

# **Final Draft**

## **Phase II Responsiveness Summaries**

for

**Proposed SPDES General Permit for Regulated MS4s**

**Proposed SPDES General Permit for Construction Site Runoff**

**Proposed MS4 Designation Criteria**

**Proposed Re-issuance of GP-93-06**

**January 8, 2003**

## **Introduction**

This document contains five sections and responsiveness summaries

- (1) An introductory section: Information concerning terms and expressions used throughout the document; background and discussion of the origin and reasons for the Department's actions; and responses to comments that are generalized in nature and do not necessarily pertain to a single one of the four announced actions (beginning on page 5).

Responsiveness summaries for each of the four (4) proposed actions:

- (2) Responsiveness summary for the Department's proposed action to issue a SPDES general permit for regulated MS4s (beginning on page 12);
- (3) Responsiveness summary for the Department's proposed designation criteria from which to identify and designate regulated MS4s for inclusion into the Phase II stormwater program beyond those which are automatically designated urbanized areas.(beginning on page 23).
- (4) Responsiveness summary for the Department's proposed action to issue a SPDES general stormwater permit for construction activities (beginning on page 27); and
- (5) Responsiveness summary for the Department's proposed action to re-issue GP-93-06, the (old) general permit for ongoing Phase I construction activities (beginning on page 45).

## **Acronyms, Terms and Expressions**

The following acronyms and expressions are used throughout the responsiveness summaries:

The Department	-	the New York State Department of Environmental Conservation
“Blue Book”	-	New York Guidelines for Urban Erosion and Sediment Control (as amended, it will be called the New York Standards and Specifications for Erosion and Sediment Control) available at <a href="http://www.dec.state.ny.us/website/dow/swmanual/swcsorderform_v1.pdf">www.dec.state.ny.us/website/dow/swmanual/swcsorderform_v1.pdf</a>
BMP	-	<u>B</u> est <u>M</u> anagement <u>P</u> ractice
CAFO	-	<u>C</u> oncentrated <u>A</u> nimal <u>F</u> eeding <u>O</u> peration
CWA	-	<u>C</u> lean <u>W</u> ater <u>A</u> ct
Design Manual	-	New York State Stormwater Design Manual available at <a href="http://www.dec.state.ny.us/website/dow/swmanual/swmanual.html">www.dec.state.ny.us/website/dow/swmanual/swmanual.html</a>
DOT	-	the New York State <u>D</u> epartment of <u>T</u> ransportation
EOH	-	<u>E</u> ast of <u>H</u> udson portion of New York City's Watershed
ECL	-	NYS <u>E</u> nvironmental <u>C</u> onservation <u>L</u> aw
EPA	-	United States <u>E</u> nvironmental <u>P</u> rotection <u>A</u> gency

EPF	-	<u>Environmental Protection Fund</u>
FOIL	-	<u>Freedom Of Information Law</u>
Instruction Manual For Construction NOI	-	Instruction Manual for Construction Notice of Intent and Basics for Stormwater Pollution Prevention Plan
ISTEA	-	<u>Intermodal Surface Transportation and Efficiency Act</u>
MEP	-	<u>Maximum Extent Practicable</u>
MGD	-	<u>Million Gallons per Day</u>
MS4	-	<u>Municipal Separate Storm Sewer System</u>
automatic	-	MS4s identified under 40 CFR Part 122, §122.32(a)(1)
designated	-	MS4s identified under 40 CFR Part 122, §122.32(a)(2)
regulated	-	MS4s identified as either “automatic” or “designated”
NOI	-	<u>Notice Of Intent</u>
NOITT	-	<u>Notice Of Intent, Transfer or Termination</u>
NOT	-	<u>Notice Of Termination</u>
NPDES	-	<u>National Pollutant Discharge Elimination System</u>
NYSARC	-	<u>New York State Association of Regional Councils</u>
Phase I regulations	-	the federal NPDES stormwater regulations initially promulgated on November 16, 1990, as amended. 40 CFR Part 122, subsection 122.26.
Phase II regulations	-	the federal NPDES stormwater regulations initially promulgated on December 8, 1999, as amended. 40 CFR Part 122, subsection 122.26.
Phase I construction	-	Construction activities identified under 40 CFR Part 122, §122.26(b)(14)(x)
Phase II construction	-	Construction activities identified under 40 CFR Part 122, §122.26(b)(15)
POTW	-	<u>Publicly Owned Treatment Works</u>
SEQRA	-	<u>State Environmental Quality Review Act</u>
SPDES	-	<u>State Pollutant Discharge Elimination System</u>
SWCDs	-	<u>Soil and Water Conservation Districts</u>
SWPPP	-	<u>StormWater Pollution Prevention Plan</u>
SWMP	-	<u>StormWater Management Program</u>
TMDL	-	<u>Total Maximum Daily Loads</u>
UA	-	<u>Urbanized Area</u> according to the U.S. Census
303(d)	-	New York State 2002 Section 303(d) List of Impaired Waters Requiring a TMDL

## **Background**

Clean Water Act (CWA) - The 1987 CWA contains provisions aimed at launching a national effort to regulate the discharge of pollutants into waterways during runoff events. The CWA identifies specific activities which, before discharging stormwater runoff to a “Water of the United States,” need authorization under Section 402 of the CWA (the NPDES program). New York State is a NPDES-approved state, having its SPDES program first approved by the EPA in 1975 and is thus charged with administering this program in the state.

Phase I - EPA published stormwater regulations on November 16, 1990. These Phase I regulations focused on large and medium municipalities and stormwater runoff from certain specified types of activities and required that they obtain NPDES authorization ( coverage under a permit issued pursuant to the NPDES program) by October 1, 1994. As the NPDES permitting authority, the Department issued two general permits in 1993, one dealing with industrial site runoff and another addressing stormwater runoff from construction projects involving a disturbance of five (5) or more acres.

Phase II - EPA’s Phase II stormwater regulations were promulgated on December 8, 1999. They significantly expanded the scope of activities that are subject to NPDES permitting and set March 10, 2003 as the date by which new and ongoing Phase II construction activities would need to obtain a permit. The Phase II regulations reduced the threshold for construction activities from five (5) to one (1) or more acres of disturbance. The Phase II regulations also identified publicly owned and/or operated separate storm sewer systems (MS4s) which lie within areas designated as urbanized (as defined by the United State Census) as automatically needing a permit under the NPDES program. States are expected to augment this automatic list to include additional separate storm sewer systems on the basis of state specific designation criteria designed to address their particular areas of concern. These regulated MS4s must submit a Notice of Intent (NOI) by March 10, 2003. The NOI outlines how they will adopt appropriate measures to address stormwater within these systems. Collectively, the “automatics” and the state designated systems are “regulated MS4s” under the federal Phase II stormwater program.

New York State has made significant progress in improving the State’s water quality. The new federal stormwater control program builds on New York’s successful efforts. In spite of our headway, water quality problems remain, and stormwater is one of the major challenges we still face. Water from rain or melting snow runs off land, carrying litter, eroding soil, bacteria and other pollutants into our bays, rivers and lakes. This pollution results in closed beaches and shellfish beds, spoiled fishing and swimming, excessive weed growth, and destruction of aquatic habitat. Large amounts of stormwater rushing off paved surfaces can flood yards, streets and basements. The new stormwater program will help correct these problems, protecting and restoring our valuable environmental resources. More than 90% of remaining water quality problems resulting from nonpoint sources with stormwater runoff the major source of impairment after atmospheric deposition

While the Department recognizes that further control of polluted stormwater runoff is a major concern in New York, the Department is concerned that no additional resources were provided by EPA to implement this expanded program. In 2002, \$3.4 million was earmarked under the State Environmental Protection Fund to assist municipalities with design and implementation of programs required by the federal regulations. In addition, the Department is re-allocating more than \$1 million in partnership funding towards this effort. The Department greatly appreciates all the assistance our partners have provided in working to make this program a success.

Public Notice - On September 18, 2002, the Department proceeded to public notice with four (4) proposed actions in association with its responsibility, as the NPDES permit-issuing authority, to implement the federal Phase II stormwater regulations. The proposed actions included general permits for both of the Phase II activities identified in the regulations:

1. Construction activities involving a disturbance of one (1) or more acres; and
2. Regulated MS4s.

The Department also proposed two additional actions:

3. Designation Criteria which would add additional MS4s to the Phase II program primarily because of water quality concerns; and
4. An extension to the existing Phase I general permit for construction activities for a short transition period.

Response to Public Notice - The Department provided a sixty (60) day comment period and solicited comments until November 18, 2002. In all, the Department received several hundred pieces of correspondence in the form of postcards, letters, faxes, and e-mails. A large portion of the responses were identical in content. Several responses arrived late, but generally contained the same comments that were cited in responses which were received on or before the deadline.

The Department's proposed MS4 designation proposal drew the greatest attention, especially with regard to support of the East of Hudson (EOH) portion of the New York City Watershed. Many parties advocated designating MS4s throughout the entire EOH watershed and developing additional criteria for construction activities in the EOH watershed. The Department has responded to both concerns. The entire EOH watershed is designated. Also, the Department anticipates that the EOH watershed is the primary candidate for developing more stringent watershed-specific permits for MS4 and construction activities. The Center for Watershed Protection, a nationally recognized stormwater management firm, has been working with Department staff and watershed stakeholders to recommend permit requirements beyond those outlined in the statewide program needed to achieve the Total Maximum Daily Load (TMDL)-mandated phosphorus reductions for the EOH watershed.

A large number of responses were received from the Soil and Water Conservation

community which centered primarily around the Department's proposal to issue a general SPDES stormwater permit for construction activities of one (1) or more acres of disturbance. The Department currently permits nearly 2,000 Phase I construction activities (5 or more acres of disturbance) and expects that Phase II construction activities will amount to four to five times as many as permitted under Phase I. There is a significant need to provide expertise to the regulated public, and we anticipate help from our partners at the county Soil and Water Conservation Districts. As expected, there was also a considerable response from local government and agencies which will be subject to the Phase II regulations by virtue of their being regulated MS4s. The Department is responding to these issues.

In response to the comments that were made during the public notice period, the Department has prepared a responsiveness summary having five components, one for each of the four proposed actions and another component which addresses comments made that could not be readily associated with any specific proposed action, but were more general in nature. For example, comments were made which address funding and training needs, and other comments dealt with procedural and policy matters and were addressed as general comments. Also, there were comments received which pertained to more than single proposal so the reader of the responsiveness summary is encouraged to examine all five components for complete responses to all of the issues that were raised.

Many valuable comments were received resulting in adjustments of the Department's proposals and providing help and guidance to the Department in the ongoing development of this program. The Department is appreciative of those who made an effort to help the Department begin implementation of the federal Phase II regulations under tight time constraints.

The review of comments received as a result of the September 18, 2002 public notice was conducted in a manner that involved a diversity of Department staff and included specialists, attorneys, engineers, permit writers and others. The general permits are "first generation" Phase II permits, not only in New York State, but also throughout the country. The Department recognizes that this is the first step in an evolving program and hopes, with the assistance of our partners, to use experiences learned to further refine the program in the future as EPA's guidance develops and New York State's experience expands.

Copies of the new SPDES general permits for stormwater runoff, the Designation Criteria and the Responsiveness Summary are available from the Department's website at:

<http://www.dec.state.ny.us/website/dow/PhaseII.html>

or by calling 518-402-8109

## General Comments Responsiveness Summary

### Administering the Program

#### Funding

**Question: What about about the cost of implementing the MS4 program and the need for an economic analysis of impacts in New York State?**

Response: New York State is also concerned about the cost of this unfunded Federal mandate and is making funding available to assist MS4s with implementation of the SWMP and six minimum measures. As the Department was developing the New York State permits, staff considered projections of funding needed for MS4s and others to implement the program. Based on economic analyses performed by the federal government at the national level, the Department estimated the range of costs for New York State MS4s and shifted funding priorities to provide resources to facilitate the start-up of this program for MS4s. The Department continues working with partners to find additional ways to provide the regulated community with assistance.

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

To help cover the basic costs of starting the MS4 program, during the next state fiscal year \$3.4 million has been earmarked from the Environmental Protection Fund (EPF) to assist MS4s. This funding will be available in 2003 as MS4s develop and begin implementing their Stormwater Management Programs (SWMPs), following the submittal of their NOIs by March 10, 2003. MS4s have until 2008 to fully implement their SWMPs. Additional funding from the EPF is anticipated in future years, which will be available to further assist MS4s as they move to full implementation of their SWMPs.

Even with state assistance available, communities will still need to budget for stormwater management. For example, some municipalities are considering increased fees be charged to a developer for the review of stormwater pollution prevention plans for a development. Other communities are considering creating stormwater management authorities or districts which would charge back management costs based on the amount of impervious area on a given property.

Mitigating the impacts of stormwater pollution through effective implementation of this

program is expected to generate economic benefits to the state by improving shellfishing, swimming, boating, and general water quality as well as reducing 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.

**Question: What about the ability of New York State to devote sufficient resources to ensure proper evaluation of Stormwater Management Programs (SWMPs), Stormwater Pollution Prevention Plans (SWPPPs) and enforcement of the regulations to attain maximum levels of water quality improvement?**

Response: New York State is committed to administering an effective Stormwater Phase II program. The Department has estimated resources needed to administer the program and is refocusing staff, improving program efficiency, shifting workload from lesser priorities and reorienting its work with partners to provide effective support to this high priority program.

### **General Outreach and Information**

**Comment: DEC should develop and implement a compliance strategy that includes outreach and education, training and technical guidance components.**

Response: The Department has been working with its partners to develop specific outreach and education, training and technical guidance to help with the implementation of the Stormwater Phase II program. As the program is implemented, the Department will refer to the suggestions in planning additional outreach, training and technical guidance components.

**Comment: DEC should provide a public education and outreach technical assistance team to assist MS4s.**

Response: The Department is committed to providing assistance with public education and outreach. The Department is working with regional partners (e.g., Sea Grant, New York State Association of Regional Councils, Soil and Water Conservation Districts) who can help MS4s conduct public education and outreach. The Department will also provide guidance and sample materials to assist MS4s with their outreach and education activities. The Department is funding a training cadre to assist with more technical aspects of implementing the two permits. Extensive training courses, technical assistance and manuals have been developed and will be provided to help with program implementation.

**Question: Does the Department plan to notify the MS4s about the Stormwater Phase II regulations?**

Response: Yes. The Department has already distributed information to counties, towns and villages and other interested parties. The Department will continue outreach activities to ensure that regulated MS4s are aware of the Phase II regulations. In addition, information about the locations of these MS4s is located at the Department's website at [www.dec.state.ny.us/website/imsmaps/urbanmap/index.htm](http://www.dec.state.ny.us/website/imsmaps/urbanmap/index.htm)

**Comment: The Department should begin a statewide outreach campaign to tell the public about pollutants and impacts.**

Response: The Department is committed to continuing activities directed at raising public awareness about stormwater management and other environmental issues. For the past several years messages about stormwater pollutants and impacts have been among the priority outreach messages and have been included in presentations given by Department staff around the state. Within the past year, the Department has increased its efforts, with special focus on how the Stormwater Phase II program will address the environmental degradation caused by stormwater runoff. For example, the May 2002 Watershed Week packets contained information about stormwater runoff and Phase II. The Department did extensive outreach in October 2002 to celebrate the 30<sup>th</sup> anniversary of the Clean Water Act. Stormwater, and the developing Phase II program was a primary focus of the outreach materials and outreach efforts. The Department will continue working with partners raise public awareness about the stormwater program.

## **Resources**

**Comment: The Phase II Program is a new requirement, and MS4s will need assistance in developing and implementing programs**

Response: The Department agrees. The Department has a stormwater website: (<http://www.dec.state.ny.us/website/dow/mainpage.htm>) which includes links to resources that are beneficial to MS4s that are in the initial stages of putting together their stormwater programs. In addition, many private organizations have helped provide public information about Phase II. Of note are programs that have been developed by the American Public Works Association. The Consulting Engineers Council of New York State has been educating its members on Phase II as well. Municipal engineers or consulting firms can offer MS4s valuable assistance in developing their programs. The Department will be issuing a Request For Proposals in 2003 whereby MS4s may apply for assistance in the continuing development and implementation of their stormwater programs.

**Question: What references should permittees use to name receiving waters?**

Response: A variety of references can be used, such as topographic maps, county, town and village maps and sewerage maps. Contacts that can help MS4s find this information

include County Soil and Water Conservation Districts, Regional Planning Boards and Regional Department of Environmental Conservation offices.

**Question: Where are the locations of endangered or threatened species and their critical habitats listed?**

Response: The New York Natural Heritage Program develops and maintains New York's most comprehensive database on the status and location of rare species (including all that are listed as endangered or threatened) and natural communities (which are different types of forests, wetlands, grasslands, etc.). They presently monitor 417 rare animal species, 755 rare plant species, and 166 natural community types, keeping track of more than 10,000 locations where these species and communities are found. The program is based in the Department's Division of Fish, Wildlife, & Marine Resources. For more information contact Nick Conrad, the Program's Information Resources Coordinator at (518) 402-8944.

**Question: Where are the locations shown of properties listed or eligible to be listed on the National Register of Historic Places?**

Response: The Office of Parks, Recreation and Historic Preservation has this information. The Commissioner of Parks, Recreation and Historic Preservation is the state historic preservation officer. Visit their website at <http://nysparks.state.ny.us/field/statnatreg/> or call the Historic Preservation Field Services Bureau at (518) 237-8643.

**Comment: DEC should develop a list of BMPs and describe the conditions for which they are most appropriate. This type of guidance is especially critical in sensitive watersheds like East of Hudson.**

Response: This type of information is available now, and being updated to support implementation of the Phase II Stormwater Program. *The New York State Stormwater Management Design Manual* (available at <http://www.dec.state.ny.us/website/dow/swmanual/swmanual.html>) and *the New York Standards and Specifications for Erosion and Sediment Control* (contact your SWCD or the Empire State Chapter, SWCS c/o Cayuga County SWCD, 7413 County House Road, Auburn, NY 13021 to order) both contain this information. Another resource is the *Urban/Stormwater Runoff Management Practices Catalogue for Nonpoint Source Pollution Prevention in New York State* (available from the Department by contacting the Bureau of Watershed Management(518) 402-8250).

**Training and Technical Assistance**

**Comment: Providing technical assistance and guidance to the regulated community should be a priority for the Department.**

Response: The Department agrees and has made development of guidance materials and preparation of individuals to provide assistance a high priority. Over the past several years, the Department has provided approximately a million dollars per year to partners to develop assistance materials and create technical assistance capacity to support the Stormwater Phase II program. The Department will continue to provide assistance and will support others who provide technical assistance and guidance to the regulated community.

**Comment: DEC should establish a pool of experts who could be called upon to help municipalities tackle and comply with the stormwater regulation.**

Response: The Department agrees and is in the process of finalizing a program to form a cadre of trainers to provide training and assistance to MS4s and the construction industry. In addition, the Department is developing agreements with the Soil and Water Conservation Districts to provide technical assistance.

**Comment: The Department should develop a statewide model law or plan for controlling construction site runoff within MS4s.**

Response: The Department has a model stormwater ordinance that was developed under the Phase I program which is currently being updated along with additional guidance material. It is expected to be available during early summer 2003.

**Comment: The Department should develop a statewide model Operations and Maintenance/Good Housekeeping manual.**

Response: This information is generally covered in existing materials, but not in one document. The Department will work with its partners to expand on this information and create a document containing specific guidance.

**Comment: DEC should develop a list of BMPs and describe the conditions for which they are most appropriate. This type of guidance is especially critical in sensitive watersheds like East of Hudson.**

Response: This type of information is available now. See response under Resources above.

**Comment: DEC should stress the use of nonstructural BMPs, especially in sensitive watersheds like East of Hudson. Preventative measures should be the first line of defense.**

Response: The Department agrees. The guidance manuals, training sessions and individuals providing technical assistance will continue to focus on the importance of prevention activities. The references and training courses available provide information on when and where it is beneficial to use nonstructural management practices.

**Question: How are municipalities supposed to balance human health and safety concerns against stormwater requirements? For example, if the Department determines that road salting or sanding operations are resulting in unacceptable stormwater quality, will the permit be construed as requiring the suspension or complete cessation of such operations?**

Response: Good decision making will be facilitated by implementation of the Phase II Stormwater program. The good housekeeping minimum measure is designed to help MS4s to take a holistic look at their practices and modify them as appropriate so that the practices are still effective (e.g. making snowy or icy roads safe for motorists) but are not detrimental to the environment.

**Comment: The permit does not provide sufficient guidance to enable the permittee to identify the pollutants of concern that the permittee must address in its Stormwater Management Program. Although the permits mention some pollutants, it does not indicate how a permittee should identify other pollutants of concern that are not specifically listed in the permit.**

Response: The permit is the starting point, but not the only source of information needed or available to develop the Stormwater Management Program. Likely pollutants of concern in stormwater runoff include, but are not limited to: floatables, settleable solids, suspended solids, oil and grease. Coliform bacteria and nutrients may also be considered a pollutant of concern. Other resources such as the Department's Waterbody Inventory/Priority Waterbodies List (WI/PWL) and 303(d) list are available to help identify pollutants of concern. The WI/PWL can be obtained by contacting the Division of Water's Bureau of Watershed Assessment and Research at (518) 402-8179 and the 303(d) list is on the Department's website at [www.dec.state.ny.us/website/dow/303dcalm.pdf](http://www.dec.state.ny.us/website/dow/303dcalm.pdf). The Department and its partners have scheduled training, events and technical assistance materials that will further help communities with identification of their pollutants of concern.

## **Partnerships**

**Comment: Favor regional stormwater management facilities to address post-construction stormwater runoff. The *Design Manual* does not specifically acknowledge regional facilities. Recommended that some language be included in the *Design Manual* that defines regional facilities.**

Response: The concept of regional stormwater management facilities will be considered for inclusion in materials being developed to assist with the Stormwater Phase II program implementation. The message might be incorporated in a variety of places. Although the current version of the *Design Manual* does not fully address this topic, the Department will reexamine this issue when the design manual is next updated. The *Design Manual* is meant to deal with individual construction activity. It is appropriate that MS4s address the cumulative impact concern in developing their SWMPs, which may lead to regional stormwater management facilitation to address post-construction runoff.

**Comment: The time allotted to file an NOI is insufficient to adequately allow municipalities to pursue coordinated approach with neighboring communities. Having to identify partnerships in the NOI may actually discourage municipalities from forming partnerships because of the short time frame for to pursuing and developing partnerships and for filing the NOI.**

Response: The federal Clean Water Act sets the March 10, 2003 deadline. In many areas of the state, MS4s have already begun cooperating and are reaping the benefits of this partnership. In cases where this has not occurred and is unlikely to occur before the March 10, 2003 NOI filing deadline, partnerships can still be established after the deadline. MS4s have five years to fully develop and implement their Stormwater Management Program and, in some cases, developing partnerships will be an integral part of the program. The Department has added a section to the NOI which asks the MS4 to list all other MS4s they are working with.

**Comment: DEC should provide local government with clearly articulated policy statements on the benefits of intermunicipal agreements for the proper implementation of the Stormwater program.**

Response: The Department agrees with the comment and plans to cover this topic in the guidance material that it is preparing for MS4s. The Department will also emphasize the importance of intermunicipal cooperation by making it a priority factor in funding decisions.

**Comment: Recommend that SWCDs and DEC have a more formal working relationship. Districts could help with many aspects of delivering the program. The Districts already interface directly with local municipalities and are in a good position to coordinate, combine and contract with other districts to deliver the program.**

Response: The Department agrees with the comment and is moving ahead to develop suitable working arrangements.

**Comment: SWCD staff activities on stormwater should be patterned after the successful CAFO program, where SWCD staff help implement the program, and a key component is a certification process for SWCD staff that allows them to demonstrate the skills required to deliver the program.**

Response: The Department agrees and will strive to replicate the successful elements of the CAFO program in implementing the Stormwater Phase II Program.

## **MS4 General Permit, GP-02-02, Responsiveness Summary**

### Jurisdictional Issues

**Comment:** A number of commenters expressed confusion as to which MS4s need to obtain coverage. Major questions concern discharges to groundwater and discharges to other MS4s. There have also been questions that relate to control of discharges that originate out of the jurisdiction of a particular MS4; for example, discharges that enter a stormwater system maintained by the New York State Department of Transportation (DOT).

Response: The control of discharges by regulated MS4s is mandated by EPA regulation. This includes the implementation of controls within the upstream area that drains to the discharge. An MS4 may not have the authority to control stormwater runoff originating upstream of their system. In response to comments, the draft permit has been modified to help clarify who is responsible for the implementation of stormwater programs in these cases. The permit modification states that MS4s who apply for coverage under the general permit will be required to implement the six minimum measures within the regulated portions of their jurisdictions. Areas that are tributary to the subject MS4's system, and those which are tributary to *other* downstream MS4 systems, must be subject to the program of the MS4 having jurisdiction and control over the subject land area from which stormwater runoff is discharged. The permitted MS4 is ultimately responsible for the stormwater discharge from its own system, no matter what the origin of the runoff. If there is an upstream MS4 discharging into another downstream MS4 system, the downstream system can petition the Department to designate the upstream MS4, unless the upstream MS4 is already a regulated MS4. In either event, an upstream MS4 is responsible for its stormwater discharges to downstream systems.

With this change to the MS4 permit, the jurisdictional issues raised by the commenters will be adequately addressed. Any MS4 desiring coverage under the general permit will be required to implement their program throughout the designated area under their jurisdiction and control, regardless of which MS4's system receives the stormwater discharges.

MS4 discharges to groundwater are not subject to the Phase II stormwater regulations.

### Dates By Which Programs Are Required

**Comment:** Some commenters have suggested that the Department allow more time to develop programs, and specifically that the March 2003 deadline is unrealistic.

Response: The Department agrees that the deadline is close, but the federal CWA sets the March 10, 2003, deadline. To be in compliance, MS4s must submit an NOI by the deadline with a listing of initial management practices and initial measurable goals for

each of the six minimum measures. There is no provision for extension of this time frame in the federal regulations.

The EPA states that programs must be flexible, and modified as necessary. Each year, MS4s should report to the Department on their progress toward implementation and indicate any changes made to their programs. The permit language has been changed to clarify that the program described on March 10, 2003 is an initial one. Also clarified is the ability for MS4s to modify their programs at any time during the life of the permit and report on these changes in their annual reports.

### Program Implementation Schedule

**Comment: The original draft of the MS4 permit did not address what progress would be expected of MS4s who applied for coverage under its provisions. Nor did EPA provide any guidance, specifying only that by March 2008, programs would be fully implemented. Many commenters questioned the intention of EPA and the Department with respect to this silence and were concerned that many MS4s would postpone any implementation of their programs until 2008.**

Response: The EPA did not expect MS4s to have a program fully implemented by March 2003. Likewise, it is not reasonable to assume that EPA expected MS4s to wait until March 2008 to start their programs or this would have been clearly stated within the Phase II regulations. For this reason, the final permit has been modified to require that steady progress be demonstrated in the implementation of programs.

The Department requires the MS4 to demonstrate substantial continual progress over the life of the permit or they will be found to be in violation of its provisions. While all MS4s must have their programs fully implemented by 2008, the Department encourages MS4s to maximize implementation of their programs and have their full programs operational before 2008.

### Objectives of Six Minimum Control Measures

**Comment: Some commenters expressed confusion as to the term Maximum Extent Practicable or MEP. They want to know what the minimum is that has to be done to comply with Phase II. They feel that the Department should spell out this "minimum" more clearly.**

Response: Both the CWA and the Phase II regulations mandate that permits for discharges from MS4s require controls to reduce the discharge of pollutants to the maximum extent practicable ("MEP"). CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.26(d)(2)(iv). While not a replacement for understanding the CWA and the Phase II regulations, EPA guidance sets forth MEP as a "standard for water quality that applies to all MS4 operators regulated under the NPDES

Storm Water Program. Since no precise definition of MEP exists, it allows for maximum flexibility on the part of MS4 operators as they develop and implement their programs." See Storm Water Phase II Compliance Assistance Guide Appendix A, A-3, USEPA Office of Water 833-R-00-002 (March 2000) <<http://www.epa.gov/npdes/pubs/comguide.pdf>>. Thus, MEP is not a fixed standard nationwide or even statewide.

Using MEP, rather than a specific numerical standard, grants New York MS4s subject to the Phase II regulations flexibility in the development of their programs and the selection of appropriate best management practices (BMPs). Consistent with EPA guidance, it is important to note that "compliance with the technical standard of MEP requires the successful implementation of approved BMPs." (Page 4-17 in aforementioned Guide, Appendix A). Further, as set forth in the final permit, the Department retains the right to take enforcement action for any violation of applicable state water quality standards (see Part 3 "Special Conditions"). With respect to MEP in the final permit, citations to where the clause MEP is used in the CWA and Phase II regulations have been added for clarification.

#### Expansion of Activities to include Publicly Owned Treatment Works (POTWs)

**Comment: The 1990 ISTEA exemption for industrial operations conducted by small municipalities expires on March 10, 2003. It was suggested that POTWs be given the option of either having their SPDES permit for the treated wastewater discharge revised to cover stormwater runoff or gaining coverage under GP-98-03, the stormwater general permit for industrial site runoff. It was further suggested that the Department develop an "add-on" stormwater permit component that could be added to each POTW individual permit.**

Response: The Department estimated that there are approximately 187 POTWs whose design flow is 1.0 million gallons per day (MGD) or greater. The EPA's Phase II regulations require that by March 10, 2003, certain POTWs obtain coverage for any of their stormwater discharges. This coverage is in addition to any coverage that the facility had for its sanitary sewage discharge. EPA considers the operation of a POTW as an "industrial activity" under 40 CFR Part 122.26, §122.26(b)(14) and hence, coverage for any stormwater runoff is required. However, to date, the Intermodal Surface Transportation Efficiency Act (ISTEA) has exempted smaller municipal governments, i.e., those with populations less than 100,000, from permitting requirements. As of March 10, 2003, many previously exempted POTWs will now need permit coverage for any of their stormwater discharges.

Only POTWs with sanitary sewage discharges of one MGD or greater are required to obtain coverage for their stormwater runoff. Coverage is possible in two ways. One is that the existing SPDES permit for the wastewater discharge could be modified to include the stormwater discharge. However, modifying the individual SPDES to address

stormwater runoff within the time constraints presented by the Phase II deadline is not possible at this time. A second way is for POTWs to obtain coverage through the Department's existing Industrial Sector General Stormwater Discharge Permit, GP-98-03. In fact, many existing POTWs with discharges of stormwater runoff have already gained permit coverage under GP-98-03.

### Waivers

**Comment: Is there a possibility of waiving permit coverage requirements for certain MS4s, in particular for school districts?**

Response: The federal Phase II stormwater regulations provide for the possibility of two (2) waivers under 40 CRR Part 123, subsections 123.35(d)(1) and (2). Both waivers specify the circumstances under which a waiver is possible and neither provides waivers for a generic class of activities. Simply stated, waivers are predicated upon existing and future pollutant loadings and would have to be determined on an activity-by-activity basis.

Public schools with fewer than 1,000 students may qualify for a waiver under 123.35(d)(1).

It should also be noted that the EPA does not require coverage for a stormwater sewer system that serves in very discrete areas such as individual buildings. Therefore, a school with more than 1,000 students in one building is not subject to Phase II.

### Annual Reporting Requirements

**Comment: Identify when reports should be filed and what they should contain**

Response: The final permit now requires that all reports are due on June 1st each year. This includes the annual report and the annual compliance certification. Consistent with the EPA regulations, the report period will end March 10th of each year. However, it was felt that more time was needed by MS4s to complete the report at the close of each annual period. The contents of the report are specified in part V.C. of the MS4 permit.

### Identification of "non-traditional" MS4s

**Comment: Commenters asked for a list of all non-traditional (other than counties, cities, towns and villages) MS4s.**

Response: Identification of the various cities, towns, villages and counties automatically subject to Phase II is easier than identifying all MS4s that might be subject to Phase II. Presently the Department has limited information regarding these "non-traditional" entities even though they are required by the Clean Water Act to obtain permit coverage.

The Department is attempting to gather information on the non-traditional MS4s by requiring all MS4s who develop SWMPs to identify other MS4s that contribute substantially to their pollutant loadings.

The Department encourages public entities to make their own determination as to whether or not they require coverage. The Department will assist any MS4 who has questions as to whether or not they require coverage under Phase II.

**Comment: Commenters suggested that regulated MS4s should identify other regulated MS4s which are located within their jurisdiction. Also, commenters suggested that the Department and/or traditional MS4s be required to identify "non-traditional" MS4s that might lie within the jurisdiction of their municipality.**

Response: The final MS4 permit was modified to help to identify these "non-traditional" MS4s. The final permit requires MS4s to report in their annual reports on other known MS4s that contribute substantially to their pollutant loadings. This will help the Department follow-up concerning permit coverage. The Department determined that it was not appropriate to require regulated MS4s to identify "non-traditional" MS4s that might lie within the jurisdiction of their municipality if they did not discharge to the regulated MS4.

#### Grammatical Corrections and Clarification of Terminology

**Comment: A number of commenters made suggestions as to grammatical and terminology changes. Also, some changes were suggested to improve clarity.**

Response: Most of these have been incorporated in the final permits. Of note, references to stormwater management *plans* have all been changed to stormwater management *programs* in the final permits. The latter term is what is referred to in EPA's Phase II regulations. The reference to a *plan* in the draft permits was a source of confusion to many commenters.

### **Responses To Comments on Specific Measures**

#### Public Education and Outreach Minimum Measure

**Comment: The Department should coordinate outreach and education materials for all MS4s to use.**

Response: This is a good suggestion. The Department is planning to provide guidance materials for MS4s to use and plans to provide specific materials for MS4s to distribute. However, in some cases, material should be community specific, and the Department will not be able to provide this type of material.

**Comment: Many suggestions were made regarding topics and audiences that should be the focus of public education and outreach, including the media for delivering the information.**

Response: The Department is preparing a guidance document for MS4s that will provide assistance on how to meet each of the six minimum measures. These suggestions are helpful and will be considered as the Department develops guidance.

**Comment: In the case of non-traditional MS4 (e.g., Canal Corporation, and Thruway Authority), the commenter asked that the public education and outreach requirements be limited to people that use, work or reside on the property.**

Response: The MS4 should address whomever it needs to in order to achieve the permit goals.

**Comment: In Part IV, Section B, paragraph 1b of the MS4 permit, it should be made clearer that the public education and outreach program that is developed should become an ongoing one that continues for the life of the permit.**

Response: The Department agrees with this comment and has modified the permit to make this point clearer. Ongoing public education and outreach activities are necessary to ensure future water quality protection.

**Comment: Public education and outreach programs that are implemented by overlapping jurisdictions could create confusion with the public.**

Response: The Department will address this concern by encouraging and facilitating inter-municipal cooperation and use of existing materials in the delivery of public education and outreach programs. Coordination of the outreach programs will increase program efficiency and improve the consistency of the messages delivered to the public. This approach should help reduce any confusion that might occur because of overlapping jurisdictions.

**Comment: Are counties required to target only that portion of the population that falls geographically within the “Urbanized Areas?”**

Response: Yes, the permit only requires that counties or other municipalities target the area within the urbanized areas or other area identified by designation criteria. However, reducing stormwater runoff over an entire county (or city, town or village) would benefit all its citizens and therefore a municipality may want to provide information and education about the benefits of reducing stormwater runoff over its entire jurisdiction. In addition, it may be more cost effective to have one set of programs for the whole jurisdiction.

## Public Involvement/Participation Minimum Measure

**Comment: There were many suggestions on how MS4s should conduct public involvement and participation activities.**

Response: The Department is preparing a guidance document for MS4s that will provide assistance on how to meet each of the six minimum measures. The Department received many good suggestions and will review and consider all the suggestions that the commenters made in the development of this document.

**Comment: In Part V, Section B (Record keeping) of the MS4 permit, the required notice for the public to review records be changed from wording in the draft that says, “not to exceed 2 days” should be changed to “not to exceed 5 days” due to the fact that multiple departments may need to coordinate to comply with the request.**

Response: The Department agrees that five days notice is more appropriate than two days notice and is also consistent with State Freedom of Information Law (FOIL) requirements. Therefore, the permit has been changed to incorporate the suggested wording, “not to exceed five days.”

**Comment: In Part IV, Section B, the Department should add the language, “at a minimum” at the top of the list of activities that MS4s must do to comply with this portion of their permit.**

Response: The Department agrees and has modified the MS4 permit to include this preface to each of the six minimum control measures.

**Comment: A commenter suggested that a public meeting to discuss the annual report is not necessary, that posting the report on the website is adequate.**

Response: The Department does not agree with this suggestion. Many people do not have access to the web and others who may have web access are not comfortable or would not feel welcome to provide feedback on the report. However, coupling posting the report on the web with holding a public meeting would be a good way to increase feedback on the report. It should be noted that, under this requirement, MS4s do not have to hold a separate meeting; rather, they can choose to incorporate this element into an existing meeting.

**Comment: The permit should include a specific mechanism for public input while developing the SWMP.**

Response: The Department agrees. The final permit includes the requirement that was set forth in the draft permit under Part IV, Section B, paragraph 2.c.ii, “design and conduct a public involvement/participation program which identifies types of input you

would seek from them *[key individuals and groups]* to support development and implementation of your program and how you will use it.”

**Comment: MS4s must require that the impact and mitigation elements of SWPPP for a project subject to SEQRA are fully covered and subject to public participation during the SEQRA process.**

Response: MS4s will be required to review SWPPPs as part of their Construction Minimum Control Measure. Approvals of site plans and land subdivisions containing SWPPPs are *already* subject to SEQRA.

#### Illicit Discharge Minimum Measure

**Comment: The Department should stipulate in the permit that the decision as to what constitutes “adequate funding” (illicit discharge minimum measure) should be the municipality’s and not questioned unless a water quality or permit violation occurs.**

Response: The Department agrees. The wording has been changed to delete the words, “adequate funding.” The permit language now reads: “Develop and implement a program to detect and address non-stormwater discharges, including illegal dumping to the system.”

#### Construction Minimum Measure

**Comment: Providing training for construction operators would be unduly burdensome on municipalities and that providing educational materials would be sufficient.**

Response: The permit has been modified to eliminate the requirement that the MS4 provide the education and training for construction operators. The permit does still require the MS4 to develop and implement education and training measures for construction operators about the requirement to develop and implement a Stormwater Pollution Prevention Plan and any other local requirements. The MS4 can develop and deliver information or can reference suitable training and information that are available through other parties. Many courses are available and are listed on the Department’s website at [www.dec.state.ny.us](http://www.dec.state.ny.us). The Department will help by providing lists of courses and educational materials to fulfill this requirement. Thus, the Department feels the requirement will not be overly burdensome to MS4s. This provision should also help remind the MS4 to provide information on local construction requirements.

#### Questions Associated with Joint Filing of NOIs and Joint Delivery of Programs

**Comment: The Department should allow for consolidated reporting among MS4s that have entered into formal comprehensive agreements for fulfilling all requirements of the program.**

Response: The Department will investigate mechanisms which would allow for consolidated reporting among MS4s that have entered into formal comprehensive agreements for fulfilling all requirements of the program.

**Comment: Questions were raised about the language in the permit that deals with agreements between cooperating MS4s.**

Response: The language in the permit reflects the federally promulgated regulations (“Phase II Program”). EPA mandates that, at a minimum, stormwater permit coverage be obtained for any stormwater discharge from an MS4 located in an "urbanized area". However, the boundaries of urbanized areas do not coincide with drainage catchment, watershed or political boundaries. Rather, they criss-cross all of these boundaries. EPA and the Department encourage cooperation between MS4s in developing and implementing the six minimum measures in Urbanized Areas. They have not specified any minimum legal requirements for intermunicipal agreements. Instead, this was left up to the involved MS4s. This flexibility in the federal regulation is reflected in the state’s final draft MS4 permit. Communities affected by the Phase II program are encouraged to cooperate on any portion of their SWMP, an entire minimum measure, or to have another MS4 be responsible for developing and implementing their entire stormwater program.

For example, a village that identifies the need to more regularly clean their catch basins to prevent pollution might contract with an adjacent town that has a highway department with a catch basin cleaner to periodically come into the village to clean basins there. In this case, the inter-municipal agreement would help the village address a *portion* of their Good Housekeeping minimum measure. Another example is that a town may opt to participate in a countywide program on Public Education and Outreach, thereby satisfying that *entire* minimum measure. Yet another example is that a small village with limited staff and resources, located entirely within a town, may contract with the town to develop and implement an entire stormwater management program for the village, thereby satisfying their *entire legal obligations* under the Phase II Program.

There are many possibilities for arrangements between MS4s. As long as the statutory requirements of the Phase II Program are met, namely that a stormwater management program with the six minimum measures be developed and implemented within MS4s that need coverage, subject MS4s will be in compliance. MS4s will still need to file separate Notices of Intent. They need to document any legal arrangements they have with other entities to either assist or receive assistance with these programs.

**Comment: Part IV, Section C of the MS4 permit encourages cooperation between MS4s, however it fails to state that if MS4s enter into intermunicipal agreements that they are still individually responsible for their permit requirements and therefore should use legally binding agreements.**

Response: The final MS4 permit states in Part IV, Section D, “DEC encourages MS4s to cooperate whenever and wherever possible when developing and implementing their stormwater program”<sup>1</sup>. In order to clarify this issue, the Department amended the final permit to add, “However each MS4 is responsible for obtaining its own permit coverage and filing its own NOI.” If an MS4 relying on another MS4 regulated under Section 122 of the stormwater regulations to satisfy one or more of their permit obligations, they must note that fact in the NOI. This other entity must, in fact, implement the control measure(s) and must agree to implement the control measure on behalf of the other MS4. This agreement between the two or more parties must be documented in writing, signed by both parties, included in the stormwater management program, and be retained by the permittee for the duration of this permit, including any automatic extensions of the permit term. Please note that each MS4 is jointly and severably liable to comply with the terms of the permit. While entering into intermunicipal agreements should allow for ease and efficiency in administering the programs, it does not relieve an MS4 from any liability it may possess for its discharges under the federal CWA and ECL.

**Comment: A county may not be able to reach mutually-acceptable agreements with all entities (such as towns) it needs in order to comply.**

Response: The permit encourages intermunicipal agreements and cooperation but it does not require them. It is possible that, in some counties, all the regulated entities may not participate in a cooperative effort. Although, probably not the most efficient of circumstances, this arrangement could still meet the permit requirements.

**Comment: Regional approaches to water quality issues are important to encourage, especially those approaches that use watershed-based solutions for water quality problems. Part IV, Section C (Section D of the final permit), encourages cooperation between MS4s but it needs more prominence and substance.**

Response: The Department feels that the most appropriate way to advance this concept is through its guidance materials for MS4s and through outreach and education efforts and activities. The Department will continue to emphasize opportunities for intermunicipal cooperation and watershed-based solutions throughout implementation of the stormwater program.

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<sup>1</sup> For example, villages are encouraged to cooperate with towns, towns with counties, and adjacent counties with each other. In addition, municipal governments are encouraged to coordinate and cooperate with “non-municipal MS4s such as DOT, school and fire districts, federal and State facilities located within and adjacent to their jurisdictions.

## **Designation Criteria Responsiveness Summary**

### **Additional designation criteria**

**Comment: Designate MS4s that discharge to waterbodies that are not supporting the waterbody's best designated uses.**

Response: The Department has adopted a designation criterion that will do this whenever an EPA- approved Total Maximum Daily Load (TMDL) is developed that requires reduction of a pollutant associated with stormwater. Waterbodies that are not currently meeting their designated best uses are identified in an official Department document called the New York State 2002 Section 303(d) List of Impaired Waters Requiring a TMDL. The Department is required to develop a TMDL for each of the waterbodies identified on the 303(d) list. The TMDL identifies how much a specific pollutant must be reduced from various sources to restore the best use of the waterbody. If an EPA- approved TMDL identifies a need to control stormwater to meet the TMDL, the MS4s that contribute pollutants to that waterbody will be required to seek permit coverage.

**Comment: Designate MS4s that discharge into watersheds of waters where data indicate impairment due to stormwater runoff.**

Response: The Department has adopted a designation criterion that will do this whenever an EPA-approved TMDL is developed that requires reduction of a pollutant associated with stormwater. See answer above. Whenever data indicate impairments are due to stormwater runoff, the specific waters should be considered for 303(d) listing and TMDL development. The Department feels that only those waters that have undergone a full evaluation leading to placement on the 303(d) list and development of a TMDL warrant designation.

**Comment: Designate rapidly developing MS4s.**

Response: The Department recognizes the potential value of this criterion, but feels it is premature to adopt a designation criterion of "rapidly developing areas" at the start of the Phase II program. The Department will consider adopting this criterion in the future. The Department will evaluate the feasibility of using NOI information submitted under Construction Activity permits as a way to evaluate potential rapidly developing areas.

**Comment: Designate the towns on the east end of Long Island as MS4s in order to support the goals of the National Estuary Program. The towns recommended for inclusion are Southold, Shelter Island, and East Hampton.**

Response: The towns at the eastern end of Long Island do not currently meet the designation criteria that require both sensitive waters and contiguity to an urbanized area. Based on public input, the Department does not feel it is appropriate to adopt a designation criterion that would be based solely on sensitive waters without regard to urbanized areas. A TMDL for the Peconic Estuary will be developed within the next few years. The TMDL will

identify whether or not additional stormwater controls are needed for the eastern-most towns of Long Island. If so, these towns will become designated MS4 areas.

**Comment: Designate MS4s based on the existence and location of sensitive waterbodies. Use information from federal, state and local water quality programs.**

Response: The proposed designation criteria were selected to protect sensitive waters by designating areas contiguous to Urbanized Areas that discharge to sensitive waters (AA, AA special and SA waters). The official state classification and standards system is used to identify sensitive waters. The state classification system allows for local input, and the classifications are approved at the federal level.

**Greater protection for the East of Hudson Watershed.**

**Comment: Designate the entire East of Hudson (EOH) watershed as a regulated MS4 with a heightened permit program including rigorous standards and goals.**

Response: The final designation criteria designate the entire East of Hudson watershed as a regulated MS4. In addition, the Department has begun a stakeholder involvement process to evaluate and develop enhanced watershed specific permits for Construction Activity and MS4s in the EOH watershed.

**Comment: Designate all cities and towns whose boundaries extend into the EOH watershed.**

Response: Although the existing MS4 permit requires only MS4s within the watershed boundary to comply with the MS4 permit, MS4s are encouraged to conduct the six (6) minimum control measures within the entire municipal boundary.

**Comment: Consider the other EPA-suggested designation criteria that lead to designation of the EOH watershed.**

Response: The entire EOH watershed is designated as a regulated MS4 under the final designation criteria.

**Comment: Propose additional criteria to cover the Catskill and Delaware reservoirs.**

Response: At this time, the Department believes that the final construction permit coupled with stormwater control required by the New York City Watershed Rules and Regulations adopted pursuant to the New York City Watershed Agreement provide adequate protection for the Catskill and Delaware reservoirs in the West of Hudson portion of New York City's watershed. The Department has conducted a TMDL analysis of all of the West of Hudson reservoirs. The TMDL has determined that stormwater controls beyond those currently in place are not necessary at this time.

### **Use Watersheds as the basis of designation**

**Comment: Designate watersheds where a TMDL has been developed.**

Response: A watershed-based approach has been adopted in the TMDL criterion. When a TMDL is developed, and it indicates that stormwater is contributing to the exceedance of the TMDL, the municipalities that contribute stormwater to these watersheds will be designated as requiring coverage under the MS4 permit.

**Comment: Designate MS4s that discharge into watersheds of 303(d) listed waters.**

Response: It would be inappropriate to adopt a watershed approach for all 303(d) listed waters in the absence of a more detailed technical analysis that identifies where stormwater is an issue and which MS4s must reduce stormwater runoff to alleviate the problem.

**Comment: Designate MS4s that discharge into the watersheds of AA, AA-special, and SA waters.**

Response: The Department does not believe it is appropriate to designate MS4s that discharge to a watershed tributary to AA, AA-special and SA waters unless an analysis has been done to demonstrate that stormwater is an issue of concern, and that the area in question impacts this issue.

**Comment: Designate basins upstream of reservoirs that are not meeting water quality standards (West Branch, Boyd's Corner, Bog Brook, Cross River) as MS4s.**

Response: The Department's final designation criteria do include the entire East of Hudson watershed, including West Branch, Boyd's Corner, Bog Brook and Cross River.

**Comment: Apply East of Hudson permit criteria in all areas of the Peekskill watershed.**

Response: The Department does not feel it is appropriate to designate all areas of the Peekskill watershed based on the information submitted during the comment period. At this time, the Peekskill watershed does not meet the proposed designation criteria; there is no documented use impairment similar to that identified in the NYC reservoirs East of Hudson.

### **Additional designations should be kept to a minimum**

**Comment: Minimize designation of additional MS4s and examine the costs and benefits of the program before expanding the designation criteria.**

Response: The EPA regulations require designation of urbanized areas but give states discretion on whom to designate beyond the "automatics." The Department has adopted a carefully selected, but limited set of additional criteria for designation. The Department will consider the costs and benefits resulting from implementation of the Phase II program to

help determine the need for future designations.

**Comment: Opposed to statewide coverage.**

Response: The Department is not expanding designation of MS4s statewide at this time. The Department will consider the effectiveness and cost-effectiveness of use of the permits before it designates other areas and/or reissues the permit. Any decisions on expanding the coverage will undergo public review and comment.

**Comment: For the second designation criterion, identify specific locations instead of developing a designation criterion so that rural MS4s won't be drawn into regulations when they only touch the boundary of a regulated MS4.**

Response: The named locations were identified as the areas currently meeting the additional designation criteria. In the future, additional areas may meet the criteria, at which point the MS4s in that watershed will become regulated. The Department is required to develop criteria rather than simply identify specific locations so that permit coverage is expanded as conditions develop that warrant permit coverage. Thus additional MS4s will be covered if, and when, necessary to achieve the environmental goals of the law. Rural areas will not be drawn in unless their population growth makes them equivalent to an urbanized area.

**The process of including additional MS4s should be expedited**

**Comment: Evaluate MS4s as conditions evolve rather than on five-year permit cycles; designate new categories every two years; go to statewide coverage sooner than 15 years from now.**

Response: As a practical matter, the Department believes that five years is a reasonable time frame to evaluate additional designation criteria. However, if conditions evolve before five years that suggest additional designation would be warranted, the Department will consider these matters and make a decision at that time. The Department will evaluate the success and the cost of the Phase II program during the initial five years to determine the pace of additional designations.

**Comments seeking clarification**

**Comment: Are the Canal Corporation, Thruway Authority and Department of Transportation specifically designated?**

Response: The Canal Corporation, Thruway Authority and the Department of Transportation are required to seek permit coverage for operation of MS4s within regulated MS4 areas, including the automatically designated urbanized areas and the areas added by applying New York's designation criteria.

**Comment: Do the proposed criteria apply to all communities or only the EPA “watch list” of those with 10,000 population and 1000/square mile density?**

Response: The designation criteria apply to all municipalities across the state. At this time, none of the EPA “watch list” (communities with 10,000 population and 1000/square mile density) meet the NYS Designation Criteria of a TMDL watershed or sensitive waters contiguous to urbanized areas.

**Comment: What about lands in Connecticut that should be regulated to protect New York’s drinking water?**

Response: The Department believes that all waters of the State of Connecticut tributary to New York State drinking waters have been designated to require MS4 permit coverage.

## **Construction Permit (GP-02-01) Responsiveness Summary**

### **Authority/Enforcement**

Construction activities and regulated MS4 stormwater management programs

**Comment: The Department should not delegate its NPDES responsibilities to the regulated MS4's, particularly for the first five year period of an MS4's permit coverage when the MS4's Construction Site Stormwater Runoff Control program may not be fully implemented. The Department should ensure that permitted construction activities are meeting their permit requirements.**

**Comment: A regulated MS4's SWMP will be developed over the five-year term of the permit, GP-02-02, and a local program may initially not be fully implemented. It is premature at this time to rely on an MS4's program for regulating construction site runoff.**

**Comment: The Department should eliminate any mention of MS4s from this permit cycle since MS4s will not have their programs up and running in the first five years, and use this time until the next permit to develop an integrated permitting system.**

Response: The Department did not intend to delegate NPDES responsibility to regulated MS4s, but perhaps this was not clear in the proposal. The aim of acknowledging MS4s’ stormwater management program requirements (SWMPs) was an attempt to avoid potential conflicts between local requirements for regulating construction activities and the State’s requirements as contained in the SPDES new general permit for construction activities, GP-02-01.

Regulated MS4s will need to develop and implement SWMPs in accordance with the MS4 permit, GP-02-02, which requires regulated MS4s to address six minimum components in their SWMP, including runoff from construction activities. It is generally agreed that SWMPs need to reflect local conditions, with the State’s Construction Permit

GP-02-01 providing a benchmark for regulated MS4s to follow. It has been the Department's aim to have stormwater regulated by these two requirements in a consistent and non-conflicting fashion and in recognition of the local program and the establishment of the state construction permit.

Commenters are correct in that regulated MS4s' SWMPs may not be fully implemented during the first round of permitting. Therefore, references to local MS4 programs have been deleted from the proposed general permit for regulated MS4s, GP-02-02. Perhaps future permits for construction activities and regulated MS4s will provide greater deference to MS4 programs which are operating under a SPDES permit and are adequately regulating construction site runoff. But, for the immediate term, many MS4 programs may not be satisfactorily complete and it would be premature to rely on them at this time.

#### DEC Inspection and Enforcement Authority

**Comment: Inspection and enforcement authority for the general permit should be retained by the Department.**

Response: As stated above, the Department agrees. The Environmental Conservation Law provides the Department with the authority to perform inspections and initiate enforcement actions at any site or facility subject to the provisions of a permit they issue and this will not change in any way.

#### Cease and Desist Orders

**Comment: Establish a provision in the permit that would authorize the issuance of stop work orders. The ability to stop work quickly at a construction site and require immediate implementation of necessary stormwater management measures would be an important additional enforcement mechanism to ensure compliance with the Clean Water Act and the ECL.**

Response: The Department maintains that it has this authority under the ECL (§71-1929), and agrees that this suggestion should be expressly included in the permit. ECL §71-1929 allows for injunctive relief for any violation of the terms of a permit issued pursuant to Article 17 of the ECL, such as this permit. Therefore, if any terms of the permit are violated, the Department has the authority to seek injunctive relief for the violation. Referencing the Department's authority in the permit will better put permittees on notice of the potential outcome of failing to comply. Language has been added in the final permit in Part V, Section A, to clarify that the Department has the authority to order "an immediate stop to all construction activity at the site" upon a finding of significant noncompliance.

## When are Permit Conditions Enforceable

**Comment: The permit needs revisions to make clear that enforceable controls on polluted runoff become effective at the initiation of a construction disturbance, rather than when a polluted storm water discharge occurs.**

Response: The language in Parts V.A., *Duty to Comply*, and I.E., *Deadlines for Notification*, of the construction permit addresses this concern. Part I.E. states that operators who intend to obtain coverage under the general permit must do so prior to the commencement of construction activities, and part V.A. states that an operator must comply with all conditions of the permit, including all the terms of the SWPPP. Otherwise, any permit noncompliance constitutes a violation of the CWA (Clean Water Act) and the Environmental Conservation Law and is grounds for enforcement.

## Enforcement by non-Regulated MS4s

**Comment: Please clarify the role of local government in non-regulated MS4s. Does a local government have to review SWPPP before issuing building permits? If they see violations of normal Erosion and Sediment Control practices do they:**

- 1) read the SWPPP to see if it is being violated?**
- 2) call the Department to enforce the General Permit?**
- 3) issue a Stop Work Order until the Department resolves the General Permit issue?**

Response: It would be a good idea for local governments to review the SWPPPs before issuing building permits, but this is not a requirement at this time, unless required by the locality itself. The issuance of a building permit is handled by local government and is subject to the requirements they have established and the New York State Building Code. If a violation is observed, the local government should notify the Regional Office of the Department.

## Permit Requirements and Standards

### Standards versus Guidance

**Comment: The permit language must be stronger that standards need to be established, otherwise, permittees will deviate from guidance. For example, terms such as "recommendations for technical standards" and "applicants are strongly encouraged" are unacceptable. The Department's technical standards should be required unless the applicant presents alternatives that have been certified to protect water quality. The use of the word "recommended" in describing the Department's standards could weaken enforcement.**

**Comment: It is better to "present the DEC technical standards as required components of the SWPPP unless a licenced professional certifies that the alternative measures are as protective of water quality and otherwise comply with this general permit, or unless an individual permit is sought by the applicant."**

Response: The Department agrees that for purposes of clarity it is better to present the *Design Manual* and *New York Standards and Specifications for Erosion and Sediment Control* technical standards as required components of the SWPPP for five (5)-day permit coverage. This was the Department's intention in the draft permit insofar as distinguishing between five (5)-day and sixty (60)-day permit coverage. Given this, the Department has removed all references to "recommended" technical standards from the permit and instead just refers to them as the Department's "technical standards."

The Department believes that there will be legitimate departures from the "technical standards" which can be effectively dealt with under the terms of the permit. Under the terms of the construction permit, GP-02-01, departures from technical standards that are referenced in the permit will require a written certification from a licensed professional that the departures are satisfactory alternatives. Furthermore, the general permit requires applicants for activities which will not conform to the Department's *Design Manual* and *New York Standards and Specifications for Erosion and Sediment Control* technical standards are subject to a sixty (60)-day wait for obtaining permit coverage. This extended period of time will afford the Department with an opportunity to verify that there is sufficient justification to warrant a departure from the technical standards which are contained in the *Design Manual* and the *New York Standards and Specifications for Erosion and Sediment Control*. The NOI will also require an explanation of such departures which will enable the Department to take appropriate further action.

#### Effluent Limitations and/or Performance Standards

**Comment: The Department should set effluent limitations and/or self-monitoring requirements (e.g. for phosphorus, solids, etc.) in the general permit.**

Response: The Department does not feel it is appropriate to set specific numeric effluent limitations at this time. The nature of stormwater and stormwater treatment does not lend itself to the easy establishment of such effluent limitations. Since quality and quantity of stormwater is highly variable, there would be no way to establish site specific effluent limits based upon currently available information. The Department has developed and updated the stormwater management *Design Manual* and the *New York Standards and Specifications for Erosion and Sediment Control* for to provide the most up to date criteria possible. The Department believes this is a first good step. The EPA has not established effluent criteria for construction activities. The EPA is in the process of developing technology-based standards for construction activities. It is expected that the EPA will address effluent limitations in that process. The Department feels that it is appropriate to wait until the EPA has completed the process of establishing technology-based standards before the Department would consider establishing any effluent limitations.

Notwithstanding the absence of specific numeric effluent limitations, in accordance with the Environmental Conservation Law, the permit expressly prohibits the discharging of any pollutant that causes contraventions of state water quality standards.

## Inspection Certification

**Comment: The Department should retain the requirement that all self-inspection reports be undertaken by a qualified professional whose report certifies, under penalty of law, what steps are necessary to correct identified site violations during construction or that the site is in full compliance.**

Response: The Department has revised the final permit in Part III.D.3 to clarify that site inspections shall be conducted by a qualified professional. In addition, language has been added to Part III.D of the permit which requires the site inspector to document in the inspection report any deficiencies that were identified with the implementation of the SWPPP.

## SWPPP Details

**Comment: The permit must require the Stormwater Pollution Prevention Plan (SWPPP) to be fully engineered and provide specific details. The specifications for the project should include a detailed description of the pollution prevention and control work required; and state clearly what is required, when, and who is responsible for carrying it out.**

Response: The Department is requiring a minimum of fundamental information, evaluation and computation for all the components of the SWPPPs. Specifications of the control measures are identified in the two documents: *NY Standards and Specifications for Erosion and Sediment Control* and the *NYS Stormwater Management Design Manual*. The details of required information is outlined in the *Instruction Manual for Submitting Construction Notices of Intent*. Depending on which components of the SWPPP are required, detailed information must be provided on erosion and sediment control, water quality control and water quantity control. This requirement to present “fully designed and engineered stormwater management practices” in the SWPPP has been clarified in Part III, Section D.2 of the final permit.

## Clarification on SWPPP Requirements

**Comment: DEC needs to provide further clarification as to any additional requirements for SWPPPs for sites meeting Condition A, B, or C as identified in the proposed permit.**

Response: The Department has modified the permit language in Part III.D. *General Contents of SWPPPs* to provide further clarification of the SWPPP requirements for the different categories of construction activity identified in the permit.

## Minimum Inspection of Construction Sites

**Comment: The present 7 day self-inspection schedule should be reinstated. The proposed draft permit required self-inspections every 14 days as opposed to 7 days in the current permit, GP-93-06.**

Response: The Department agrees. The weekly (minimum) inspection schedule has been

revised to reflect 7 days as opposed to the 14 days as originally proposed.

Long-term Maintenance of Permanent Stormwater Management Structures

**Comment: Stormwater controls must be properly operated and maintained. The Department should require long term maintenance of stormwater control structures.**

Response: While the Department agrees that long-term maintenance of stormwater control structures is preferred, the present federal regulations do not require the control of stormwater runoff from construction sites after construction is completed. However, the Department does require in Part III, Section D.2.b(7) of the final permit that the SWPPP “provide a maintenance schedule to ensure continuous and effective operation of each post-construction stormwater control practice”. In addition, Section 8 of the Notice Of Termination highlights the necessity of such plans:

8a. *Are there permanent stormwater control structures remaining on the site?*  
 yes     no

*If the answer to question 8a. is yes, briefly describe:*

*If the answer to question 8a. is yes, answer the following questions 8b., 8c., and 8d.:*

8b. *Is the design and function of each described in the final SWPPP?*  
 yes     no

8c. *Have the new owners been given a copy of the operation and maintenance requirements for long-term operation?*  
 yes     no

8d. *Who will be responsible for long-term maintenance?*

Maintenance of stormwater management practices are also identified in the *Instruction Manual for Submitting Construction Notices of Intent* for implementation during construction as well as post-construction as an essential component of the SWPPP. The instructions address this as:

*Inspection and maintenance measures must be indicated on the Construction Sequence Schedule and performed once a week or immediately after periods of rainfall during construction. This schedule must also identify maintenance measures for practices that remain on the site once construction is finalized.*

At this point, the Department is relying on its ability to abate any violation of a water quality standard, and recognizes that such structures exist mostly in urbanized areas. Furthermore, the EPA has not provided guidance with regard to the need to permit such facilities.

In urbanized areas, the post construction runoff must be controlled by the SWMP minimum measure that deals with post construction runoff. The Department will continue to evaluate this issue and seek further guidance from the EPA.

## Pre- versus Post-development Conditions

**Comment: Clarification was requested on what is required and what is optional. Do post-development conditions (quantity/quality) have to meet pre-development conditions?**

Response: The methodology presented in the *Design Manual* requires the capture and treatment of the stormwater runoff from the 90 percentile annual rainfall event to provide sufficient water quality treatment, regardless of the previous use of the land.

For water quantity control, three measures of control are required: channel protection, overbank flood and extreme storm. The 24-hour extended detention of a post-developed 1-year, 24-hour storm event is considered to provide sufficient control for channel protection. This helps to reduce the rate of discharge based on the proposed paved areas regardless of pre-development conditions. It is only for overbank flood and extreme event control criteria that the pre-post development evaluation approach is considered. For this set of criteria, control of 10-year and 100 year storm is required to reduce the discharge to pre-development rates for the above criteria respectively.

## Importance of Maintaining Pre-Development Stormwater Runoff Conditions.

**Comment: The Department should continue to stress the importance of maintaining pre-development stormwater runoff conditions.**

Response: Maintaining pre-development runoff condition is a different approach than the one currently adopted by the Department. It is not necessarily a better approach. Maintaining pre-development runoff condition is a more simplified concept. This approach works for water quantity control if the pre-development site condition is either undeveloped or developed with a small percentage of impervious area. From a water quality perspective, this approach will fail if the site has pre-development land use with a high loading rate, such as high density residential. The *Design Manual* specifications set protective standards for post-development regardless of the pre-development conditions.

## Treatment of Runoff Volume

**Comment: The draft general permit does not require the treatment of a sufficient volume of runoff from heavy precipitation events.**

Response: The Department has proposed that permanent stormwater controls be designed to handle runoff from the 1 year, 24 hour storm throughout the State. The *NYS Stormwater Management Design Manual*, follows the 90% capture rule. This method is based on a regional analysis of the rainfall frequency spectrum. The technical basis for the 90% capture rule is that the stormwater treatment practice is explicitly designed to capture and treat the runoff from the 90<sup>th</sup> percentile annual rainfall event. Although the total volume of rainfall from storms greater than the 90<sup>th</sup> percentile event is greater than 10% of the annual rainfall, a practice sized for the 90<sup>th</sup> percentile event will also treat a fraction of these storms. The sizing rule based on the 1-year 24 hour event will generally result in very large treatment volumes. Adopting even more stringent criteria may be

warranted to target specific pollutants, such as areas requiring a higher reduction in phosphorus. However, the *Design Manual* is meant to set criteria for statewide applications.

#### Spectrum of Practices in Technical Standards

**Comment: A wider selection of Erosion and Sediment Control practices should be added to the revised *NY Urban Erosion and Sediment Control Guidelines*. Currently this document focuses on larger sites.**

Response: The Department's *NYS Standards and Specifications for Erosion and Sediment Control* (an update to the *NY Urban Erosion and Sediment Control Guidelines*), includes a wide range of practices that may be applied to small sites. The new release will contain a chapter that highlights some examples of these applications for small sites.

#### Consistency of Technical Standards versus Permit Requirements

**Comment: The information provided in the guidance manuals (Bluebook, NYS Stormwater Management Design Manual) does not always agree with the permit. These documents should be updated.**

Response: It is not clear from the comment as to what specifically does not agree. The *Design Manual* and the general permit were developed at the same time, and both reflect the current thinking. Chapter 3 of the *Design Manual* needs updating to reflect the latest changes of the construction permit, once it is issued. Blue Book contains a few chapters that reflect the permit, GP-93-06, but is being updated and will be released at approximately the same time as the Construction Permit, GP-02-01. The Department will review the final documents and revise them to establish consistent language between the permit and the standards.

#### Stream Channel Protection

**Comment: The reference/exemption (stream channel protection volume requirements) for fourth order streams in the *NYS Stormwater Management Design Manual* is incorrect and should be removed.**

Response: The references for identification of fourth order streams will be enhanced in the new release of the *Design Manual*. The condition in the sizing criteria that allows for a waiver of overbank flood and extreme event controls has raised flooding concerns as opposed to water quality or channel protection. Generally applying these water quantity controls is unnecessary for the larger stream. It must be noted that the State of New York is among the few states in the nation with the most stringent requirements for water quantity control. Changing the waiver from fourth order to fifth order stream may be presented through the process of the *Design Manual* update and will be accepted if such argument is supported by scientific studies.

### 60 Day Review Period

**Comment: Will the full sixty-day review period be automatic for all SWPPPs with variances (deviations from State's recommended technical standards), or will shorter periods be possible in some instances?**

Response: Any project that varies from the Department's technical standards will not obtain permit coverage until at least sixty (60) business days after the Department's receipt of a completed NOI.

**Comment: The sixty-day requirement for review of SWPPPs containing variances from the Department's standards appears open ended. Does the clock continue to run while the applicant is seeking to provide the Department with additional information (which may have to be supplied)?**

Response: No. If the Department requests additional information during the 60 day time frame, the review period is suspended until the applicant provides the information requested. Therefore, the wait period may be longer than 60 days.

### Timing of Obtaining Permit Coverage

**Comment: One class of activities has not been addressed. Those activities disturbing less than five acres of earth and commencing between December 9, 2002 and March 2003 would not be required to have a Stormwater Management Permit until March 2003. What would an operator do to be in compliance with regard to such a project when March 2003 arrives?**

Response: Phase II construction projects do not need permit authorization until March 10, 2003. However, a NOI must be received either 5 or 60 days (depending on conditions A, B and C of the permit) in advance of the March 10<sup>th</sup> date.

### Public Availability of Documents

**Comment: The permittee's SWPPP and weekly self-inspection reports should be available to the public upon request. This will facilitate citizen involvement and enforcement.**

Response: The Department agrees that the SWPPP and inspection reports should be made available to the public. The availability requirement has been clarified in Part V, Section F of the final permit, "The SWPPP and inspection reports required by this general permit are public documents that the operator must make available for inspection, review and copying by any person within five (5) business days of the operator receiving a written request by any such person to review the SWPPP and/or the inspection reports. Copying of documents will be done at the requester's expense."

State Environmental Quality Review Act (SEQRA)

**Comment: There were several comments regarding Part I.D.7 of the permit and its related footnote (number 11). The intent of this condition is to ensure that the procedural requirements of the State Environmental Quality Review Act (SEQRA) are met when permits other than the construction Stormwater SPDES are required from the Department.**

Response: The Department made the following minor wording changes to I.D.7 which should clarify the issues raised:

*7. New stormwater discharges from construction activities which require any other Uniform Procedures Act Permit (Environmental Conservation Law, 6 NYCRR Part 621) cannot be covered under this General Permit until the other required permits are obtained. Upon satisfaction of the State Environmental Quality Review Act (“SEQRA”) for the proposed action and issuance of necessary permits, the applicant may submit an NOI to obtain coverage under this general permit<sup>11</sup>.*

What this condition says is, that when a project requires permits in addition to coverage by the Stormwater Construction SPDES, then the negative declaration prepared for the Stormwater Construction SPDES is not satisfactory and SEQRA must be satisfied for the entire proposed action. The Department believes that footnote 11 simply explains the purpose of the condition and should remain as originally worded.

**Comment: Part I.D.7 of the permit would place potential permittees in a “dead end” where they could not proceed.**

Response: All this condition does is to ensure that review of the project is not unlawfully segmented. In normal circumstances, all applications for a project are reviewed simultaneously.

**Comment: Each project receiving coverage under the construction permit should be fully reviewed pursuant to SEQRA.**

Response: A negative determination under SEQRA has been made for all activities covered by the General Permit for construction. This is because the Department found that projects that are solely permitted under this General Permit and that comply with the terms of this permit will have no adverse impact to the environment. If additional permits are needed from the Department, a separate SEQRA determination for the project must be made.

## **Specific Conditions and Activities**

### **Protection of buffers and other resources**

**Comment: There should be provisions in the permit to direct construction activity away from wetlands, lakes, streams and their associated buffer zones.**

Response: The Department has addressed this in its *Design Manual* and *Instruction Manual for Submitting Construction Notices of Intent*. Under the basics of developing a SWPPP it is stated: "The first step in developing a SWPPP is to characterize and evaluate the site. This involves collection of specific data related to the site. An evaluation will only be complete with consideration of limitations and advantages of each individual site. This process will enable the selection, sizing and siting of practices to address the unique circumstances of a site." Two principal considerations listed in this section are: protection of waterbodies, wetlands, wildlife & natural resources; and avoidance of disturbing sensitive areas and valuable resources (vegetative, water, wetlands).

In addition to these provisions, the ECL may require additional permits for discharges to some of these areas. Coverage under the General Permit does not relieve the obligation to obtain any other applicable permits.

### **Placement of Practices and Protection of Resources**

**Comment: There are no provisions in the new permit to protect natural resources. The permit should clearly state that erosion and sediment control practices should not be allowed in stream channels, wetlands or in adjacent buffer areas. In addition, the Department must prohibit construction activities on streambanks.**

Response: This concern is also addressed in two other documents: the Department's *Design Manual* and *Instruction Manual for Submitting Construction Notices of Intent*. Under the basics of developing a SWPPP, the protection of natural resources is identified in the first step of the "Pre-Construction Actions:" The manual instructs: "*Evaluate, mark and protect important trees and associated rooting zones, wetlands, and on-site septic systems absorption fields.*"

In addition to these provisions, the ECL may require additional permits for discharges that affect natural resources. Coverage under the General Permit does not relieve the obligation to obtain any other applicable permits. For example, Article 15 of the ECL requires stream disturbance permits for all activities in or near streams classified as C (T) or higher.

### **Steep Slopes**

**Comment: Construction on steep slopes must be limited. The Department should limit construction on steep slopes and prohibit construction on slopes greater than 20% (a similar comment recommended 15%).**

Response: Grading policies are normally set by the local government and the review of proposed grading plans are done by the municipalities. The focus of the construction permit is to control stormwater runoff so it does not impact water quality, rather than restrict construction. However, the Department's *Instruction Manual for Submitting Construction Notices of Intent* recognizes the line between steep slopes and the need for more careful attention, as it prompts the applicant to "Avoid disturbing steep slopes." Practices can be utilized which will minimize adverse impacts from runoff from "steep" slopes while taking into account other relevant factors. In addition, ECL §17-0501 prohibits any actions that violated a water quality standard. Therefore, if any activity is conducted on steep slopes that leads to a water quality standard violation, the Department can seek injunctive relief and monetary penalties of \$25,000/day to address the violations.

### Clay Soils

**Comment: The Department must prohibit construction activities on clay soils.**

Response: The construction permit regulates stormwater runoff, not development. However, if stormwater runoff occurs over a soil with very low permeability, additional measures will have to be undertaken to protect water quality. In such circumstances, infiltration practices are not recommended. The Department's technical standards contain specific information on the applicability and appropriateness of practices based on soil type. The principles of SWPPP planning as discussed in the Department's *Instruction Manual for Submitting Construction Notices of Intent* require avoidance of infiltration practices on soils with a low infiltration rate, and avoidance of unnecessary compaction.

### Site Stabilization

**Comment: The 14 day site stabilization time frame for construction activities that have temporarily or permanently ceased is too long. A 7 day time frame is recommended, even where activity will be resumed within 21 days.**

Response: The 14-day site stabilization time frame is the same that is in the existing permit for Construction GP-93-06. The Department has found this time frame satisfactory.

### Construction Phasing

**Comment: The Department should maintain construction phasing and reinstate the 5 acre construction phasing requirement of GP-93-06.**

Response: The final permit has been changed to re-instate the five acre requirements for phasing that applies to sites greater than five acres. In addition, the Department encourages permittees to apply the principle of phasing at sites smaller than five acres.

## Activities Within A TMDL Watershed

**Comment: How are applicants (especially small municipalities and residential contractors) to know if the discharge from the site is covered by a TMDL?**

Response: Interested parties can contact the Department's Division of Water for help. In addition, maps and documentation will be provided in the *Instruction Manual for Submitting Construction Notices of Intent* and also on the Department's stormwater web page at [www.dec.state.ny.us](http://www.dec.state.ny.us).

## Removal of Outfalls

**Comment: Frequently in roadway construction and rehabilitation projects, there are existing stormwater outfalls discharging to surface waters. Does the following language in Part II of the permit, "Termination of Coverage," suggest that these outfalls shall be removed during the course of construction?**

**"Where a site has been finally stabilized and all stormwater discharges from construction activities that are authorized by this permit are eliminated, ..."**

Response: It is not the Department's intention to have existing outfalls removed. The final permit language has been revised to clarify this issue.

## Agricultural Waiver

**Comment: The Department should provide a waiver for agricultural operations that are implementing water quality improvement projects and are in compliance with the SPDES GP-99-01 permit for concentrated animal feeding operations.**

Response: Because stormwater discharges associated with the construction of livestock feeding facilities are different both in content and nature from stormwater discharges associated with the operation of such facilities, the former are not "agricultural operations" and are not entitled to the exclusion for agricultural stormwater discharges. Also, the applicability of the NPDES program to the post-construction, operational phase of these facilities must be determined according to the Federal Clean Water Act regulations for animal feeding operations, concentrated animal feeding operations, and feedlots.

At this time, the Department's General Permit for Concentrated Animal Feeding Operations (CAFOs), SPDES GP-99-01, does not provide coverage for discharges of stormwater runoff from construction activities that occur at these sites. Therefore, an operator engaging in construction activity, subject to the Phase II regulations, must also acquire coverage under the Department's SPDES General Permit for Stormwater Discharges from Construction Activity, GP-02-01.

## **Definitions**

### **Terminology**

**Comment: Existing paved areas should not be used in “disturbance calculations” to see if a project meets the disturbance threshold.**

Response: The Department agrees that only disturbances that result in soil exposure should be factored in this calculation. Land disturbance refers to the exposure of soil resulting from activities such as clearing, grading and excavating.

**Comment: The differences in an Erosion and Sediment Control plan and a Stormwater Pollution Prevention Plan (SWPPP) are not clearly defined in the permit.**

Response: The Department agrees and has revised the final permit to better define the differences between an E&SC plan and a SWPPP.

### **“Larger Common Plan of Development or Sale”**

**Comment: The Department should define “larger common plan” as used in “construction activity that is part of a larger common plan of development.”**

Response: A “larger common plan of development or sale” describes a situation in which multiple construction activities are occurring, or will occur, on a contiguous area. In other words, permit coverage is needed if disturbance of one or more acres is occurring or is anticipated to occur in conjunction with the initial disturbance.

### **Definition of Construction Activity**

**Comment: The Department should provide a definition of *construction activity* and a clear statement of the circumstances under which a permit is required. Are the following activities included in the definition of “construction activities,” or included in the “total amount of disturbed area:” maintenance of roadside drainage ditches, enlargement of drainage ditches, resurfacing of roadways, detention ponds, pipelines, land clearing for lawns, timber harvesting, agricultural buildings, wetland creation, and stream restoration.**

Response: The federal NPDES Phase II regulations require that all stormwater discharges from a construction activity that results in a land disturbance of equal to or greater than 1 acre obtain permit authorization. In addition, sites disturbing less than 1 acre must also obtain coverage if they are part of a larger common plan of development or sale with a planned, combined disturbance of equal to or greater than 1 acre.

Construction activities can include road building, construction of residential houses, office buildings, industrial sites, commercial sites or demolition. Construction activities may also include clearing, grading and excavating that results in land disturbance. However, construction activity does not include resurfacing of roadways nor the routine maintenance that is performed to maintain the original line and grade, hydraulic capacity,

or original purpose of the facility.

### Retrofit Projects

**Comment: The permit does not specifically define what a retrofit project is . Clarification is needed to differentiate between what a retrofit is versus a new project:**

Response: A retrofit project is one where improvements (i.e. repairs and/or modifications) are made to existing infrastructure at a developed site, typically to correct a design that is inadequate or malfunctioning, or otherwise in need of improvement.

### Narrative Water Quality Standards

**Comment: Section I.A.1. of the construction permit states “There shall be no increase in turbidity that will cause a substantial visible contrast to natural conditions.” How is “substantial visible contrast” defined? Is this subjective? How is “ best usage” defined?**

Response: The term, “substantial visible contrast”, is subjective and is not currently defined in Part 703 New York State’s Water Quality Regulations. The term, “best usage”, is defined in Part 700.1 and means “those uses as determined by the Commissioner in accordance with the considerations prescribed by the Environmental Conservation Law”.

**Comment: Part III.C.2 of the permit should include a requirement for amendment whenever the SWPPP fails to result in achieving the goals (turbidity, flow levels, etc.).**

Response: The Department agrees. Part III.C.2. of the permit states that the SWPPP will be amended if it proves to be ineffective in eliminating or significantly minimizing pollutants and does not achieve the general objectives of controlling pollutants in the stormwater discharges.

### Future Permit(s) for Stormwater

**Comment: Referring to Section III.A.5.c. of the permit, can you provide an example of what the Department means by “... under GP-93-06 may not be allowed subsequent to the expiration of this general permit, GP-02-01...”.**

Response: The terms, conditions, requirements, etc. that will be included in the permit that will be prepared in five years hence after GP-02-01 expires are not known at this time. Therefore, there are no such examples that can be provided at this time.

## **Suggestions Made**

### **Two-tiered Permitting**

**Comment: The Department should provide a two-tiered system of permits, one permit for disturbances between one and five acres and another for those disturbances over five acres.**

Response: The Department believes that it can implement the program more effectively with just one permit that can be applied to any size construction project. The size of the land disturbance is a distinction found in the regulations when, in fact, size may not be the overriding factor in terms of defining the environmental protection that is needed. Furthermore, application of a two-tiered permitting system statewide could be confusing to the regulated community.

### **Regulatory Fees**

**Comment: The \$50 regulatory fee for general stormwater SPDES permits should be raised and the increased revenues should go directly towards implementation and oversight of the SWMPs.**

Response: Regulatory fees are set by the Legislature in statute and disbursement of funds are set in the State budget.

### **East of Hudson (Croton Watershed) Permit**

**Comment: The Department should create a specific Phase II stormwater permit for the East of Hudson watershed.**

Response: The Department has committed significant efforts towards that end and will continue to do so. The Department has already begun a stakeholder involvement process to define the needs and best approach for addressing the special concerns in the East of Hudson watershed. Although GP-02-01 is primarily aimed, **at this time**, at implementing the federal Phase II regulations within the prescribed timetable, the Department is committed to working with stakeholders to develop watershed-specific construction and MS4 general permits to continue efforts that focus on the needs of the East of Hudson watershed.

**Comment: Within the East of Hudson Watershed (EOH), a basic set of erosion controls should be developed for use at construction disturbances between 0.2 and 1 acre in size.**

Response: The Department will address this issue in the most appropriate fashion once the statewide permits are finalized and issued. This suggestion will be discussed when considering the watershed-specific permits for East of Hudson.

**Comment: The Department should implement the “TMDL” phosphorus budgets and state anti-degradation policy in the EOH watershed.**

Response: The State's anti-degradation policy applies to all waters of the State, including EOH. Insofar as the TMDL is concerned, applicants are required under the terms of the general permit to factor into their SWPPPs whatever an applicable TMDL identifies as being appropriate controls for the pollutant which the TMDL identifies. Such an approach will enable an immediate implementation of TMDLs as they are developed, without the need to necessarily pursue changes to the general permit during its term. And, as mentioned earlier, activities whose runoff will be discharging a pollutant of concern within a TMDL watershed is subject to a sixty (60) day review period before gaining coverage under the general permit. During that time, the Department may request a copy of any SWPPPs for review.

### **Re-issued GP-93-06 Responsiveness Summary**

Comments to DEC's proposed re-issuance of GP-93-06 until August 1, 2003:

**Comment: One topic commented on relates to the requirements contained in GP-93-06 and cites them for the purposes of comparing them with the requirements in the new permit, GP-02-01. For example, some commenters cited the buffer reference and the weekly inspection requirements contained in the appendices to GP-93-06.**

Response: With regard to the reference to buffer areas and weekly inspection requirements, the latter has been revised in the new general permit. In other words, the proposed minimum 14-day inspection interval has been changed to 7 days (See responsiveness summary for GP-02-01). As far as buffer areas, maximum slopes and similar technical issues are concerned, the Department agrees that permittees must consider these factors, and a variety of others, when exposing soil to stormwater runoff. The Department has developed an instructional component of the NOI which will present applicants with instructions on how to best deal with these matters and the various other circumstances. The Department is also working on publishing further guidance on matters such as low-impact development and non-structural practices for reducing the impacts of stormwater runoff. More discussion is contained in the responsiveness for the new construction general permit, GP-02-01.

**Comment: A commenter also made reference to GP-93-06 and the fact that coverage could be obtained under it in two (2) days for Phase I construction activities involving five or more acres of disturbance. Yet, the commenter cited the new permit, GP-02-01, which will apply to both Phase I construction activities and to smaller ones under Phase II, as requiring either five (5) or sixty (60) days, thus constituting a longer "wait" period. The commenter questioned the rationale behind imposing a longer period of time for smaller, and generally less problematic situations.**

Response: The reasons for the Department establishing a longer "wait" for permit coverage are basically twofold. First, two days is often not enough time to assure that

Notices of Intent (NOI) arrive at the Department to enable even a cursory examination of an applicant's NOI. In fact, experience has shown that, since GP-93-06 was issued in 1993, NOIs were frequently received beyond the 48 hour coverage time specified in the general permit. Second, the Department is implementing measures in the new general permit which provide the Department with an better opportunity to further examine priority situations where water quality is either potentially threatened or actually impaired. The new, longer time frames for permit coverage under the new general permit reflects an approach which will afford the Department with more time during which to conduct further examination of higher priority construction activities. Simply stated, those activities which will be subject to the 60 day pathway for gaining permit coverage under GP-92-01 are those which deserve greater attention.

Further discussion can be found in the responsiveness summary for the new general permit for construction activities, GP-02-01.

**Comment: Another commenter asked if the date was the only change made to the original GP-93-06.**

Response: The simple answer is no, the date isn't the only change, but the other changes are relatively minor and reflect the overall purpose of the short-term reassurance. Once the new general permit for construction activity is issued, the Department will no longer accept Notices of Intent for new construction activities submitted for NPDES authorization under GP-93-06. The only activities that will be covered under the re-issued GP-93-06 will be those that were covered previously under GP-93-06 at the time when the new general permit, GP-02-01, is issued. These construction activities will be allowed to continue coverage under the re-issued GP-93-06 until its expiration, August 1, 2003 at which time these construction activity runoff will need to gain permit coverage under the new general permit, GP-02-01. If these activities still need permit coverage after August 1, 2003.

It is envisioned that many activities which were covered under GP-93-06 at the time when the new general permit, GP-02-01, is issued will terminate their permit coverage by submitting a NOT sometime between the time that the new general permit, GP-02-01, is issued and the time that GP-93-06 expires. In other words, these activities would reach the point at which the project no longer needs a NPDES permit in order to comply with the CWA (see Part VI of GP-93-06).

It should also be noted that former GP-93-06 permittees which need to get permit coverage beyond August 1, 2003 under GP-02-01 will be allowed to operate under the provisions of their SWPPP which they developed in accordance with the expired general permit. That is provided, however, that they continue to adhere to the requirements of the expired permit. Under the terms of the new general permit (GP-02-01), a permittee which previously had permit coverage under the expired permit (GP-93-06) when the new general permit was issued, will be allowed to continue to implement their SWPPP which was developed in accordance with the expired general permit, GP-93-06. Essentially, GP-02-01 stipulates that the requirements of their "old" permit become part of their new SWPPP either by reference or by actual incorporation of a copy of the

permit. Alternatively, the permittee could decide to incorporate the requirements of GP-02-01 into the project in question.

These provisions are intended to allow activities to “finish out” their coverage under GP-93-06 and not be confronted with a potential re-design because of the requirements of the new construction general permit. However, they may consider the new requirements and amend their SWPPPs wherever possible, but the likelihood of being able to do so will vary from project to project and is not a requirement of the new general permit, GP-02-01. If such changes are suitable for a particular project, the Department strongly encourages activities to update their plans wherever it will result in greater protection of receiving waters.

Note: There have been no significant changes made to the Department’s proposal to re-issue GP-93-06 except for minor language changes made for clarifying purposes.