

“Storm water discharges are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex. The water quality impacts of storm water discharges are related to the uses designated by States and Tribes in their WQS, the quality of the storm water discharge (e.g., conventional or toxic pollutants conveyed to the receiving water) and quantity of the storm water (e.g., erosion and loss of habitat caused by increased flows and velocity). Uses may be impacted by both water quality and water quantity. Depending on site-specific considerations, some of the water quality impacts of storm water discharges may be more related to the physical effects (e.g. stream bank erosion, streambed scouring, extreme temperature variations, sediment smothering) than the type and amount of pollutants present in the discharge. For municipal storm water discharges in particular, the current

use of system-wide permits and a variety of jurisdiction-wide BMPs, including educational and programmatic BMPs, does not easily lend itself to the existing methodologies for deriving numeric water quality-based effluent limitations. These methodologies were designed primarily for process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in receiving waters. Using these methodologies, limitations are typically derived for each specific outfall to be protective of low flows in the receiving water. Because of this, permit writers have not made wide-spread use of the existing methodologies and models for storm water discharge permits. In addition, wet weather modeling is technically more difficult and expensive than the simple dilution models generally used in the permitting process.”

However, despite EPA’s position, the Department may incorporate MS4 sampling and laboratory analysis into the MS4 general permit if the Department determines in the future that it is necessary for protection of water quality.

The commenter has not identified any Federal or State statutes and/or regulations related to monitoring that must be met, or are failing to be met. With respect to monitoring, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 108. To comply with these directives, the monitoring requirements of the Draft MS4 Permit must enable a discharger and the Department to identify violations of water quality when they occur, and assist in the development of more stringent permit limits that will address such violations. See CWA § 308(a), 33 U.S.C. §1318(a). Indeed, “[t]he effectiveness of the permitting process is heavily dependent on permit holder compliance with the CWA’s monitoring and reporting requirements. See 33 U.S.C. § 1318.” Piney Run Pres. Ass’n v. County Comm’rs, 268 F.3d 255, 266 (4th Cir. 2001). Therefore, EPA’s regulations governing federal- and state- issued NPDES (SPDES) permits specify that discharge permits must contain:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for non-continuous discharges under § 122.45(e)

40 C.F.R. §122.44(i). (45)

Response: C.F.R. 122.44 explicitly applies only when applicable. C.F.R. 122.44(i), in its entirety, applies to monitoring procedures applicable to traditional individual NPDES permit requirements. Traditional monitoring, designed primarily for process wastewater discharges that occur at predictable rates with relatively consistent pollutant loadings, is not applicable to stormwater discharges. Stormwater discharges are highly variable with numerous outfalls. The use of traditional monitoring to determine compliance with permit requirements would skew the MS4 resource commitment to monitoring activities rather than activities that actually reduce pollutant loadings. In contrast to the comment, , GP-0-10-002 does include an assessment that uses land use and best management practice information in pollutant loading models to quantify loadings from some MS4s or MS4 areas. This assessment combined with available ambient monitoring will be used to determine the effectiveness of the tiered permit requirements in the MS4 permit. As allowed for by EPA guidance, the 2010 MS4 general permit does not require monitoring for compliance with numeric effluent limitations, since there are no numeric effluent limitations for stormwater (see explanation below to this comment regarding BMPs – Federal law does not require numeric effluent limits for stormwater).

The commenter cites Piney Run Pres. Ass'n v. County Comm'rs, 268 F.3d 255, 266 (4th Cir. 2001). However, this case is not controlling in New York. New York is in the 2nd Circuit for the Court of Appeals and this case was decided by the 4th Circuit. Additionally, this case involves an individual NPDES permit; whereas, the SPDES permit at issue here is the MS4 general permit. As the case states:

"The permitting authority receives discharge information from all relevant parties and then calibrates each individual permit to maintain overall state water quality standards. NPDES permits are therefore somewhat interdependent; the permitting authority must account for the effluent discharge of others in calculating the appropriate levels for an individual permit holder." Piney Run, 268 F.3d at 266.

Where no effluent limitation for a category of discharges has been promulgated or if an operator is discharging a pollutant that is not covered by an effluent limitation guideline, the permit writer may employ best professional judgment (BPJ) as the basis for effluent limitations. The MS4 general permit contains non-numeric limits, which are based on expert Department staff's BPJ. These non-numeric limits are commonly referred to as Best Management Practices (BMPs). 40 CFR 122.44(k) provides "[b]est management practices (BMPs) to control or abate the discharge of pollutants when: ... (2) Authorized under section 402(p) of the [Clean Water Act] for the control of storm water discharges; (3) Numeric effluent limitations are infeasible; or (4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA." Section 402(p) of the Clean Water Act states "[p]ermits for discharges from municipal storm sewers... (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

The commenter has not correctly identified any Federal or State statutes or regulations that must be met or are failing to be met. With respect to this comment, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations. There is no legal requirement to include monitoring and sampling by the MS4 in the MS4 general permit.

Comment 109. Department regulations echo this insistence on routine monitoring from SPDES permitted point sources. Permit holders are obliged to take samples and measurements "representative of the quantity and character of the monitored discharges." 6 NYCRR §750-2.5(a). (45)

Response: 6NYCRR 750-2.5(a) requires "the permittee shall comply with all recording, reporting, monitoring and sampling requirements specified in the permit." This regulatory requirement does not require that a permit must contain monitoring, but it does require compliance with monitoring if monitoring is a condition of the general permit. This is true, even though the MS4s gain coverage under the general permit and are not permittees.

The commenter has not correctly identified any State regulation that must be met or is failing to be met. With respect to this comment, the MS4 general permit is in compliance

with all applicable State regulations. There is no legal requirement to mandate sampling in the MS4 general permit.

Comment 110. The Department’s failure to incorporate representative sampling puts it at odds with emerging trends in stormwater permitting, as exemplified by other state permits. The Department must re-evaluate this position and revise the Draft MS4 Permit to incorporate sampling protocols that reflect the above-stated legal requirements.

The permit should:

Specify minimum parameters to be monitored including chemical, biological, and flow (volume and rate) parameters;

Specify a minimum number or percentage of monitoring locations, both at strategic stormwater outfalls and in-stream locations;

Specify that monitoring must be adequate to track progress of stormwater controls;

Specify that monitoring must be adequate to demonstrate progress toward and ultimately compliance with WLAs; and

Specify triggers for adaptive management (*i.e.*, changes to SWMP) where monitoring shows insufficient progress towards goals. (45)

Response: The Department will rely on collective efforts of all monitoring activities related to the impaired waters, which may include ambient monitoring conducted by the Department,

special projects for monitoring, watershed monitoring efforts, other agencies monitoring, academic monitoring, and publicly funded monitoring projects. One need only look to the Long Island embayements to see that this strategy provides a comprehensive picture of the state of MS4 discharge receiving waters. All of the Long Island waters include NYSDEC monitoring stations that can be used as an indicator of MS4 compliance.

The Department is not required by existing law or regulation to comply with “emerging trends.” Rather, permit requirements must be based on applicable statutes and regulations. The commenter has not correctly identified any Federal or State statutes or

regulations that must be met or are failing to be met. With respect to monitoring and sampling, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 111. A handful of associations, and local government officials made remarks specific to the use of ambient water quality monitoring to assess if the reduction at the TMDL waterbody has been met. How will the success for an individual MS4 achieving the load reduction be determined. The introductory text makes two references to ambient water quality monitoring, but does not specify who will be responsible for conducting such monitoring, the DEC or the MS4, where will it occur, what is the methodology that will be used, and will the MS4's receive monitoring reports? What will the petition process be if "ambient water quality monitoring demonstrates consistent compliance" and the covered entity requests suspension of additional BMP requirements? DEC should provide baseline data as the basis of evaluating post-BMP monitoring data.

Response: The details of the load reduction and meeting the permit requirement will be provided in the Watershed Improvement Strategy Guidance. The success of individual MS4s in achieving the load reduction is determined by the progress and effectiveness of the watershed improvement strategy and ambient water quality monitoring data. The Department will continue to reevaluate the metric used in the watershed improvement strategy to achieve the water quality standards.

The MS4 permit requires tracking of load reduction to be performed by the use of a computer model. The contributing load from each MS4, as estimated by the model, will be accepted as the assumed baseline.

The Department will rely on collective efforts of all monitoring activities related to the impaired waters, which may include ambient monitoring conducted by the Department, special projects for monitoring, watershed monitoring efforts, other agencies monitoring, academic monitoring, and publicly funded monitoring projects. One need only look to the Long Island embayments to see that this strategy provides a comprehensive picture of the state of MS4 discharge receiving waters. All of the Long Island waters include NYSDEC monitoring stations that can be used as an indicator of MS4 compliance.

Comment 112. Part VII.A.5.a.v: states that covered entities are required to utilize available training to educate the Town Board and Planning and Zoning Boards on low impact development principles, better site design approach, and green infrastructure applications. As Towns are also

covered under the MS4 General Permit, we feel that it should not also be the responsibility of Incorporated Villages or Cities to educate Town Boards. The language in this section should be revised. (34)

Response: It is not the intent of the permit that Incorporated Villages or Cities educate Town Boards. The permit is modified to replace “Town” with “municipal” to address this concern.

Comment 113. Measurable Goals - Part VII.A.5.c. – This section should identify what sorts of things the “measurable goals” must relate to. For example, the Permit should be clear that “address levels of output (*i.e.*, results in terms of reduced pollution and/or improved water quality).

Response: Regarding the comment on Part VII (and Part VIII that contains similar language for non-traditional MS4s) of the MS4 permit identifies specific performance requirements and SWMP reporting requirements, which are prescriptive and beyond measureable goals. Also, the Department has revised the Annual Report form to include specific output (see response to comment # 70) to address this comment.

With respect to measurable goals, the commenter has not identified any Federal or State statutes or regulations that must be met or are failing to be met. There is no legal requirement for the suggested revisions the MS4 general permit regarding measurable goals. The MS4 general permit is in compliance with all applicable Federal and State laws and regulations

Comment 114. Part VII.A.5.a.viii.d. – This section should be revised as follows, to be consistent with other sections: “Select appropriate post-construction *stormwater BMPs* and *measurable goals* to ensure the reduction of discharges of pollutants all POCs in *stormwater discharges* to the *MEP* and ensure that such discharges do not directly or indirectly cause or contribute to the violation of a water quality standard.”

Response: The correct section that pertains to this comment should be Part VII.A.5.d.

With respect to this comment, see response to comment #70 and #23 regarding water quality standards compliance and the annual report/SWMP plan, respectively.

The MS4 general permit is in compliance with applicable Federal and State laws and regulations.

The commenter has not identified any Federal or State statutes and/or regulations related to water quality standards compliance that must be met or are failing to be met. With respect to water quality standard compliance, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 115. Banking and Credit System for On-Site Stormwater Management Requirements

The section authorizing “banking and credit systems” (Part VII.A.5.a.viii) should be replaced with a requirement that, for any project where it is infeasible to fully satisfy an on-site retention standard from the Manual at a given site, off-site mitigation shall be required. A credit and banking scheme, such as that described here, can be established to direct the off-site mitigation projects to the most useful locations, in terms of anticipated water quality benefits. However, new development and redevelopment projects that are able to meet the Manual’s on-site retention standards should not be allowed to substitute that compliance with off-site credits or banking.

Response: The permit allows the MS4 to utilize a banking and credit system for redevelopment, as well as for new development in impaired watersheds. This banking and credit system is proposed as an option to MS4s that have a watershed plan., The availability of this option will encourage those MS4s that don’t have a watershed plan to develop one. This is a new provision for this MS4 permit. There is no legal requirement to include a banking and credit system in the MS4 general permit. The Department will evaluate the effectiveness of this provision, and if necessary, make modifications .

The commenter has not identified any Federal or State statutes and/or regulations related to the banking and credit system that must be met or are failing to be met. There is no legal requirement to have a banking and credit system in the MS4 general permit. With respect to the banking and credit system, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 116. We had difficulty arriving at an accurate number of pounds of phosphorous, nitrogen and pesticides and herbicides used by our municipality. The golf course superintendent indicated that he already has to make a report to the DEC so he can continue being a licensed applicator of certain products. Isn’t therefore much of this reporting redundant? ,The town uses very little fertilizers/herbicides/pesticides. Doing the calculations to convert liquid based products measured in fluid oz., aerosol cans and differentiating what part of a bag of “weed and feed” gets broken out to the proper category is cumbersome and subject to many mathematical

errors. These figures are in all likelihood just a minute fraction of the overall amount of these substances utilized by our residents in Town. Pallets of these products are stocked at the local Home Depots or Lowes or garden centers to be used by thousands of residents on thousands of properties. (8)

Response: The Department is not requiring a duplicate report of pesticide application as required for licensed applicators. The MS4 general permit requires very limited information. The intent is to establish a measure of application of chemicals and evaluate the trend. This reporting requirement will enable MS4s to keep track of chemicals they use in their maintenance activities and evaluate the reported values on annual basis. An estimated value based on a documented procedure is acceptable for reporting. The Department revised the pesticide reporting requirement to “acres of application”.

MS4 program is responsible for reducing chemical applications and maintaining a sensible use of fertilizer / pesticides through the MS4 operations. Parallel to this effort MS4s should address the use of chemical by targeting commercial and private entities by educational work. The Department simultaneously works on other fronts, such as Zero Phosphorus Fertilizer, to reduce chemical application.

Comment 117: This section discusses incorporating the use of green infrastructure practices in routine upgrades of stormwater drainage and conveyance systems. The exact language used is weak and unenforceable as written (“Consider and incorporate”). If upgrades are completed without incorporating green infrastructure, the permit should require MS4s to document which practices were “considered” and the reasons why they were rejected. (13)(44)

Response: In regards to enforceability of green infrastructure requirements, the Department is using a multi faceted approach to promote green infrastructure. The MS4 language on green infrastructure needs to be evaluated in the collective context of the construction permit and the State Technical Standards. Although encouraging the use of Green Infrastructure is considered a positive first step, other requirements of the stormwater permitting are the driving force in implementation of Green Infrastructure. Please see response to comment #86. The process established in the Design Manual requires that developers document which practices were "considered" and the reasons why they were rejected.

Comment 118. Redevelopment

The Draft Permit provides that a minimum requirement for an MS4's post-construction program is to provide protection equivalent to the Construction General Permit (Part VII.A.5.i). However, as noted in the comment letter on the Draft Construction General Permit that we are also submitting today, as drafted, that Permit applies only to sites where construction involves soil disturbance, which may exclude many redevelopment projects in paved areas. The MS4 Permit further provides that a municipality's post-construction program must "address" runoff from "redevelopment" projects that involve "land disturbance" over certain size thresholds (e.g., Part VII.A.5.a.iii). The term "land disturbance" is not defined; however, in contrast to "soil disturbance," the phrase suggests that redevelopment projects that build on existing paved surfaces without excavating down to the soil would be covered. The Permit should be clarified to ensure that such redevelopment projects are covered. Further, the Permit should clearly provide that the MS4 must not only "address" runoff from such projects, but that these projects must meet the same post-construction standards applicable to projects covered by the construction permit (i.e., that the specific requirements of the stormwater Design Manual apply to any project within the MS4 that involves "land disturbance" over the relevant size threshold, whether or not there is "soil disturbance").

Response: This issue primarily relates to the Construction Permit and Design Manual. It is not the intent of the Department to establish different criteria for MS4 oversight of construction activities than for construction activities authorized under the construction general permit. The use of the term "land disturbance" is in deference to the way in which MS4s oversee construction activities through the local land use control process.

The criteria for redevelopment projects are defined in the NYS Stormwater Management Design Manual.

The commenter has not identified any Federal or State statutes and/or regulations related to redevelopment that must be met or are failing to be met.

Comment 119. In relation with runoff reduction techniques and green infrastructure in the routine upgrade of the existing stormwater conveyance systems, while this section does not appear to be mandatory, the acronym "MEP" would appear to be obligatory. It is requested that this statement be modified as follows:

Consider cost effective runoff reduction techniques and green infrastructure in the routine upgrade of the existing stormwater conveyance systems and municipal properties to the MEP. Incorporate such techniques with particular applications that are found to be feasible, beneficial,

and cost-effective. Some examples include replacement of closed drainage with grassed swales, replacement of the existing islands in the parking lots with rain gardens, or curb cuts to route the flow through below grade infiltration areas or other low cost improvements that provide runoff treatment or reduction. (42)(33)

Response: The requirement for MEP entails more consideration of all possible and available opportunities to reduce polluted stormwater. The proposed language will not be incorporated in the final MS4 permit.

Comment 120. Grass swales are better at "flow volume" reductions, however increase maintenance costs, may not be better at pollutant reduction, and are subject to erosion as critical velocities are reached during larger storm events. (33)(42)

Response: All stormwater practices (green infrastructure or traditional treatment system), are effective only if they are maintained properly. Implementing a long term maintenance schedule is integral to performance of grass swales as well as any other SW practices.

Comment 121. Concerned with cost ramifications and long-term maintenance requirements of low Impact Development, Better Site Design and Green Infrastructure practices to developers are not well understood at this time. A concern exists that MS4s could be at a competitive disadvantage with non-MS4 communities, in regards to attracting development, if the principles of LID, BSD, and Green Infrastructure become local law and are viewed as burdensome by developers. (42)

Response: Many of the green infrastructure practices are not more costly than conventional practices, and in some cases are even less expensive. The Design Manual addresses maintenance related issues for state-wide applications. The comment is not clear how non-MS4 communities will be at a disadvantage if local law is adaptable with GI principles

Comment 122. Although Part VII.A.6.a.i allow for winter road maintenance to be addressed in a municipal pollution prevention plan, the draft permit does not comprehensively address snow and ice removal practices as a potential source of pollution. In prior versions of the Draft MS4 permit, NYSDEC called for requiring permittees to develop Snow and Ice Operations Plans. Although elements of that comprehensive requirement may have appeared burdensome to municipalities, municipal deicing practices are one of the primary opportunities for

municipalities to prevent pollution from ever entering the MS4. As such, there are fundamental components that should be returned to the tiered approach for those areas that discharge POCs to impaired watersheds. To track the pollution potential, MS4s in impaired watersheds should be required to 1) track and report on the number of road miles and the volume of deicing materials used annually 2) avoid the use of deicing materials that contain elevated levels of phosphorus. On the second item, NYSDEC indicated that it would prohibit the use of "phosphorus bearing anti-caking materials in a near term permit modification" (MS4 Permit Response to Public Comments April 2008). (40)

Response: Comment noted. Although the commenter provides valuable input, this section of the permit was not subject to modification and addressing the issue is not within the extent of the updates to this permit renewal. This comment will be considered for future updates to the MS4 annual report.

Comment 123. Is there any size (sq. footage, location. etc.) criteria for including these in the program or is the list all inclusive to those facilities? How is the state reaching out to those facilities and institutions and others on the list to fulfill notification requirements? Will state facilities be included or exempted (i.c. State Colleges and Universities, state facilities for juveniles, jails, prisons, state DOT facilities, etc.)? (43)

Response: The coverage eligibility for the traditional non-land use control and non-traditional remains the same as GP-0-08-002. The Department will rely on compliance and enforcement mechanisms to address issues.

Comment 124. "provide the opportunity for the public to participate in the development, implementation, review, and revision of the SWMP." The Authority/Corporation believe "revision" should be changed to "comment". The public can provide comments and suggestions to incorporate into revisions, but the public will not actually be making the revisions for MS4s. (41)

Response: It was not the Department's intent for the public to participate in the actual revision of the SWMP. However, public comments should be part of the review and revision process of the SWMP.

Comment 124. This section states that every outfall within our jurisdiction shall be part of an outfall reconnaissance inventory (ORI) once every 5 years. Many of Nassau County's outfalls are in tidal regions and as such are either submerged, discharging outgoing tidal water or discharging infiltrating groundwater This office has commented in the past that performing an

ORI on an outfall that discharges groundwater or is impacted by the tidal cycle achieves no information as to whether there is an illicit connection. (19)

Response: Comment does not concern the proposed updates to the MS4 permit updates to the MS4 general permit.

Comment 125. This comment is not on the revisions but on the language in the current permit. The draft local law includes a requirement for a security in the maintenance agreement. I understand the purpose, but in practice this is going to be an administrative headache and is likely to be ineffective. Because of the large number of small water quality treatment facilities, the MS4 will have to try and keep track of numerous bonds or letters of credit and ensure that they are periodically renewed. With little experience on actual maintenance costs, the security amounts are difficult to estimate and many will likely be too high or too low. A better mechanism would be to have any maintenance costs incurred by the MS4 added to the tax bill for the property. (7)

Response: Comment does not concern the proposed updates to the MS4 general permit. The Department realizes the obstacles in maintenance of non-structural stormwater control practices and will make available resources that would outline useful measures to address the difficulties associated with long term maintenance of such practices. The Department encourages MS4s to incorporate appropriate measures into their local law.

Comment 126. Sample Local Law

The Sample Local Law (referenced in Part VII.A.5.a.iii.) must be updated to ensure it is, in all respects, consistent with the revised MS4 and construction Permits and the revised Manual.

For example, section 2.2.2 of the sample local law

(www.dec.ny.gov/docs/water_pdf/localaw06.pdf), which identifies categories of projects that require a post-construction SWPPP, appears to be inconsistent with Appendix B of the construction Permit.

Additionally, Section 3.2 of the Sample Local Law requires compliance with the Design Manual or a demonstration of “equivalence.” This language in the Sample Local Law should be corrected, as described above (section IV of this letter) concerning similar language in the draft permit.

The MS4 Permit should call any changes in the Sample Law to the attention of permittees and provide a deadline for MS4s to conform their own local laws. Otherwise, permitted MS4s must be required to review their own local ordinances and codes for conflicts with or obstacles to implementation of the practices described in the revised stormwater Design Manual. (45)

Response: The MS4 permit states that “In the development of the watershed plans, municipal comprehensive plans, open space preservation programs, local law, ordinances, and land use regulations, covered entities must consider principles of Low Impact Development (LID), Better Site Design (BSD), and other Green Infrastructure practices to the MEP. In the development of the watershed plans, municipal comprehensive plans, open space preservation programs, local law, ordinances, and land use regulations, covered entities must consider smart growth principles, natural resource protection, impervious area reduction, maintaining natural hydrologic conditions in developments, riparian buffers or set back distances for protection of environmentally sensitive areas such as streams, wetlands, and erodible soils.” Section 2.2.2 of the sample local law is highly focused on erosion and sediment control and the construction phase of the project. Appendix B identifies the post-construction control requirements. In Part VII.A.5.a.iii. of the MS4 general permit, MS4s are encouraged to evaluate their local laws for consistency with green infrastructure principles. The MS4 permit does not require MS4s to change their local laws to incorporate green infrastructure principles. However, the MS4s are required by their local laws to follow the Design Manual which is being updated to include green infrastructure principles. The Department can make available information on any local law that has incorporated green infrastructure principles.

The commenter has not identified any Federal or State statutes and/or regulations related to the sample local law that must be met or are failing to be met. There is no legal requirement to have a sample local law. With respect to the sample local law, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 127. BSD/LID is highly desirable, but politically very difficult to enforce at the local level for residential development. For instance, rain gardens can be included in a design, but who will prevent a homeowner from removing them? Porous pavement could be well suited to residential driveways, but what will stop a homeowner from having the driveway sealed? One way to encourage more use of these technologies would be for the DEC to work with the DOT to set mix designs for porous asphalt and concrete as a standard for new construction. (7)

Response: Installation and maintenance of stormwater practices on private property is a concern. Some alternatives are to construct such practices in the Right-Of-Way, establish legally binding agreements, or incorporate maintenance agreements into the deed. Additionally, signage prohibiting removal of the practice on site can be required.

Comment 128. Naturally vegetated buffers along stream corridors are very effective, but monitoring and enforcement can be a problem, especially if buffer widths vary widely from project to project. Adding stream buffer language to the Sample Local Law with standard minimum widths should be considered. (7)

Response: Comment does not concern the proposed updates to the MS4 general permit. However, the Department encourages MS4s to incorporate appropriate measures to their local law.

Comment 129. “...Covered entities must consider natural resource protection, impervious area reduction, maintaining natural hydrologic condition in developments, buffers or set back distances for protection of environmentally sensitive areas such as streams, wetlands, and erodible soils in the development of environmental plans.” Requirements, standards and protocol, in a clearly-understood format needed to achieve compliance must be provided by the DEC to convey the DEC’s goal for this task. (14)

Response: The MS4 permit currently requires MS4s to consider incorporating the above measures in their local law or comprehensive plan. The MS4s should evaluate their local laws and make a determination where such controls apply to their municipalities and develop appropriate provisions for their local laws.

Comment 130. More guidance is needed for what measures are cost-effective. Do catch basin inserts and the use of perforated pipe - both of which are easy to implement during routine upgrade or replacement projects - provide any significant treatment? Would it make sense to use porous concrete for gutters, or would this immediately become clogged? Adding open swales will be unacceptable to the public along local roads. (7)

Response: Catch basin inserts are not a verified technology for effectiveness and may not be useful under varied conditions. It is not clear what function a perforated pipe will serve. If it is for gradual discharge, lowering sediment discharge and infiltration, it should provide some benefits. Daylighting with perforated pipe is used in some practices but may cause short circuiting in some. It will depend on the application. Open swales are already used in many communities; others may choose other alternatives. Application

of practices for retrofit purposes has to be targeted on the POC and verified for treatment benefits.

Comment 131. Guidance for an appropriate monitoring program must be provided by the NYSDEC. Obviously this program will be an integral part of the modeling noted in Part III and as such is an enforceable requirement of high import. At a minimum, frequency, locations, methodology and contingencies must be specified in detail. Educational and technical resources must also be provided by the State to effectively implement these permit requirements. A definition of ambient monitoring is required as it relates to the migratory nature of water. Monitoring should occur in the outfalls not necessarily in the water bodies as it is multi-jurisdictional. The State should be prepared to provide a “boiler plate/cook book” as guidance to the MS4 regarding the modeling and monitoring program with attendant technical assistance. Clear and concise parameters will facilitate effective management at the local level. (14)

Response: At this point the Department believes that such a monitoring program will have to be designed for the area in which it is to be performed. Nonetheless, many if not all of the areas subject to the additional BMP requirements already have on-going ambient monitoring programs underway.

Comment 132. There is not sufficient evidence to support the concept in Chapter 10 of the Design manual that upsizing traditional practices is effective in phosphorous removal. Given the inconclusive monitoring/performance data for the traditional SMP’s nationwide, especially regarding phosphorus removal, I would propose that the additional post construction treatment requirements in phosphorous impaired watersheds be met only with source control/runoff reduction. I’m just not convinced that bigger wet ponds are the answer. (5)

Response: This comment does not address updates to the MS4 general permit. The original version and the updated version of Chapter 10 of the Design Manual emphasizes source control and provides examples for runoff reduction applications.

Comment 133. Numerous county and municipal officials expressed concerns regarding the fiscal impacts. Has any regulatory impact statement been completed assessing the cost of compliance for local municipalities and other regulated MS4’s? The stormwater retrofit component of the General Permit is just one component of the six minimum measures that must be addressed by regulated MS4’s in the EOH watershed, albeit the most expensive component. This cost well exceeds a cost that can be borne by taxpayers. Many local governments stated

that the permit imposed unfunded mandates that placed a financial burden on their ability to provide services to area residents. (14) (38) (41) (38) (39) (29) (12)(17)(25)(42)

Response: New York State is also concerned about the cost mandate and has awarded over eleven million dollars in grants to assist MS4s with development and implementation of SWMPs. As the Department was developing the New York State permits, staff considered projections of funding needed for MS4s and others to implement the program.

EPA has estimated that MS4s might expect to spend between \$3 and \$60 per capita (cost estimate from 2002) to implement stormwater programs in their jurisdiction. The lesser figure represents a program that would meet the minimum program requirements whereas the upper cost figure might be suggestive of an extensive program, with many optional components that a community might find beneficial and desirable. So for example, a community with a population of 30,000 might spend anywhere from \$100,000 to \$2,000,000 annually on their programs.

Mitigating the impacts of stormwater pollution through effective implementation of this program is expected to generate economic benefits to localities by improved shellfishing, swimming, boating, and general water quality, as well as reduced impacts from flooding. Based on the EPA analysis, benefits of the Phase II stormwater program nationwide are anticipated to be greater than the costs of its implementation. The Department expects this will also be the case in New York State.

For Water Quality Based Effluent Limitations in the permit, cost considerations are not part of the TMDL analysis.

In relation to stormwater retrofits, the Department recognizes that conducting a retrofit program in general will require significant funding. The draft WIS Guidance will include a list of funding sources that are potentially available. The Department will continue to identify funding sources to support MS4 compliance. The Department will consider targeting future funding programs to address the research/technical needs identified within the comments received.

Comment 134. Deadline dates that are before the issuance date of the general permit should be removed from the table. Under the Pollutant Load Reduction, if "In accordance with the TMDL allocation" refers to the "Croton Watershed Phase II Phosphorus TMDL Implementation Plan", reference to said document should be included in this general permit. (35) (41)

Response: The deadline defined by GP-0-08-002 is kept in this MS4 general permit for enforcement purposes. The Croton Watershed Phase II Phosphorus TMDL Implementation Plan, as well as other WISs, are/will be stand alone documents. They are/will be public noticed and available on the Department's website.

Comment 135. My comment is that the inspections of on-site systems should be conducted according to a standardized procedure and reporting format. (2)

Response: The Department did not want to provide a specific standardized procedure for conducting inspections to allow for some flexibility for the MS4s. The permit requires an investigation/inspection and includes a reference to the USEPA guidance publication on IDDE which outlines various procedures to conduct such an investigation/inspection to satisfy the requirement.

Comment 136. The New York Onsite Wastewater Treatment Training Network (OTN), State University of New York at Delhi (SUNY Delhi) and the New York State Department of Environmental Conservation (NYSDEC) have developed the Inspection of Existing Onsite Wastewater Treatment Systems training course. This training is made possible through an agreement with, and funded by NYSDEC Non-Point-Source Pollution Program to improve regulatory compliance and water quality. Trained inspectors that have completed this course are trained to deliver in-depth inspections according to a standardized procedure and reporting format. OTN Registered Inspectors are required to follow a standardized six (6)-page inspection check list, which, if followed, will deliver an in-depth comprehensive inspection of the entire system, not just the septic tank. (2)

Response: For the purpose of detecting the presence of ongoing and/or intermittent on-site sanitary discharges to a storm sewer system, the in-depth comprehensive inspection as noted above is not necessary as a standard field investigation/inspection. Where specific conditions warrant or where a problem/failure has been identified, a more in-depth inspection may be warranted.

Comment 137. It appears obvious to me that inspections currently are not being conducted by OTN Registered Inspectors. If they were, the proposed change listed above in Slide 1, that I high-lighted in bold brackets [-] would not be needed, since the OTN's standardized inspection **is** of the entire system, not just the septic tank. (2)

Response: The Department is not requiring inspections to be conducted by OTN registered inspector. However, the permit does specify that inspectors conduct regular

field investigation/inspection in accordance with EPA's publication entitled "Illicit Discharge Detection and Elimination a Guidance Manual for Program Development and Technical Assistance".

Comment 138. IX.A.3.b.: Inspection, maintenance, and repair of on-site septic systems is not a stormwater related task, and should not be a part of the MS4 permit obligation. These systems are already regulated by DEC, County Health Departments, and local municipalities. Proper inspection of septic systems requires specialized training. (5)

Response: The Center for Watershed Protection (CWP) has identified on-site sanitary discharges to the storm sewer system as a source of pollution (phosphorus, pathogen) in some areas. For example, it is estimated that a failing septic system contributes approximately 1 kg/yr of phosphorous to a waterbody. The permit requires an investigation/inspection as a proactive approach in addressing illicit discharges from failing on-site systems in areas where septic systems are known or suspected to have the potential to discharge to an MS4

Comment 139. Several commenters stated that Suffolk County Department of Health Services, Waste Water Division, possesses the expertise, knowledge and training to address these concerns. Perhaps additional state funding could be provided to the counties to address this concern and obviate the need for the towns to recruit additional personnel then train them for this permit requirement or perhaps the DEC has staff that could address this matter as well. It was also noted that these systems are not stormwater systems, and are already regulated by the DEC, State and County Health Departments, and the building code. (7) (10) (14)(23)

Response: The Department agrees that the County Health Department may be a logical entity to conduct the program. This will be acceptable provided the necessary agreements/documentation is in place. A potential approach is that the County MS4 gains the authority as a single entity and undertakes the septic inspection/maintenance at the County level. This approach must ensure that the County is proactive in all suspect areas. See response above regarding on-site sanitary discharge contribution to pollutant loading to a storm sewer system. Additionally, the creation of a Wastewater Disposal District, as noted in the comment, may satisfy the MS4 requirement.

Comment 140. The NYSDEC is requiring local municipalities to regulate on-site sanitary wastewater systems. It is the understanding of the Town of Babylon that in most cases this regulatory framework lies with the local health department. The local health department has the

expertise in these matters. In Suffolk County, the Suffolk County Department of Health Services regulates on site wastewater systems. Although the trigger for these requirements has not reached Babylon yet, we would be very concerned regarding this requirement being imposed on Babylon in the future. It appears that according to the proposed regulation, the entire sanitary system must now be inspected every five years (previously every 3 years). Clarification is necessary to determine exactly what is required. Do the regulations require an inspector to locate a homeowner's septic tank and leaching pools, remove the lid and perform a visual inspection? In most cases the access points to these systems are buried. If unearthing of the system is required, this is a highly intrusive inspection and will damage the homeowners landscaping and lawn. The Town would be responsible for returning the area to original condition. Getting homeowners authorization to excavate to inspect a sanitary system is problematic. Note that Suffolk County is an MS4 also. In addition, the health department has information on groundwater elevations and records of malfunctioning on-site sanitary systems. So would it not make sense to have the local health department meet these requirements and then share the information with local government? (10)(27)

Response: The permit strongly encourages cooperation between covered entities. Related to the on-site sanitary system investigation/inspection program, a local health department may satisfy the permit obligations of other covered entities by implementing the program on a county level. However, staffing, funding, enforcement mechanisms, procedures, and documentation must be in place to substantiate that septic systems are being inspected in areas where they are known, suspected, or have the potential to discharge to an MS4 in EACH MS4 within Suffolk County. Such a program cannot be limited to new construction or home sale.

It is important to note that if one covered entity is relying on another covered entity to satisfy one or more of its permit obligations, the fact must be noted on the covered entity's MCC form. The other entity must, in fact, implement the MCM(s) and must agree to implement the MCM(s) on the first covered entity's behalf. This agreement between the two or more parties must be documented in writing and signed by both (all) parties. Please refer to Part IV.B of the permit. The investigation/inspection does not necessarily need to be invasive to detect the presence of ongoing and/or intermittent sanitary discharges to the storm sewer system. Additionally, the creation of a Wastewater Disposal District, as noted in the comment may satisfy the MS4 requirement.

Comment 141. Once a municipality designates target areas, it must conduct regular field investigations/ inspections within those areas of residential and commercial and industrial on-site

sanitary systems to detect the presence of ongoing and/or intermittent on-site sanitary discharges. To meet this requirement, must an inspector locate a homeowner's septic tank and leaching pools, locate each pool, remove the lid and perform a visual inspection? Or will examination of the MS4 system be adequate? If unearthing the system is required, this is a highly intrusive inspection and will damage the homeowners landscaping and lawn. The municipality would be responsible for returning the area to its original condition. Getting homeowners authorization to excavate to inspect the system is problematic. (10)

Response: Inspection of the homeowner's septic tank and leaching pools is required by the MS4 general permit and is an enhancement to IDDE program. The inspection should not be invasive unless an illicit discharge is identified. Elimination of any illicit discharge is at the expense of the property owner.

Comment 142. Certain proposed provisions affecting septic systems in draft permit GP-0-10-002 deviate from the requirements in GP-0-08-002 and may impose new burdens on EOH municipalities. Such provisions are unnecessary because the CSS Program will provide improved and cost-effective administration of septic systems within the Westchester County portion of the EOH watershed. (27)

Response: The Department believes the CSS program complies with the permit requirements. GP-0-10-002 indicates that regular field investigations/inspections should be done in accordance with the most current version of the EPA Publication entitled Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment. This guidance manual includes various options for conducting regular field investigations/inspections and it is the Department's understanding that the current programs being developed by the EOH municipalities comport, in concept, with the guidance manual.

Comment 143. The CSS Program for monitoring septic systems is consistent with Governor Paterson's recent call for shared services to produce cost savings (see Jan. 12, 2010 Governor's press release on cost sharing, mergers, and consolidation to save taxpayer dollars). Although the CSS Program was developed with substantial input by NYSDEC, NYSDOS, and WPPC, it is puzzling that the proposed GP-0-10-002 provisions differ from these consultations. (27)

Response: The Department encourages cost sharing and MS4s may utilize existing mechanisms.

Comment 144. While I support the important objective of watershed protection, I note that the proposed changes may impede the efficiencies attained through the Comprehensive Shared Services Program and add further costs to the East of Hudson municipalities that already face severe budget constraints, as well as increased obligations under the MS4 general permit program. I thus recommend the following changes to draft permit GP-0-10-002:

Remove IDDE Inspection Standard in Permit Section IX.A.3.b

Remove 1,000 Gallon Septic System Threshold in Section IX.A.3.b. (27)

Response: The Department supports monitoring program attained through the Comprehensive Shared Services Program and add further costs to the East of Hudson municipalities that already face severe budget constraints. The 1,000 gallon threshold is not arbitrary but rather is the threshold above which systems require SPDES permit coverage and are regulated by NYSDEC. Less than 1,000 gpd systems are subject to the local health department regulation and enforcement.

Comment 145. The DEC has provided varying language concerning the inspection of on-site sanitary systems through many revisions to the MS4 Permit. It has never provided for an effective minimum standard. Because of this, this program is unlikely to achieve the goal of reducing pollutants in the East of Hudson. The only locations where this program will achieve its goal are in those locations where the regulated MS4 in conjunction with the County Department of Health voluntarily implements a program that exceeds the minimum expectations for this permit requirement; where the population density is great enough where these illicit discharges have some impact on water quality; and where large number of systems are in close proximity to sensitive water bodies and wetlands. (32)

Response: The Department believes that if all on-site sanitary systems designed for less than 1,000 gpd are investigated/inspected as per the most current version of the EPA Publication entitled Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment, it will result in the detection of the presence of sanitary discharges to the storm sewer system which can subsequently be eliminated. This will result in the reduction of pollutants to water bodies and positively impact water quality.

Comment 146. This section states: "The covered entity shall complete the mapping of approximately 20% of the system every year, with the entire system being mapped by January 8, 2013." The general permit will likely be issued with less than three years remaining before the

January 8, 2013 deadline. It is suggested that this deadline be revised to May 1, 2015 to be consistent with the requirement in IX.C.3.b. on page 77. (35)

Response: This is a requirement from GP-0-08-002 that MS4s had begun in 2008. By 2013 the MS4s have had 5 years to meet this requirement, which was originated in GP-0-08-002 permit and must result in 100% mapped system by 2013.

Comment 147. Given that POCs from improperly functioning on-site sanitary systems contribute to the pollutant loading to impaired waterbodies, there does not appear to be a technical justification for reducing the frequency of inspections and maintenance from 3 to 5 years. Guidance documents from USEPA state that septic inspections should occur at least once every *three* years. Perhaps in areas that meet their nutrient loading requirements, such a relaxation of inspection requirements might be warranted. However, since this provision of the permit applies to areas that drain to impaired waterbodies, it is recommended that NYSDEC not relax the frequency of inspections and maintenance from 3 to 5 years until it can be demonstrated that the waterbody meets water quality standards. It appears that there is adequate capacity to inspect and maintain on-site systems using the 3-year inspection schedule included in NYSDEC's existing MS4 permit. Even if select areas currently lack the number of haulers needed to adequately maintain all the systems, then this inadequate capacity could certainly be addressed by keeping the required inspection schedule to be every 3 years since the market will adjust to create the capacity needed to satisfy the demand for hauling services. (40)

Response: Due to the fact that there is a great variety in the intensity of use of on-site sanitary systems, it was determined that five (5) years is the maximum frequency to conduct an investigation/inspection. While not an explicit requirement, in developing programs which ultimately must detect and eliminate illicit discharges, municipalities may target areas for more frequent inspections such as coastal areas with steep slopes or low infiltrative soils. Poorly functioning or improperly designed and maintained on-site sanitary systems can fail and result in the discharge of pollutants to municipal separate storm sewers and surface waters.

Comment 148. The proposed permit requires that all septic systems be "inspected" every 5 years. However, the permit later uses the term "investigation/inspection" and includes a reference to the USEPA publication on IDDE. By including this new reference to the IDDE manual, is not clear if the permit is now allowing investigations identified in USEPA's IDDE manual - such as a homeowner survey - to satisfy the requirement where previously a septic inspection was required. At a minimum, the site inspection should be conducted as a "Surface Conditions

Analysis" and be performed by individuals with training and certifications or licensing so that inspections are not done by homeowners. It is recommended that the term "inspection" be used in the permit and a definition included in Part X. (40)

Response: Investigation is an IDDE activity and inspection focuses on the source regardless of impact. For a septic tank to be inspected, it first must be pumped so the inside of the tank can be visually inspected. This prerequisite effectively removes a "homeowner survey" as an alternative for compliance with this permit requirement.

Comment 149. On-site sanitary systems of less than 1,000 GPD will require inspection once every five years. Field inspections are to be conducted in compliance with EPA Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assistance. There are several methods of inspection indicated in the IDDE manual. It is unclear as to what will constitute acceptable inspection methodology. In addition, are there or will there be training requirements for inspectors? Unless there is a known potential IDDE violation from a failing system it is unclear as to how access to private properties for routine inspections every 5 years will be accomplished. Will SPDES permits be required for systems in excess of 1,000 GPD? Who will be responsible for inspecting these systems? (44)

Response: The MS4 permit requirement on field inspection relates to the on-site system itself. As indicated in the above response, since an inspection of the tank is not possible without pumping the tank, a homeowner cannot conduct the inspection alone. Access to private properties is regularly made by electric meter readers and assessors, along with others. SPDES permits have been required by the Department for systems designed for greater than 1,000 GPD.

Comment 150. The deadline of December 31, 2009 is referenced in two locations, and should be revised. (35)

Response: The deadline for meeting the requirement to establish ordinance to regulate between 5,000 sf and 1 acre soil disturbances and start inspection of such sites was December 31, 2009. That language is maintained in the MS4 permit language for enforcement purposes.

Comment 151. A number of comments focused on the language regarding waste load allocation. Will the final TMDL assign a reduction to each MS4? How is the "fraction of the total required load reduction" to be assigned between MS4's. (Part III.C.2) These comments recommend that for TMDL areas, the permit should state that it will be the MS4's obligation to meet the waste

load allocations specified in the TMDL and to develop and implement a watershed improvement strategy pursuant to IX.B or IX.C. Having each MS4 be "...responsible for individual load reductions, which is a fraction of the total required load reduction in the TMDL..." may not be a fair or effective way to establish responsibility. The proportion of each MS4's responsibility should be based on the load contributions from the modeling, not area, population, or other comparative means. DEC should establish clear and equitable criteria for determining the percentage of the total required load reduction each MS4 in the TMDL area will be responsible for. The potential for gross inequities is significant and may place unreasonable burdens and unattainable requirements on some MS4s. (1) (9) (10) (12) (14) (15) (19)(20)(21)(22) (26) (34) (38) (39) (41)

Response: The TMDLs assign a waste load reduction or a load reduction which has MS4 stormwater runoff contribution as waste load included. In the case of the EOH watershed, the Department employed a modeling tool to assign the load reduction attributed to MS4 contribution for each MS4 retrofit requirement. In assigning the estimated load for each MS4, the Department relies on available modeling tools, which utilize input variables commonly used in urban watershed modeling.

The permit updates include numeric percent reduction requirements and deadlines specified for each WIS area. The MS4 permit additionally states: It will be the MS4's obligation to meet the waste load allocations specified in the TMDL.

The Department is developing guidance and tools (Watershed Improvement Strategy guidance) to assist regulated entities with initiating their Watershed Improvement Strategies. To address many of the comments with regard to with Watershed Improvement Strategy requirements, Department is requiring the development by the MS4s of the strategy (See WIS Guidance for pathogen) to start working towards meeting their TMDL POC load reductions through the use of feasible options.

The Department's approach to ensuring MS4 permit compliance is to promote MS4 technical capacity to meet the requirements of the permit and to support MS4s in following the WIS guidance.

Comment 152. The language in this section appears to conflict with Section III.C.2 in that it limits cooperative retrofit projects to the East of Hudson Watershed. This should be changed to clarify that cooperative retrofits are allowable in any TMDL watershed. (7)

Response: The Department incentivizes cooperation among MS4s and does not limit that to the EOH watershed. The language in Section IX A. New York City East of Hudson (EOH) Watershed MS4s is necessarily specific to the EOH Watershed. In the case of the EOH NYC Watershed, cooperation was promoted by establishing a longer time to submit retrofit plans if those plans were developed cooperatively.

Comment 153. NYS DEC General Permit No. 0-08-002 required that regulated MS4's develop a Retrofit Program by December 31, 2009 (for RSEs) and the Croton Watershed Phase II Phosphorus TMDL Implementation Plan established that the Retrofit plan achieve a 1,200 kilogram reduction in phosphorus over a 10 year period, or by 2019. Table IX.A appears to indicate that the completion deadline that the Pollutant Load reductions, which is equal to the TMDL allocation which for the East of Hudson watershed is 6,741 kilograms, is 2019.

II. Table IX.A indicates that the pollutant load reduction that must be met by every covered entity is "in accordance with the TMDL allocation". The TMDL allocation is provided for individual reservoir watershed. As noted above, the TMDL allocations are not provided for individual covered entities, or even sub-watershed basins. (33)

Response: The 6,741 kilograms noted is the overall reductions in phosphorus needed to meet the TMDL in the EOH. Of that 6,741 kilograms, MS4 stormwater is only a portion of the source of pollution. The retrofit reduction requirement is a component (less than 20%) of the allocation to address the stormwater portion of the pollution.

Comment 154. Retrofits The Draft Permit is essentially devoid of changes to the retrofit provisions for TMDL watersheds in Part IX, even though it was a major issue for stakeholder discussion and there was broad consensus during the stakeholder sessions that more detail was required to define what constitutes an acceptable retrofit program. The Draft Permit should be revised to include the following requirements:

The retrofit plans must include measurable goals for load reductions and demonstrate how, in combination with other requirements of Part IX, the retrofits will achieve TMDL compliance;

A permittee's retrofit implementation schedule must be consistent with the TMDL implementation schedule;

Each retrofit program must include a systematic evaluation of opportunities for retrofit on public property and identify sub-goals for each municipal agency that owns/controls property;

Each retrofit program must include mapping of impervious areas to target for green infrastructure retrofits;

The Department must invite and consider public comments on retrofit plans (or substantial plan revisions) before approval or disapproval; permittees should be required to allow for public participation and comment before submitting plans (or substantial plan revisions) to the state;

Annual reports must include a detailed assessment of progress toward implementing the retrofit program; and

Permittees must be required to revise retrofit plans as needed when annual assessments show less progress than was anticipated. (45)

Response: The commenter has not identified any Federal or State statutes and/or regulations related to retrofits that must be met or are failing to be met. There is no legal requirement to address retrofits in the MS4 general permit. With respect to retrofits, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

However, the proposed language will be considered in the development of the watershed improvement strategy (WIS) guidance, which addresses retrofits. The Department has developed a WIS guidance for pathogens and the Department anticipates a draft of this guidance will be released along with the MS4 permit. It is Department's intent to develop similar guidance for WIS with other POCs. It must be noted, though, that the consensus of the stakeholders discussions, which included the commenter, was to include the numeric reduction level and deadlines to meet this requirement in the permit. The MS4 permit does include language that specifies types of retrofit projects, as defined in Part X of MS4 general permit.

Comment 155. Given the fact that watershed modeling in the Onondaga Lake watershed has not been completed, and recent monitoring data of the lake shows periods when phosphorus levels are below the TMDL limits, I would propose that the heightened design criteria for post construction practices in the watershed be eliminated until there is conclusive evidence that it is necessary, beneficial, and effective. This requirement for substantially more treatment volume is consuming additional land, expense and resources with questionable results. Relative to the retrofit program in the Onondaga Lake watershed, the timeframes presented in the table represent a more reasonable and workable schedule than those in the previous permit. (5) (13)

Response: Please note the specific requirements for the Onondaga Lake watershed are as stated in Table IX.B of the MS4 permit. Pollutant load reductions in the phosphorus limited watersheds are subject to the standards in Chapter 10 of the Design Manual. Although the sizing criteria for water quality volume is based on the 1-yr storm, the emphasis is on source control and runoff reduction by green infrastructure. Also note that the condition of Onondaga Lake with respect to meeting water quality standards is still under review and the need to reduce or at least maintain phosphorus loads within the watershed is being addressed in a revision to the TMDL.

Comment 156. The Authority/Corporation is looking for further clarification on the pollutant load reduction requirements. Using the Oscawana Lake watershed as an example, the pollutant load reduction is 18% reduction. Does this mean that each MS4 that discharges to the Oscawana watershed must reduce the amount of phosphorus that is discharged to the watershed by 18%? What baseline should be used? Should modeling be used to determine a theoretical baseline and to determine BMPs that would meet a theoretical reduction? (41)

Response: Each MS4 that discharges to the Oscawana watershed must reduce the amount of phosphorus that is discharged from its sewershed by 18%. The waste load reduction required of all MS4 in Oscawana Lake watershed can be accomplished from all contributing MS4s in that watershed working as a RSE or individually. Please refer to Comment #57 for a response on the baseline question which explains the use of computer modeling tools for establishing a base line.

Comment 157. What modeling programs are acceptable? Are there any specific criteria, such as the "design storm" that should be used for the model? (41)

Response: Please refer to Chapter 10 of the Design Manual.

Comment 158. The Department will sample ambient water quality to assess if the reduction at the TMDL waterbody has been met, but how will the success for an individual MS4 achieving the load reduction be determined? If the TMDL load reduction is not met it could be that some MS4s did not fully implement their reduction measures. BMPs were improperly designed or maintained, the actual effectiveness of BMPs are less than what was theoretical determined, and/or the original TMDL model monitoring response was incorrect. (41)

Response: Ambient monitoring does not identify the sources indicated above. It helps with an overall evaluation of watershed load. The Department is not currently

considering outfall sampling. Re-evaluation of the load reduction is performed as WIS is being implemented.

Comment 159. While much of MS4 planning will occur in engineering offices, it is not too early to examine how these standards will affect residents of any given watershed. Most of Shelter Island's properties have their own well and septic systems. The Suffolk County Health Department determines the separation distances required from their own well and septic and from neighboring systems. Introducing stormwater catch basins, swales, rain gardens and retention ponds create additional setback distances to be met from the standpoint of the Health Department. There has not been much conversation on protecting the viability of properties that will have difficulty absorbing new setbacks created by stormwater collectors. (23)

Response: Health Department setbacks and separation distance for stormwater practices are very similar to the requirements previously defined in the technical standards. These are not in conflict with requirements of conventional stormwater practices. The setbacks and separation distance requirements are commonly applied for infiltration systems.

Comment 160. The International Stormwater Best Management Practices Database indicates that only wet ponds and media filters are effective at removing total phosphorus and no practice except infiltration systems is effective at removing dissolved phosphorus, the principal contributor to eutrophication. Increasing the size of any other facilities is likely to be useless in addressing phosphorus reductions. On the other hand, a recent study in Ann Arbor Michigan (Reduced River Phosphorus Following Implementation of a Lawn Fertilizer Ordinance) found that a ban on phosphate in fertilizer resulted in a significant decrease in phosphates in runoff. We suggest adding this requirement instead of the Chapter 10 procedures. There is also research indicating that the practice of piling dead leaves on street surfaces for pick-up is a significant source of phosphorus. Certainly education can help, but a requirement prohibiting this practice would make it easier for municipal Highway Departments to require that leaves be mulched on-site or bagged for pick-up. (7)

Response: While the Department makes an effort to use different mechanisms for reducing fertilizer and requires alternative leaf removal in the MS4 permit, Chapter 10 provides an essential tool that cannot be removed from the Design Manual.

Comment 161. Did you intend to link the Map in Appendix 9 to this table in addition to the Maps in Appendix 6 and Appendix 7? (9)

Response: Yes. The heading has been corrected to read: (Mapped in Appendix 6, 7 and 9)

Comment 162. How would a small MS4 determine if it discharges pathogens (for example) to impaired water? What is the standard to be compared to? Coliforms or fecal coliforms in NYS Water Quality Standards? How can the MS4 determine if the discharge is from their system or from another (i.e., County or Town System) or from groundwater infiltration, etc.? How can the MS4 ensure "no net increase?" No net increase is from what to what? Where is the Department-supported modeling for "pathogen" loading? (34)

Response: Waste load contribution is determined by TMDLs. MS4s need to proactively participate in TMDL development. In the Long Island pathogen TMDLs fecal coliform was used. MS4s need to conduct source identification for selection of appropriate practices. On no net increase and modeling questions please refer to comments 25, 29, and 36.

Comment 163. The pollutant (i.e. pathogen) loading reduction percentages that in many cases exceed 90% for Long Island watersheds are unattainable. It is wrong to ask MS4s to implement a retrofit program (and submit approvable plans and schedules) to achieve reductions that are currently not feasible. Taking a specific example; Hempstead Harbor (i.e. top row on pg 75 of Draft Permit) a 95% pathogen reduction is required. Appendix 9 (in the upper left hand corner) lists the municipal entities that are required to develop watershed improvement strategies for Hempstead Harbor. There are:

- 13 Villages
- 2 Towns (note Oyster Bay should be a Town not a Village)
- 1 City
- 1 County (Nassau County was omitted but owns many of the outfalls discharging to the harbor)
- NYSDOT (runoff from NY 25A, reaches the harbor in Roslyn and runoff from NY 107 reaches the harbor through Glen Cove Creek)

Response: Traditional non-landuse control and non-traditional MS4 are required to participate in load reduction. The contribution of each MS4s will be determined in the process of the WIS development, if not already identified by TMDL. Oyster Bay is

now referred to as a Town. For response on the percentage of reduction please refer to WIS guidance.

Comment 164. It is unrealistic to expect that many different public entities to coordinate and identify proven retrofit technologies that will attain a 95% pathogen reduction. DEC will lose credibility with MS4s if it requires them to do what can't reasonably be done. In short, I suggest that DEC not require MS4s to do something that isn't feasible. It would be an exercise in futility and a waste of public resources. In effect, the Department would be putting itself in a position where it could be faced with enforcing an unachievable numerical standard. Recommend that the Department change the pathogen removal requirements from a percent reduction to the Maximum Extent Practicable (MEP) and during the term of this five-year permit, provide guidance on how to attain MEP in areas that are already developed and large tracts of land are not available. (9)

Response: Comment noted and taken into consideration. The Department has evaluated the methodology used for the TMDL waste load allocation and the defined sources. The Department will be using a fraction of the load that is manageable by the municipalities and those that fall under the ability of MS4 program to identify the retrofit plan components and break downs for MS4 reduction rate in the first 5 year cycle. Please refer to WIS Guidance.

Comment 165. Many of the small Villages on Long Island that qualify as MS4s under the Phase II Stormwater Program are entirely made up of large lot residential properties, typically with 2-acre to 5-acre minimum lot sizes in accordance with local zoning codes. According to our records, between 10% and 20% of new house construction, for a single residence, causes the disturbance of more than an acre of land and qualifies as a regulated activity and thus requiring a SWPPP. Most of the house construction is the replacement of an existing older home. The Villages have passed local laws to control erosion and sediment from construction sites and to prohibit illicit discharges to surface waters. Post construction runoff control is also required. Is it the intent of the DEC to require additional stormwater treatment facilities and monitoring/sampling for water quality for the construction of a single family residence that is not part of a subdivision? (12)

Response: The Department commends the Villages for passing the local law which promote a proactive approach in addressing the impact of development. The Department is not requiring additional stormwater treatment facilities and monitoring/sampling for water quality for the construction of single family homes above the requirement of the

construction general permit. However, MS4s should look to construction activities as an opportunity to address discharges in TMDL watersheds. Following the technical standards for reconstruction projects should result in reduction of runoff and consequently load reduction.

Comment 166. Wooded, natural land is important to the land values for the exclusive Villages on the north shore of Long Island. It is the desire, either by local laws or by policy, that the Villages require limiting land disturbance and promoting tree preservation for all construction projects, and it is understood that land disturbance would be kept to a minimum that is necessary for construction. Any proposed rules that require additional stormwater handling/treatment facilities beyond dry wells or drainage reserve storage areas may cause additional land disturbances that would undermine the local preservation efforts and should not be mandated by the program. (12)

Response: The suggested approach is consistent with green infrastructure principles. This objective must be integrated into the planning process, otherwise where proposed development results in additional runoff that is not manageable on site, a runoff control and treatment will be required.

Comment 167. Since the properties in these Villages are residential, the source of the potential pollutants for pathogens would be sanitary sewage and animal wastes. A requirement mandating reduction for pathogens (of 90%) in areas where the municipalities have been unable to find sources of problems would mean that runoff from areas that have been residential for many years would be treated. The DEC is essentially requiring the Villages to treat runoff and improve water quality in areas where it has not been proven that there is a source of pollution. (12)

Response: Where sources of pathogen load are identified, reduction must focus on techniques that address that source. Runoff reduction as a principle of source control eliminates the media for loading. It helps reduce the risk of sheet flow, wash off, and transport of the pollutant built up in the environment.

Comment 168. The DEC is requiring Villages with no full time staff to prove that they have no net increase in pollutant loading to surface waters (impaired waters, p.9). (12)

Response: MS4s need to establish procedures to build in the provisions in their routine activities and decision making that will result in no net increase of POC. An evaluation and determination of no net increase of pollutant of concern can be integrated in the process of annual reporting evaluation.

Comment 169. Is the DEC requiring small Villages with no staff to inspect private residential sewage disposal systems? Is there more definitive information pertaining to what is an acceptable system besides the general information provided in the Illicit Discharge Detection and Elimination Guidance Manual and its reference to the Massachusetts inspection form? (12)

Response: The MS4s develop a strategy that defines the inspection program. The program developed in Westchester County, as an example, presents a model for implementing the inspection program that utilizes other involved entities and mechanisms. The following are the details of Westchester County program:

- *Westchester County has a law that requires the septic haulers to conduct "inspection" and fill out detailed form when they perform a pump out. "Inspection" consists of info on the property, condition of tank, review of disposal field, and indication of whether any signs of failure/break out.*
- *All the forms are sent to Westchester County and if any indicate that there are signs of problems, they are given to county sanitarian at DOH who conducts follow up inspection and addresses any issues that are discovered.*
- *Westchester MS4s are requiring per local law that all residents have their systems pumped out once every 5 years. This triggers the "inspection" noted above and subsequent DOH follow up/repair if necessary.*
- *Septic haulers in Westchester County are certified/registered and are required to receive training.*

Comment 170. Where residential lots are much larger than the minimum lot size required by the Department of Health for on-lot sewage disposal systems, it appears that by requiring sewage disposal system inspections in these areas, the DEC is inconsistent with the DOH requirements. To our knowledge, there has never been a documented case where a failing septic system has caused a discharge beyond the private property to the public street system in the Villages that have two acre (or larger) minimum lot size requirements. The DEC should consider specifying inspection requirements for smaller lots. (12)

Response: The Department does not specify lot size for on-site septic inspection. Therefore, the requirements do not exclude smaller lots.

Comment 171. As part of the Phase II Program, retrofits including CDS units and Baysavers were installed. It appears that the new requirement for 90% reduction of pollutants could rely on baseline information that would be developed since the installation of these water quality retrofits. Is it the DEC's intent to require an additional reduction in areas where CDS units and Baysavers have already been installed? (12)

Response: Hydrodynamic systems are effective for removal of large particulate pollutants, generally accepted for pretreatment. Selected management practices must be effective for pathogen removal, and as such, these systems alone are not effective.

Comment 172. The Retrofit Program is an element of the Watershed Improvement Strategy. The pollutant loading modeling required by Part III and the ambient monitoring program specified previously in this Part are contingent upon the Retrofit Program. The modeling, monitoring and retrofit programs should all be evaluated simultaneously by the DEC and then refined by the MS4s and reevaluated during implementation. Preparation and submittal by an MS4 of a Retrofit Program only will not permit sufficient time to allow preparation of an effective Watershed Strategy due to potential issues that arise during evaluation of modeling and monitoring programs. (14) . (44)

Response: Please refer to WIS guidance. This guidance defines many elements of the watershed improvement strategies, which will assist MS4s in time to get their program started in a timely manner.

Comment 173. As previously stated herein, the Town of Riverhead agrees that water quality protection is of paramount importance. In the interests of inter-municipal cooperation, prudence suggests that the covered entities subject to the proposed permit requirements be actively involved in the actual draft and construction of the proposed language to ensure that water quality protection is optimally effectuated. (14)

Response: The Department's permit will be providing an opportunity for public participation and involvement in the process of WIS development.

Comment 174. Formulation of clear and concise standards regarding the SWMP would facilitate a uniform response from the various MS4s. At present, the content of the SWMP appears to differ widely based upon the respective MS4s. Moreover, there is a definite need for additional educational training on the mathematical aspects of modeling and on the various proposed permit requirements in general. In addition, the Long Island region, given its proximity to the Atlantic Ocean and other significant water bodies, calls for education and training unique to the issues Long Island townships confront regarding storm water flow. For example, as previously stated, the multi-jurisdictional issue concerning the Peconic River which originates in Brookhaven Township, near a super-fund site, then flows in an easterly direction in to the Town of Riverhead. (14)

Response: Comment noted. Please refer to the WIS guidance. Through the development of guidance for WIS and Impaired Waters, there will be opportunities to address the modeling needs of SWMPs.

Comment 175. At the very least, a committee should be formed to address the issues raised in all of the response-comments to the proposed permit and should be comprised of various officials and/or personnel at the local municipal level. (14)

Response: Local officials are invited to attend the public meetings and participate in the group discussions and development of the WIS guidance.

Comment 176. The Village of Shoreham has a concern regarding the watershed improvement strategies. The financial implications will not be welcomed at a time when we work diligently to meet our existing obligations. Our neighboring Town shares the same watershed and is much larger in size and contributes more run-off to the adjoining Long Island Sound. To put our community in the same category is, in our opinion, an enormous burden. (25)

Response: The Department encourages cooperation among MS4s (e.g. form RSEs or utilize Single Entities). Taking this approach will allow MS4s to take advantage of benefits of intermunicipal cooperation including funding opportunities. Please refer to WIS guidance.

Comment 177. The waterbodies in the Shellfish Pathogen TMDL are also listed as impaired waters. For impaired waters, the MS4s are required to demonstrate through a model that there has been *no net increase* in pollutant loadings. For Shellfish Pathogen TMDLs, the MS4s are required to demonstrate through a model that loadings have been *reduced* by a specified amount. What are the implications of this? Are MS4s required to do modeling twice on these waterbodies? (38)

Response: The WIS waters that are listed as the Impaired Water will be removed from the list of Impaired Water (Appendix 2). Areas for which a WIS is established do not need to demonstrate no net increase of POC. They need to demonstrate the development of the WIS plan that POCs are reduced where impervious cover changes.

Comment 178. DEC should clarify the primary objective(s) in requiring pathogen reductions. Doing so could help eliminate a lot of unnecessary effort and expense on the part of MS4s. For example, if the effort is on protecting human health, MS4s can concentrate on addressing human-

sourced pathogens (such as failing septic systems) since animal-based pathogens pose much less of a threat to human health. (39)

Response: The TMDL did not distinguish the source. Additionally, water quality standards are defined based on coliform (TMDL is based on fecal coliform).

Comment 179. The permit states that the pollutant loading reductions found in Table IX combined with the non-MS4 reductions will allow waterbodies to meet standards. However, the TMDL modeling in the NYC EOH Watershed reveals that the waterbody standards will not be met. The TMDL shows that a 6,741 kg/yr reduction will be required for the EOH basins to achieve their TMDL, which is much more than 1,200 kg proposed in the TMDL Implementation Plan. The 1,200 kg/yr proposed in the TMDL Implementation Plan is less than 18% of the way toward the requirement, which leaves over 80% of the required phosphorus loading reduction unaddressed. Currently, the Croton Watershed Phase II Phosphorus TMDL Implementation Plan does not indicate how over 80% of the required P-reductions will be achieved and therefore how water quality standards will be attained. (40)

Response: The 6,741 kilograms noted is the overall reduction needed in the EOH, according to the most recent TMDL. The 1200 kg/yr is specific to the required retrofit reduction requirement, which was initially targeted at high intensity developed areas and which is only one component of the TMDL Implementation Plan. Other phosphorous reduction activities for MS4s, such as septic inspection/repair/replacement, controlling smaller construction sites, etc. have not been quantified at this time. In addition, non-MS4 sources will also contribute towards the 6,741 kilograms allocation.

Comment 180. Table IX indicates that the pollutant load reduction should be done according to the TMDL allocation. However, the allocation information found in the TMDL Implementation Plan models only a portion of the EOH watershed. To capture a complete accounting of POC loading, the entire EOH watershed should be modeled rather than limiting the modeling to the HID and LID areas. Until there is a full model of the EOH watershed that is linked to actual water quality data and proven to be within an acceptable margin of error, it is not possible to determine whether the projected loading reductions calculated by MS4s in their modeling analysis accurately reflect the phosphorus loading reduction that would be expected in the receiving waterbody. (40)

Response: The MS4 permit and WIS Implementation Plan guidance outlines a number of MS4 TMDL POC load reduction practices. The Department's approach to ensuring MS4

TMDL compliance is to promote MS4 technical capacity to meet the requirements of the permit and to support MS4s in following the WIS guidance. The Department will work with MS4s to assess the effectiveness of Watershed Improvement Strategy requirements in meeting water quality standards and in determining appropriate next steps.

Comment 181. Table IX A - The proposed deadline date for submission of the retrofit plans is before the permit becomes effective and it is recommended that the permit clarify this requirement. (40)

Response: The dates corresponding to GP-0-08-002 are kept in the GP-0-10-002 for compliance purposes.

Comment 182. More specific, low cost suggestions are needed for evaluating the effectiveness of Minimum Control Measures 1 & 2. Phone and mail surveys are NOT low cost or low labor. DEC should provide more specific, low cost methods for evaluating the effectiveness of Minimum Control Measures 1 and 2. Perhaps a point system for specific outreach tools such as websites; brochures; newspaper and newsletter articles; public meetings; educational programs; and participation events. (39)

Response: MS4s may propose low cost alternatives for effective public participation.

Comment 183. Long Island, as well as any other region in New York State that may need inspections of on-site systems within affected storm sewersheds, (Slide 2), would now be complying with EPA's Guide Lines for Management of Onsite Systems. Under these guide lines, there are five (5)-levels, or "Models" for which an entity or municipality could implement management of onsite systems, with Model 1 being the weakest, and Model 5 being the most strict. In all of the Models, the basic concept or requirement is "Inventorying existing systems and their level of performance as a minimum." If DEC requires inspections of existing systems to be conducted by Registered OTN Inspectors, areas such as Long Island would be complying with EPA's minimum requirement, or, Model 1 of Management of Onsite Systems, which is what EPA is encouraging all municipalities or entities to do. (2)

Response: The commenter is not clear on the concept of the model. The Department encourages MS4s to apply effective practices in addressing the POCs. Inventory of existing system is essential in identification of sources.

Comment 184. The Department should prepare or find a data format for the MS4's in pathogen impaired watersheds to use in their GIS mapping. The format should be suitable for rapid

conversion to the SWMM input format so the data can easily be imported into modeling efforts. (7)

Response: The Department will share all the GIS data layers owned, developed, and maintained by the Department to assist implementation of the MS4 program. Use of a specific modeling tool or output files has not been established by the Department (or discussed by MS4s with the Department), particularly concerning the fact that many small MS4s may not find this relevant to the level of their operation.

Comment 185. The new permit requirements state that the entire system must now be inspected every five years (previously every 3 years). Clarification is necessary to determine exactly what is being required to meet the permits mandate. Do the regulations require an inspector to locate a homeowner's septic tank and leaching pools, dig up each chamber, remove the lid and perform a visual inspection? In most cases the access points to these systems are buried. If unearthing the system is required, this is a highly intrusive inspection and will damage the homeowners landscaping and lawn. The Town would be responsible for returning the area to original condition. Obtaining homeowners authorization to excavate and inspect their septic system is problematic. (16)

Response: The Department did not want to provide a specific standardized procedure for conducting inspections to allow for some flexibility for the MS4s. The permit requires an investigation/inspection and includes a reference to the EPA Publication entitled Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment, which outlines various procedures to conduct such an investigation/inspection to satisfy the requirement. It should be noted that as part of a program the Department would require that the field /investigation/inspection include both the septic tank and the disposal field.

Comment 186. Mapping of the entire small MS4 conveyance system is a cumbersome and expensive task to undertake. Dye and smoke testing require many man hours to perform. Further requiring the mapping to be completed in GIS is an impractical added expense. Licenses to GIS software can be prohibitively expensive for some small MS4s to obtain and the required training to become proficient in the software and database management is extensive. (34)

Response: System mapping is essential in addressing discharges through stormwater conveyance systems and does not necessarily involve dye or smoke testing. There are many funding opportunities for system mapping available to MS4s.

Comment 187. For private residential sanitary systems, proper maintenance may also be addressed by educational efforts. (38)

Response: The Department agrees.

Comment 189. Since the average home is re-sold every 5 to 10 years, it would make better sense to require that septic/cesspool systems be pumped out and if necessary, repaired or replaced as part of real estate transfers unless the seller can demonstrate that the system has been tested or pumped out within the previous five years. This could be accomplished by providing a certification provided by a licensed septic/cesspool company at the time of closing. (29)(34)(39) (38)

Response: Opportunities to complete inspections such as a program of septic system inspections that are triggered by a real estate transaction or building/plumbing permit applications are acceptable. However, they must be used in combination with other programs as required to ensure that inspections occur every 5 years at a minimum.

Comment 190. The one most echoed comment confronts the issue of inspection, maintenance, and repair of on-site septic systems. Commenters stated that this is not a stormwater related task, and should not be a part of the MS4 permit obligation. These systems are already regulated by DEC and County Health Departments and there is no justification for this duplication of effort. Also, many small municipalities lack the staff and financial resources to undertake this burden. One county strongly opposes the requirement of routine administrative inspections of private homes or businesses as such routine entries and inspections will be unlawful and may also lead to potential county liability from digging up yards and possibly destroying systems. Unless there is a known potential violation from a failing system it is unclear as to how access to private properties for routine inspections every 5 years will be accomplished. 15) (16) (19) (20) (21)(22)(25)(39)

Response: First it must be noted that the base requirements of the IDDE MCM strictly relate to septic discharges to stormsewer systems. The Center for Watershed Protection (CWP) has identified on-site sanitary discharges to the storm sewer system as a source of pollution (phosphorus, pathogen) in some areas. The permit requires an investigation/inspection as a proactive approach in addressing illicit discharges from failing on-site systems. The inspection requirement is intended to enhance the basic program in the TMDL/WIS (pathogen, phosphorus) areas. For phosphorus WIS areas inspections are a watershed wide requirement. For pathogen WIS areas inspection is

required in areas where known, suspected or likely discharges to the MS4 are/may be occurring (Part IX.C.3.a.).

The MS4 permit requires MS4s to establish a program which requires that on-site septic systems are inspected every five years. The MS4 permit does not require that this inspection be performed by the MS4, nor does it require access to private properties by the MS4. The MS4 Permit allows for third party inspections. The details of inspection routine can be developed as a part of the WIS program.

GP-0-10-002 indicates that regular field investigations/inspections should be done in accordance with the most current version of the EPA Publication entitled Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment. This guidance manual includes various options for conducting regular field investigations/inspections. Inspections do not need to be invasive and excavation of the system would not be necessary to conduct inspections.

The Department agrees that the County Health Department may be a logical entity to conduct the inspection program. A potential approach is that the County MS4 gains the authority as a single entity or third party (e.g. RSE, coalition) to undertake the septic inspection/maintenance at the County level. However, this County level approach must ensure that the County DOH does the inspection proactively in all areas suspected. The permit strongly encourages cooperation between covered entities.

Other opportunities to complete inspections such as a program of septic system inspections that are triggered by a real estate transaction or building/plumbing permit applications are potentially other acceptable ways that can be utilized, potentially in combination with others, to meet the 5-year inspection requirement.

Comment 191. The mapping requirements in urban settings will be taxing for small MS4s – many of whom may not even own portions of the system within their jurisdiction, as many main streets, and the pipes that run under them within incorporated Villages are owned by the State, County, Town or even private landowners. In many areas, portions of the system are so old that records no longer exist. Would municipalities be required to excavate those portions of their system in order to map them? Hire consulting firms to video survey the system at high cost? This would be impractical and provisions need to be made to address this. (39)

Response: The permit requirement is to map the sewershed and not specifically all the pipes within the system. Therefore, excavation of parts of the system is not required.

Where system mapping is required, excavation is not recommended. There are alternative methods for system mapping.

Comment 192. The mapping requirement should make exceptions where records no longer exist. In such cases, reasonable inferences should be permitted provided that they are noted on the maps. (39)

Response: Complete system mapping is essential in elimination of illicit discharges. IDDE guidance provides alternative methods for system mapping.

Comment 193. The required inspection intervals are too close together, also onerous for municipalities with small staffs. Small towns with numerous water bodies may not have the means to comply. (30)

Response: It is not clear to which MCM this question relates. Generally, the Department believes that the outfall inspection requirement that “addressing every outfall within the urbanized area and additionally designated area within the covered entity’s jurisdiction at least once every five years, with reasonable progress each year” is not onerous.

Comment 194. Under the General Permit and based on conversations with DEC staff, the erosion and sediment control Department-sponsored or approved training requirements for adequately trained inspectors, construction site operators, qualified professionals, and Department endorsed individual(s) can be one in the same. However, the audience for the ES&C training course provided by NYSDEC is solely construction site operators. (34)

Response: The individuals performing inspections on behalf of the MS4 are encouraged to attend the 4 Hour, Erosion and Sediment course that the Department developed so that they have better understanding of how the erosion and sediment control practices are intended to function and so that they can identify potential problems at a construction site. There are three Department of State approved courses for individuals performing MS4 compliance inspections. They include a 1 hour course entitled, "Compliance Inspection at Stormwater Construction Sites"; a 2 hour course entitled "Construction Site Stormwater Inspections for Code Enforcement Officers"; and a 4 hour course entitled " Construction Site Stormwater Inspections for Code Enforcement Officers- Part 2". Individuals interested in taking the compliance inspection courses should contact the Department's stormwater training coordinator using the following e-mail address: DWSWtrng@gw.dec.state.ny.us. In addition, individuals interested in taking training

courses should also visit the Department's training calendar at: <http://www.dec.ny.gov/chemical/8699.html>.

Comment 195. NYSDEC-sponsored or approved inspector training is inaccessible in all areas. Many municipalities have chosen to use their Code Enforcement Officers as the personnel responsible for conducting the MS4 storm water construction site compliance inspections. As required by the NYS DOS Bureau of Code Enforcement, Code Enforcement Officers must receive 24 hours of certified Code Enforcement Training annually. Discussions with the DOS revealed that they do not currently offer DOS-certified storm water courses. DOS further indicated that since DEC is in charge of the storm water regulations it would be DEC's responsibility to approve a storm water training course for Code Enforcement Officers and then so inform DOS. Thus far DEC approved courses are rarely offered on Long Island. Discussions with DEC indicated that a compliance inspection course would typically be 4 hours: 2 hours classroom and 2 hours at a construction site. DEC also indicated that they do not have the budget to approve any new courses. Therefore, it is suggested that DEC offer more courses on Long Island or approve additional courses, such that the local inspectors can obtain the required training. Local municipalities often do not have the resources to send their staff upstate where these courses are currently offered. Perhaps DEC can also work closely with the DOS to offer locally based courses that would satisfy the requirements for the Code Enforcement Officers. This would be a great incentive for the local municipalities. (34)

Response: There is a wide range of courses and seminars provided through different groups. In the past universities, Department of State, Co. Soil and Water Conservation Districts, Conference of Mayors, APWA, Annual Conference for Municipal Officials, all hosted many events in which Department staff made presentations. Department staff have reviewed and accepted a series of training material for presentation by the Department of State. For training opportunities please visit

<http://www.dec.ny.gov/chemical/8699.html>

clearinghouse site at:

<http://www.nysgis.state.ny.us/gisdata/inventories/details.cfm?DSID=1117>

Comment 196. Developing and enforcing a local law to prohibit the feeding of geese will help, but why just prohibit the feeding of geese? At a minimum, this should be extended to the feeding of *all* waterfowl as well as to other animals such as pigeons and feral cats that are becoming

overpopulated in part due to human feeding. Besides, how does one go to a park and feed only ducks when geese and ducks co-habit the pond (a very common situation)? The requirement for the development and enforcement of a local law to prohibit the feeding of geese should be broadened, at least to prohibit the feeding of all waterfowl, pigeons and feral cats. “Develop a program to manage goose populations” is a broad and generic statement. DEC needs to define what constitutes such a program. Is egg oiling sufficient? Is hazing required? Are roundups and euthanasia required or permitted? Must goose population surveys be conducted before, during and after the development of the program in order to quantify effectiveness? Also, without regional inter-municipal cooperation, goose hazing programs succeed in making the geese move to become a problem to another jurisdiction. (12) (26) (39)

Response: The permit identifies some of the most common problems (in this case over population of geese). Local laws on prohibiting animal feeding is one option. MS4s are encouraged to identify all the means that provide effective load reduction in their implementation plan.

Comment 197. DEC needs to define what is meant by a program to manage goose populations including the permissible and impermissible components and the method and degree to which its effectiveness needs to be quantified. (39)

Response: The Department will develop load reduction credits for effective management practices.

Comment 198. DEC should study the effectiveness of street sweeping and catch basin cleaning with respect to sediment and pathogen removal and should support such efforts based in areas like Long Island where many municipalities are immediately adjacent to water bodies. Miles sweept per reporting year would be a better measure than single use. (39)

Response: Street sweeping and catch basin cleaning are common maintenance practices that are implemented as basic requirements of the MS4 program. In the case of retrofitting stormwater discharge controls, such practices do not rank high for treatment of specific POCs. The idea is to focus the selection of management practices that effectively address a POC. An enhanced maintenance program that targets pathogens, such as measures for dog waste removal, are more useful in pathogen limited watersheds than regular street sweeping.

Comment 199. Criterion 3: Is the waiver applicable to municipalities that meet one of the two Designation criteria conditions or must they meet both? (3)

Response. Both must be met.

Comment 200. There appears to be a discrepancy between the Designation Criteria document, which identifies a small portion as 25%, and the Draft Permit which assigns a value of 15%. (3)

Response: The correct value is 15%

Comment 201. Would a Registered Architect be considered a qualified inspector? (4)

Response: This comment addresses a concern under the Construction permit and is not applicable to the MS4 permit.

Comment 202. Storm sewershed-the catchment area that drains into the storm sewer system based on the surface topography in the area served by the storm sewer. Adjacent catchment areas that drain to adjacent outfalls are not separate storm sewersheds. (10)

Response: Separate system refers to separation from a sanitary system that discharges to a treatment plant.

Comment 203. DEC should provide additional guidance and instruction to MS4s to ensure that they understand how to seek relief from the source load reductions they face due to TMDL waste load allocations assigned to non-point sources. The MS4 program is well suited to implement non-point source controls. However, MS4 measures are currently being overburdened to address all reductions allocated to them categorically without necessarily having been involved in the TMDL process that may have occurred previously. MS4s should do their share, provided they have adequate means to ensure their share is fair. (1) (11)

Response: Source control is a preferred method of load reduction. The Department has developed standards for runoff reduction which results in source control. The Department will provide guidance in the process of retrofit implementation plan development.

Comment 204. In the event that only a part of a municipality in within the automatically designated area, the new designation criteria extends coverage to the municipal boundaries for construction site runoff control and post-construction stormwater management. Adoption of this provision will improve program consistency relative to the construction/post-construction requirements and eliminate confusion at the local level. While the reasoning behind providing waiver opportunities is understood, each waiver request should be evaluated on an individual case basis. The evaluation should consider not only the percentage of total municipality within

the automatically designated area and the level of current construction taking place outside of the automatically designated area, but also the sensitivity of the surrounding area, and the potential for significant environmental impacts resulting from construction activity in the surrounding area. At a minimum, waivers should be re-evaluated at the end of every permit cycle. (13)

Response: The Department agrees that waivers should not be issued automatically and eligibility must be evaluated and revisited. However, the Department defines waiver criteria. The waiver applies where a portion of the total area of the Town, Village or City (less than 15 %) is designated and where there is little or no construction activity in the area outside of the automatically designated area (less than 5 disturbed acres per year). The evaluation should conclude that additionally designated area is not subject to development requiring coverage under Construction permit.

Comment 205. Under “Storm Sewershed Definition” clarification is required since the Village of Babylon is served by sanitary sewers, separate from storm water. The present definition will cause confusion. Perhaps the term can be “Storm watershed”? (10)(21) (22) (26)

Response: In urban areas, stormwater is collected by a network of sewers and drains collectively an area that is termed the sewershed. Water that used to run through streams, rivers and underground flow is instead directed into pipes. Water that falls onto roofs usually drains into rain gutters and flows into downspouts, which are often connected directly to storm sewers.

Comment 206. NYSDEC should clearly define the term, Regional Stormwater Entity (RSE). Furthermore, NYSDEC should establish defined RSEs at a watershed level. Compliance at a watershed level spreads the burdens of smaller “small MS4s” in areas that have had difficulty in developing intermunicipal cooperation agreements and will facilitate NYSDEC’s goals of cleaner, safer waters. (28)

Response: Regional Stormwater Entity (RSE) is explained in Part III.B of the permit. The Department has provided examples for formation of RSEs in the past.

Comment 207. The qualifications for inspection personnel are also onerous. In our case the building inspectors do almost all of the inspections and they already have the expertise to look at stormwater runoff situations. Our town is fortunate in that we have an in-house civil engineer who can oversee the inspectors. (30)

Response: This comment relates to the construction permit, and is not applicable to the MS4 permit.

Comment 208. Placing significant General Permit and SWMP requirements in Part X. Acronyms and Definitions is misleading and confusing. The requirements of the SWMP are excessively complex as is. Placing additional permit conditions in the Acronyms and Definitions complicates the General Permit even further. For example, the requirement that all submitted construction site SWPPPs must be made available for public review is "hidden" in the definition of the SWMP Plan. Requirements such as this should be incorporated into the body of the General Permit or Minimum Control Measures so that small MS4s can easily understand and generate a comprehensive list of task to ensure compliance with the General Permit. (34)

Response: Comments will be considered in future updates to the permit.

Comment 209. The definition states a "person knowledgeable in the principles and practices of stormwater management and treatment". A Registered Landscape Architect does not have the education and training in hydrology, hydraulics or chemistry as required for stormwater management and treatment and should not be defined as a Qualified Professional. (36)

Response: This comment relates to the construction permit, and is not applicable to the MS4 permit.

Comment 210. NYSDEC uses the terminology of "Town, Village or City" throughout the new Additional Designation Criteria Criterion 3 - does that mean that a County must extend its MS4 program boundaries according to if and how the MS4 Town, Village or City in that County extends their MS4 area? Covered Entity, Criteria 3, is there anything an MS4 needs to do to notify the DEC that they fall under this criteria and would like the additional designation waived? How is the less than 5 acres per year calculated? Is it an average of the last X number of years or per year? If it is per year, is it based on the previous year? In Criterion 3, the terminology of "Development and Redevelopment" is included to describe the activities under MCMs 4 & 5. Because a County has no land use control, does that mean that this Criterion does not apply to a County? (36)

Response: This criterion does not apply to Counties.

Comment 211. Criterion 3 states that the designation may be waived where the automatically designated area is less than 25% of the total area of the Town, Village or City. Can a County apply the waiver to their program if the MS4 area is less than 25% of the County total area? Or

does the waiver only apply in the accordance with the individual municipalities in the County MS4 area? The Criterion 3 waiver language also has a qualifier of "little or no construction activity in the area outside" the designated MS4 area. This leaves it open to interpretation what "little" construction activity is - Is it based on area disturbed? or duration of construction? Is it relative to the number or size of projects that the MS4 manages? or the total municipal area? (36)

Response: Criterion 3 waiver only applies to MCMs 4 and 5, which will not be relevant to County MS4s. This waiver analysis will be performed based on the data from construction activities conducted in the past.

Comment 212. Appendix. 2 : The charts for impaired water bodies should include better locating descriptions of the affected segments. (i.e.: from ___ to ___) , or create an interactive web map where the segments are shown. (5)

*Response. Comment noted. The NYSDEC will consider the feasibility of this proposal going forward. Currently, the segments are available at: _____ clearinghouse site at:
<http://www.nysgis.state.ny.us/gisdata/inventories/details.cfm?DSID=1117>*

Comment 213. It appears that some waterbodies in Suffolk County are listed both in Part IX. as pathogen TMDL watersheds, and in Appendix 2, as waterbodies impaired for pathogens that do not a have TMDLs. (45) (39)

Response: The list has been verified and corrected.

Comment 214. We ask the Department to confirm that the revised Appendix 2 includes all impaired waterbodies without a TMDL for which the Department has identified stormwater runoff as a source of the pollutant of concern. This includes waterbodies on all “parts” of the current 303(d) list, as well as those on the list of “Impaired/Delisted Waters NOT Included on the 2008 Section 303(d) List” that is appended to the 303(d) list. (45)

Response: The Department has confirmed the list according to the most recent (2008) approved list of Impaired Waters in the State of New York. The listed segments in Appendix 2 are also consistent with “Impaired/Delisted Waters NOT Included on the 2008 Section 303(d) List” as is appropriate for the MS4 General Permit.

Comment 215. Nationwide studies of pathogen removal BMP effectiveness have shown that, aside from partial effectiveness of space-intensive sand filters and possibly shallow retention ponds, none of the available BMPs offer viable means of achieving the TMDL reductions being sought in the upcoming permits for Long Island watersheds. DEC is aware of these studies (two links included below). DEC is also aware that the engineering feasibility, of achieving the waterbody pathogen load reductions that were derived during the LI shellfish pathogen TMDL modeling, was not examined within the scope assigned to the EPA consultant who contributed to calculating DEC's shellfish pathogen TMDLs on Long Island. (1)

Response: The Department is aware of the challenges of meeting fully the load reductions set forth in the TMDLs. In addition, NYSDEC has become aware of environmental reasons (the tendency for mud flats to increase Pathogen Loading) why lesser load reductions may result in recovery of shell fishing. Even a reduced load reduction (e.g. 50 % where the required load reduction set forth in the TMDL is > 90 %) will, nonetheless, be challenging because of the limits of BMP effectiveness noted in the comment. The Department has prepared guidance for MS4s implementing enhanced MS4 programs necessary to restore waters to their full use. The emphasis of this guidance is the implementation of programs that will, considering all factors (BMP effectiveness, environmental factors, etc), bring Long Island's Embayments to full usage.

Comment 216. The revisions reflected in the draft revised permit reflect an attempt to address many of the issues raised during the 18 month period of discussions with the working group of interested parties. I commend the Department for opening the evolution process of this permit to the community of stormwater participants. I encourage a similar process moving forward, as I believe there is still much to be improved in this permit. Delegating DEC's stormwater regulatory responsibility to reluctant local municipalities is a complex and difficult task at best, especially when there is no model to follow, and new mandates are being imposed to DEC by EPA. I hope that any future public involvement processes can include alternatives to committing a day of time to physically driving to Albany, and provide better opportunities for more productive input and the sharing of ideas from all critical perspectives. (5)

Response: The Department appreciates the comment and will consider it moving forward.

Comment 217. After a bit of research it appears that there is no real scientific correlation between increased impervious and increased pollutant loadings of Phosphorous and Nitrogen. These pollutants appear more readily in low impervious, agricultural and farmland areas. Yet,

we are asked in the SPDES to relate the size of our stormwater storage facilities only to impervious area, rainfall being a constant. For example, if our entire watershed was impervious we would have to construct a giant stormwater treatment system yet there would be no source of phosphorous or nitrogen or other pollutants. On the other hand, if the watershed were completely farmland, usually rich phosphorous, nitrogen pollutants and sediment, they would require the minimal stormwater volumes since they would qualify for the minimal factors. (6)

Response: Please note that the emphasis in Chapter 10 of the Design Manual is on source control and green infrastructure. The most effective treatment is identified as wet pond to provide effective detention time. More detail is provided in the Design Manual.

Comment 218. The SPDES permit should allow an alternative method to determine water quality volumes where the Engineer may make an assessment of the actual pollutants rather than constructing large structured storage systems, which probably do nothing to improve water quality. (6)

Response: An alternative method for hydrologic modeling is provided in the Design Manual.

Comment 219. First and foremost, the Town of Riverhead shares New York State's concern that water quality is of paramount concern. In addition, the Town believes that water quality can best be preserved based upon clearly understood requirements and goals proffered by the permitting agency pursuant to realistic expectations as supported by objective scientific data. The Town respectfully opines that various provisions of the proposed permit challenges the goals hoped to be achieved regarding water quality concerns by burdening the Town with unrealistic expectations in permit language that is ambiguous, confusing, contradictory and impractical, hereby delineated as follows. (14)

Response: comments noted

Comment 220. In addition, it is incumbent upon the State or DEC to provide education, training and resources (both monetary and technical) if the State is genuinely interested in effectively managing storm water pollution on a state-wide basis at the local municipal level, which to this point in time is an unfunded mandate. (14)

Response: Both the State and EPA will provide training opportunities, and the Department will identify other suitable training opportunities.

Comment 221. Dewatering permits are already covered in other parts of the environmental conservation code and are already widely used and regulated by the state DEC successfully. Why include them de novo. (15)

Response: It is unclear to what section of the permit this comment relates.

Comment 222. Date-stamped digital photos can also be onerous. The individual digital files have the date on them, so that the date of this or that photo can always be certified. There is too great a focus on “forgery intent” or “evidence-tampering” here. (15)

Response: This is addressed in the Construction Permit, and is not part of the MS4 permit.

Comment 223. The NYSDEC should reconsider their timeline and schedule a second public review and comment period of GP-0-10-002 after the permit has been modified in response to comments received. Serious apprehension exists over how comments and concerns relayed to the NYSDEC will be addressed. (16)

Response: Comment noted. The Department is not considering a second comment period. It must be noted that this permit modification was a result of two years of public meeting and discussions with interested parties, which provided ample opportunities for public participation. After public noticing the draft permit, an additional time to the review period was provided, which extended the deadline to January 15, 2010. Furthermore, the final permit does not include significant changes which would require a second comment period.

Comment 224. New York State has developed its stormwater program and associated general permits including GP-0-10-002 to comply with the Clean Water Act. Since the general permit has been drafted to ensure New York’s compliance with the CWA, what latitude, if any is available to the State of New York to modify GP-0-10-002 based on comments received? (16)

Response: The Department’s storm water general permits must satisfy the requirements of the Clean Water Act, however, the Department may include permit provisions that are stricter than the federal requirements where allowed by Article 17 of the NYS Environmental Conservation. The Department’s storm water permits cannot include provisions that are less stringent than those required by the Clean Water Act. Therefore, changes to the stormwater general permit are possible where they fit within these criteria.

Comment 225. NYSDEC's concern relates to our understanding that certain aspects of this rulemaking cannot be changed pursuant to federal regulation. This would include the "triggers" created by the designation of Total Maximum Daily Load (TMDL) water bodies. In the future, the NYSDEC must recognize and oppose overly onerous federal regulation deemed unattainable from both a technical and economic standpoint. Upon discovering such proposals, the NYSDEC must inform affected local governments and MS4's so they can act prior to their adoption at the federal level. The responsibility for administering GP-0-10-002 falls largely with the local MS4. Local governments possess fewer resources than Federal or State agencies and have nowhere else to further delegate the program. Each MS4 permit has progressively required additional effort and resources. We are under the understanding that recommendations offered by the National Research Council have impacted the proposed regulations. A 2008 report prepared by the National Research Council entitled "Urban Stormwater Management in the United States" recommends substantial changes to the current permitting program that, if adopted will further encumber local MS4's. This "pass along" trend from higher levels of government to local MS4's is not sustainable. (16)

Response: Comment noted. The Department has been taking a phased approach in incorporating the advancement in complexity of the stormwater program. In the previous cycle of the permit, the Department introduced the measureable goals and objective requirements. The current modifications to the permits and standards were all evaluated and found to maintain a gradual transition. Many of the proposed rulemaking issues are already addressed in the NYS permits and technical standards. The Department will evaluate any and all modifications proposed in the Rule making process. The Department will examine the proposed requirements and try to keep a balance and adjust the requirements for compatibility with the existing permit requirement. For example, the two issues of watershed based permit implementation and incorporating the National Research Council study, NYS stormwater permit and standards have already established a watershed approach in the TMDL watershed and have address several findings of the National Research Council through the green infrastructure requirements in the NYS technical standards. However, the opportunity to comment on the draft regulation is equally provided to the regulated MS4s and we encourage MS4s to take advantage and voice their concerns directly with EPA.

Comment 226. Having experienced the process from inception to date, and representing one of scores of small villages with limited resources I am struck by the fact that the State, in its updating of the Permit/process, appears not to have recognized that a "one-size fits all" approach

does not make sense—at least from the standpoint of those who have to comply. Many small villages rely solely on volunteers to serve as mayors and trustees; they typically have few, if any, full-time paid staff. Particularly in the downstate counties of Westchester, Nassau and Suffolk, the physical infrastructure comprising their MS4s is often deminimis, frequently consisting largely of paved streets with just a few catch basins and minimal underground piping leading to sumps, streams and bays. (17)

Response: Each MS4 is allowed to develop their own SWMP within certain bounds, set forth by the permit. The Department encourages MS4s to form a Regional Stormwater Entity (RSE) to work at a watershed level as a unified entity to address retrofit requirements. Formation of an RSE, as explained in Part III. C.2. of the permit, will help MS4s prioritize the areas of significant problems and propose practices that will be most effective by targeting problem areas.

Comment 227. Many of these small municipalities have minimal or no commercial, industrial or utility businesses within their jurisdiction. Yet they are expected to have the resources—and the need—to implement the same processes, maintain the same records, and complete the same filings as large municipalities with full-time paid expert staffs, significant commercial, industrial and/or utility activities and large, complex MS4s. (17)

Response: MS4s that primarily consist of residential areas and do not include highly urbanized areas, may develop a plan of action that is more suitable for their type of land use and activities. Such plans may be different from tradition mix land use, land cover type development, but should be highly focused on the sources of POCs for that type of development.

Comment 228. Small municipalities can hire the expertise they lack – but at significant cost relative to their operating budgets and tax bases. However, this becomes an onerous problem typical of unfunded mandates: The state passes down the costs of implementation, reporting, etc. to the local municipality; but ultimately it is the already over-taxed resident who pays the bill. Given the State of New York’s fiscal problems one would think it would be doing everything in its power to minimize added tax burdens on its residents. (17) (38) (39)

Response: MS4s may take advantage of opportunities that become available via various funding sources such as WQIP and SRF to cover the cost of such projects.

Comment 229. In general this permit, like the previous two, seems to be geared more towards the upstate region of New York and not Long Island. It seems primarily focused on non-tidal

and fresh water bodies where phosphorus is the major problem and where there is significant watershed acreage in agricultural use or communities with expanding suburban sprawl or municipalities with large acreage and only a partial portion of their land area under MS4 jurisdiction. While we realize that having different permits for every MS4 is impractical, the fact remains that Long Island is different and tasks such as checking tidal outfalls for dry weather flow just doesn't make sense. Nassau County's policy for the past 60 years has been to infiltrate as much storm water as possible via drywells and recharge basins and as such we are way ahead of the curve and we feel this should be recognized by the State when granting permit coverage. Other commenters stated that one size does not fit all when it comes to permit requirements for combating stormwater impacts. Another suggestion was that State DEC considers a "Lite" version for smaller municipalities. (19) (17) (39)

Response: The Department acknowledges the differences between different geographic areas of the state. The requirements related to Watershed Improvement Strategies (WIS) are based on the TMDLs, developed with a focus on the POC. The WISs in Long Island are specifically developed according to the information pertaining to Long Island land use and land cover. The Department will seek to address conditions that do not equally relate to different types of MS4s relevant to required load reduction retrofit and BMP selection. MS4s need to actively participate in the watershed wide development of retrofit implementation plans and application of management practices in different geographic areas of the state. Infiltration in many circumstances is an effective method of runoff reduction and water quality treatment. However, in the best conditions of soil and other physical factors, an infiltration system is effective when it is designed according to objective technical standards. Highly porous soil puts Long Island in a great advantage to utilize feasible and viable options.

Comment 230. Nassau County's policy for the past 60 years has been to infiltrate as much storm water as possible via drywells and recharge basins and as such we are way ahead of the curve and we feel this should be recognized by the State when granting permit coverage. (19)

Response: Comment noted.

Comment 231. The true stakeholder in any watershed is the property owner. At present, they are way behind on the learning curve as to what MS4 will entail. Simply an educational process of the public will not take into account the problems that the owners, unaware at present, will face. There must be an avenue where input from an educated property owner will affect the

ultimate stormwater plan decided upon. These projects can't just be dictated down to the public. (23)

Response: The Department will accept reduction credit for a variety of practices including educational work, local law and the long-term effects of cultural changes if they are objectively defined and effectively implemented.

Comment 232. A new subdivision is much easier to accommodate the MS4 requirements as it is designed. Retrofitting existing neighborhoods with multiple owners and existing constraints will be ever more difficult. MS4 must acknowledge that. (23)

Response: Program implementation in new construction is more feasible in some respect. The Department utilizes the construction permit to proactively address the stormwater discharges from new development.

Comment 233. The watershed improvement strategies will place a large amount of work on the Village of Nissequogue. The Village of Nissequogue appears to have the same responsibility of its neighboring Towns who may have a considerable amount of discharge points as compared to the Village. (29)

Response: The contribution of POC from individual MS4s are calculated based on the area of contribution. Therefore, normally there will be less allocation on a small municipality with less area of contribution.

Comment 234. NYSDEC's MS4 and Construction Activity Permits have become progressively prescriptive as well as administratively and technically more complex. Certainly, draft Permits No. GP-0-08-002's and GP-0-10-001's requirements are more administratively demanding and technical in nature. So, it is reasonable to anticipate that the Final Permits will be similarly administratively and technically demanding. The administrative and technical requirements probably are readily understood by those of us who are involved in the stormwater runoff/non-point source pollution arena and understood by appropriately experienced and/or appropriately licensed professionals. However, persons such as elected officials and senior appointed officials, who may not be (or are not) similarly knowledgeable nor experienced, are intimately involved with the Final Permit's requirements. Moreover, these persons or other similarly situated persons may be ultimately responsible for the Final Permit's implementation, compliance and subsequent audits. Such situations are particularly true in the smaller "small MS4s" - MS4s with fluid elected, appointed or employed leadership; MS4s lacking dedicated staff devoted to the issue of

stormwater runoff/non-point source pollution; MS4s with limited budgetary and resources; or MS4s relying on unpaid volunteers to fulfill the Permits' requirement. (28)

Response: Elected officials are in key positions where they are responsible for critical decisions concerning the stormwater issues and discharges that effect water quality of the receiving water. Lack of knowledge or temporary nature of the position are examples of some obstacles that such entities need to overcome to enable their municipalities to meet the requirements of the permit and remain in compliance. Both the Department and State Department provide training opportunities that elected officials can take advantage of and improve their understanding of environmental issues that are a vital issue in sustainability of the communities they lead.

Comment 235. It is prudent to make the language clear. The first means to achieve clarity is by expanding the Permits' definition section and writing clear, concise definitions using plain language that do not use "stormwater runoff/non-point source pollution" jargon or technical terms. Next, I refer you to the Office of the Federal Register (OFR) which offers resources to help writers comply with the Presidential Memorandum of June 1, 1998 - Plain Language in Government Writing - <http://www.archives.gov/federal-register/write/plain-language/> and <http://www.archives.gov/federal-register/write/handbook/ddh.pdf> - National Archives and Records Administration, Office of the Federal Register Federal Register, Document Drafting Handbook. These URLs provide guidance for producing documents that are readily understood by end-users and the public. To facilitate understanding and compliance with the Final 2010 Permits, NYSDEC should consider rewriting the Permits in a "who, where, why, what, how" format, the format that the Federal Environmental Protection Agency (EPA) has used in a recent Final Rule published at 75 Fed. Reg. 521 (January 5, 2010)(40 C.F.R. Part 63 - Standards for Prepared Feeds Manufacturing; Final Rule. (28)

Response: The Department has clarified language in response to this comment where applicable.

Comment 236. NYSDEC should develop and issue guidance document representing NYSDEC's latest thinking and expertise regarding meeting the requirements of the forthcoming Permits - "Guidance for MS4s" and "Guidance for Construction Activity". Such Guidance may be either for immediate implementation, or for comment purposes only, or merely recommendations. Guidance need not create or confer any rights for or on any person and need not operate to bind NYSDEC or the public. Moreover, these Guidances may permit alternative approaches if the

approach satisfies the requirements of applicable New York State statutes and regulations, and should include a relevant NYSDEC staff person's (s') contact information. (28)

Response: The Department has developed several guidance documents to assist regulated entities. There is also contact information for program staff in Central Office and Regional Offices available on the Department's website.

Comment 237. While it is understood that the USEPA uses the language reporting on the effectiveness of the program as part of their general permit language, a better term for this would be evaluation of performance measures. Evaluating effectiveness implies that the MS4 can directly link their Phase II efforts to water quality improvements. This is extremely difficult to statistically show due to the nature of storm water, as it would require the isolation of countless variables and many years of data collection. Also, there are no practicable measurements for MS4s to directly correlate program accomplishments with water quality in receiving waters. Reporting on the evaluation of performance measures would allow the MS4 to describe a change in their level of effort over time. This is a much less overwhelming task and more realistic tangible objective to evaluate, assess and report on. (34)

Response: The permit requires reporting on the implementation of the program to show effectiveness of the employed practices. Implementation of practices at varying levels of performance which have varying levels of effectiveness has a merit and collectively can result in load reduction. Evaluation of performance measures should eventually demonstrate load reduction.

Comment 238. In general, check for spelling/grammar. Missing words, incorrect permit numbers and improper capitalization (for example: Page 8, E, 2nd sentence "A single entity shall defined by" is missing "be", Page 38, 5, a, i, the permit number should be GP-0-10-001, not 002, which is the MS4 permit, Page 40, new in New York was not capitalized). This is not a complete list of such spelling/grammar revisions. (36)

Response: Comment noted.

Comment 239. The MS4 permit should require a baseline 100 foot buffer in all Stormwater Pollution Prevention Plans ("SWPPP"). The 100 foot buffer should increase for waters of high quality, trout streams and headwaters and possibly decrease for more urban and lower quality streams. Currently riparian buffers are only a suggested Best Management Practice ("BMP"). Given the evidence of the effectiveness and their low-cost, buffers should be mandatory. Including a mandatory buffer in the MS4 General Permit will ensure that the benefits of the

buffer which should also be required during construction continue to protect water quality post-construction. (37)

Response: Conservation of natural areas and vegetated buffers are included in the New York State Stormwater Management Design Manual as one of the first steps in site design according to the State's technical standards. Vegetated Buffer and filter strips are also a practice offered in the Design Manual for consideration as a runoff reduction method. Adopting buffers as a requirement during construction for protection of water resources is considered in the NYS Standards and Specification for Erosion and Sediment Control. Maintaining the existing buffer during construction to be extended to the post construction period, although indirectly implied in the Standards, would be an issue that needs to be addressed through the construction permit. Although, MS4s may choose to address this issue through their local laws and comprehensive planning.

Comment 240. A basic narrative is needed upfront in the permit in order to explain the objectives of the permit; who is covered; and how the permit ties in with other regulatory mechanisms (such as the Section 303(d) lists for non-TMDL water bodies and for impaired water bodies with established TMDLs). This will help avoid confusion among the regulated community. (39)

Response: Comment noted.

Comment 241. Owasco Inlet and Tribs is on the 303(d) list of impaired waterbodies. With this designation there are some additional conditions and requirements for permits and SWPPPs. Most of this watershed lies within the Village and Town of Groton and neither are regulated MS4s. How will the permit requirements be handled and how will Groton (Village and Town) be advised about these added conditions? (43)

Response: The MS4 permit requirements are limited to regulated automatically or additionally designated MS4 areas, unless municipalities apply for coverage voluntarily. In addition, some of the unregulated areas may be designated as MS4s during the permit term.

Comment 242. The Draft Permit should identify special measures required for MS4s that discharge to waters impaired by floatables. (45)

Response: Floatables are POCs applicable to all waters of NY and not specifically related to impaired waters. The Department will address this pollutant through the

technical standards with guidance documents, effective BMPS, and maintenance and operation measures for implementation by regulated MS4s across the State.

The comment has not identified any Federal or State statutes and/or regulations related to floatables that must be met, or are failing to be met. There is no legal requirement to address floatables in the MS4 general permit.

Comment 243. Deadlines are also necessary for the SWMP review and revision process, when necessary to improve reductions in discharges of the POC. This revision should be guided by actual monitoring, not solely by hypothetical results derived from modeling. (45)

Response: Part V.A. states that the covered entity must conduct an annual evaluation of its program compliance, the appropriateness of its identified BMPs, and progress towards achieving its identified measurable goals, which must include reducing the discharge of pollutants to the MEP. Where the evaluation shows that the SWMP is not reducing discharges to the MEP, the SWMP shall be revised to reduce discharges to the MEP. This evaluation is to be completed on an annual basis, as a component of the Annual Report.

See below as an example of the revised Annual Report form:

“Evaluating Progress Toward Measurable Goals MCM (applicable to all MCMs)

Use this page to report on your progress and project plans toward achieving measurable goals identified in your Stormwater Management Program Plan (SWMPP), including requirements in Part III.B.1. Submit additional pages as needed.

A. Briefly summarize the Measurable Goal identified in the SWMPP in this reporting period.

B. Briefly summarize the observations that indicated the overall effectiveness of this Measurable Goal.

C. How many times was this observation measured or evaluated in this reporting period?

D. Has your MS4 made progress toward this measurable goal during this reporting period?

E. Is your MS4 on schedule to meet the deadline set forth in the SWMPP?

F. Briefly summarize the stormwater activities planned to meet the goals of this MCM during the next reporting cycle (including an implementation schedule)."

With reference to the second part of the first sentence of this comment, Part IX of the MS4 general permit provides schedules for submittal of approvable retrofit plans for watershed improvement strategy areas. Part IX of the MS4 general permit sets forth the Department's review and approval of retrofit plans. See also response to comment #107, related to the role of monitoring in assessment of the program implementation.

The comment has not identified any Federal or State statutes and/or regulations related to SWMP review and revision that must be met or are failing to be met. There is no legal requirement to include review and revision of the SWMP in the MS4 general permit. With respect to review and revision of the SWMP, the MS4 general permit is in compliance with all applicable Federal and State laws and regulations.

Comment 244. Part VIII. – For sections that are parallel to language in Part VII, revise as needed to be consistent with changes to Part VII. (45)

Response: Comment is not specific on subsections of the permit. All the requirements of Traditional MS4s and Non-traditional Non-land use control and non-traditional MS4s are not necessarily equal. In the cases where they are similar, the proposed changes are checked for consistency

Comment 245. Part X.B – The definition of “pollutant of concern” is too complex and leaves too much discretion to the permittee. The definition and the text of the permit should be clear that, except in the case of special (enhanced) provisions applicable to specific pollutants discharged to impaired waters, the permit’s requirements to control discharges apply to all pollutants that are found in municipal stormwater discharges. (45)

Response: The POCs listed in this section correspond to pollutants identified in the Impaired Waterbody List as posted on the department’s website. These includes both primary POCs such as nitrogen, phosphorus, silt and sediment, pathogens, flow, and floatables , as well as secondary POCs that include but are not limited to petroleum hydrocarbons, heavy metals, and polycyclic aromatic hydrocarbons (PAHs). For all POCs, stormwater or runoff is listed as the source of the impairment.

Comment 246. Comment 23.d. It appears that some waterbodies in Suffolk County are listed both in Part IX. as pathogen TMDL watersheds, and in Appendix 2, as waterbodies impaired for pathogens that do not have TMDLs. (45)

Response: Such segments have been removed from Appendix 2.

Comment 247. Request for Public Hearing

Under Article 70 (Uniform Procedures) of the New York State Environmental Conservation Law (ECL), the issuance of a general permit is governed by the procedures for the review of major projects, including the requirement that DEC must “determine whether or not to conduct a public hearing.” ECL §§ 70-0119(1), 70-0117(5)(e). “Such determination shall be based on whether [DEC’s] evaluation or comments raise substantive and significant issues relating to any findings or determinations the department is required to make [pursuant to the ECL], including the reasonable likelihood that a permit ... can be granted only with major modifications to the project because the project as proposed may not meet statutory or regulatory criteria or standards.” ECL §§ 70-0119(1). In particular, “where any comments received from members of the public or otherwise raise substantive and significant issues ... and resolution of any such issue may result in ... the imposition of significant conditions..., the department *shall* hold a public hearing.” *Id.* (emphasis added); *see also* 6 NYCRR § 621.8(b) (same).

Public adjudicatory hearings on SPDES permits must be held according to the provisions of Part 624, which provide that in advance of the adjudicatory hearing, the administrative law judge (ALJ) must schedule an issues conference in order to, *inter alia*: (1) narrow or resolve disputed issues of fact without resort to taking testimony; (2) determine whether disputed issues of fact that are not resolved meet the standards for adjudicable issues; and (3) determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to hear argument on the merits of those issues.⁵ 6 NYCRR § 624.4(b)(2). A proposed issue is adjudicable if it is both substantive and significant. *Id.*, § 624(c)(1)(iii). The regulations further provide that, “an issue is substantive if there is sufficient doubt about the applicant’s ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry.” *Id.*, § 624(c)(2). “An issue is significant if it has the potential to result in ... a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the Draft MS4 Permit.” *Id.*, § 624(c)(3).

The issues raised in this comment letter – if not resolved through revisions to the draft permit by Department staff – meet the criteria for substantive and significant issues requiring an

adjudicatory public hearing to be held. Further, because of the way in which the Draft Permit is intertwined with the Draft Revised Manual – on which public comments are due February 3, 2010 – issues raised in comments in the Manual may also require an adjudicatory hearing that covers both the Draft Permit(s) and the Draft Manual revisions.

Response: Pursuant to NYSECL section 70-0119 and 6 NYCRR 621.8(b), the Department has determined that no substantive and significant issues have been raised and therefore, there is no need to refer the MS4 general permit to the Office of Hearings and Mediation Services for an adjudicatory hearing. This determination notwithstanding, the Department reserves any and all rights regarding the applicability of the permit hearing process to SPDES general permits.

- 1 Tom Gulbransen
- 2 Canandaigua Lake
- 3 Larry Paggi, PE, PC
- 4 Town of Southold
- 5 Dunn & Sgromo Engineers, PLLC
- 6 Ralph G. Mastromonaco, P.E.
- 7 W-M Engineers, P.C.
- 8 T/Ramapo DPW
- 9 Sidney B. Bowne & Son, LLP
- 10 Town of Babylon
- 11 Tom Gulbransen
- 12 James Antonelli, P.E.
- 13 CNY Regional Planning & Development Board
- 14 T/Riverhead
- 15 T/East Hampton
- 16 Town of Babylon
- 17 Village of Baxter Estates
- 18 Eileen Keenan, NY Sea Grant NEMO
- 19 Nassau County Department of Public Works
- 20 Town of Southold
- 21 Village of the Branch

- 22 Village of Head of the Harbor
- 23 Shelter Island Planning Board
- 24 Stormwater Coalition of Monroe County
- 25 Village of Shoreham
- 26 Village of Babylon
- 27 Peter B. Harckham
- 28 Avrum H. Golub, M.D., J.D.
- 29 Village of Nissequogue
- 30 Natural Resources Environmental Protection Department, East Hampton
- 31 New York State Farm Bureau
- 32 Dutchess County Soil and Water Conservation District
- 33 T/Patterson
- 34 Dvirka and Bartilucci, P.C.
- 35 NYS DOT
- 36 WNY Stormwater Coalition
- 37 Save the Sound (Chesapeake Stormwater Network)
- 38 Suffolk County
- 39 Hempstead Harbor Protection Committee
- 40 NYC DEP
- 41 NYS Thruway Authority
- 42 Chemung County Stormwater Team
- 43 Tompkins County Soil and Water Conservation District/ Water Resources Council

44 Croton Kensico Intermunicipal Watershed Coalition

45 NRDC