



April 3, 2017

James Murphy, Chief, Bureau of Nonpoint Pollution Control  
Division of Water Quality  
New Jersey Department of Environmental Protection  
401 East State Street, P.O. Box 420  
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*Submitted via email to [stormwatermanager@dep.nj.gov](mailto:stormwatermanager@dep.nj.gov)*

**Re: Draft Renewal of Master General Permits No. NJ0141852 for Tier A  
Municipal Separate Storm Sewer Systems & No. NJ0141861 for Tier B  
Municipal Separate Storm Sewer Systems**

Dear Mr. Murphy,

The American Littoral Society, Association of New Jersey Environmental Commissions, Clean Ocean Action, Delaware Riverkeeper Network, Hackensack Riverkeeper, Natural Resources Defense Council, New Jersey Environmental Lobby, NY/NJ Baykeeper, Pinelands Preservation Alliance, and Stony Brook-Millstone Watershed Association appreciate this opportunity to comment on the draft renewal of the Tier A and Tier B municipal separate storm sewer system (MS4) permits. We recognize the efforts of the Department of Environmental Protection (DEP) to improve upon certain components of the 2009 permits, including their overall specificity and clarity. However, we believe that both permits must be significantly strengthened in order to address the ongoing harms of stormwater runoff on New Jersey's waterways.

In summary, we ask DEP to make the following improvements to the permits:

- "Clear, specific, measurable" terms in all permit requirements;

- More meaningful water quality-based requirements, such as an obligation to develop a TMDL implementation plan and to implement some portion of that plan during the permit term;
- Requirements to monitor discharges and/or receiving waters to verify compliance with TMDLs and other water quality-based effluent limitations;
- Updates to the stormwater regulations for development to include a post-construction retention standard;
- More effective stormwater facility maintenance requirements, including regular inspections and an inventory/map of existing facilities;
- Stronger sample ordinances, and clearer direction about how those sample ordinances are to be used; and
- Enhancements to the new engineer and municipal employee training requirements.

Our detailed recommendations follow below. We have also provided example permit conditions from other states' small MS4 general permits to illustrate how many of our recommendations have already been practicably implemented in other jurisdictions. We hope that these examples will be helpful to DEP when revising and strengthening the draft permits.

#### I. Stronger Permits Are Needed to Protect New Jersey's Waters From the Harmful Effects of Polluted Runoff.

Municipal stormwater has been regulated in New Jersey ever since DEP issued its first-generation MS4 permits in 2004, over a decade ago. When the U.S. Environmental Protection Agency (EPA) instituted the small MS4 permitting program, it explained that the purpose of such permits was to “significantly reduce pollutants in urban storm water” and to “protect water quality.”<sup>1</sup> The Agency determined that small MS4s in particular needed to be regulated by permit because these “storm water sources, when unregulated, tend to cause significant adverse water quality impacts.”<sup>2</sup> Yet despite twelve years of MS4 permitting in New Jersey, the harmful effects of runoff on water quality continue to grow. DEP assistant commissioner for Water Resource Management, Dan Kennedy, stated recently, “Today, stormwater pollution remains our biggest water-quality challenge.”<sup>3</sup> Indeed, DEP's own water quality data and reporting prove that the state's MS4 permits have proven insufficient to protect local waterways.

DEP most recently assessed state water quality in its Draft 2014 Integrated Water Quality Assessment Report.<sup>4</sup> The report demonstrates serious water quality impairments in New Jersey,

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<sup>1</sup> National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999).

<sup>2</sup> *Id.* at 68,734.

<sup>3</sup> NorthJersey.com, “Water Quality a Mixed Bag for New Jersey, Report Says,” Feb. 27, 2017, <http://www.northjersey.com/story/news/environment/2017/02/27/water-quality-mixed-bag-north-jersey-report-says/98478514/>.

<sup>4</sup> New Jersey Dep't of Env'tl. Protection, *2014 New Jersey Integrated Water Quality Assessment Report (Draft)* (Dec. 2015), available at

as over 98% of the waters in the state fail to fully meet water quality standards.<sup>5</sup> The report highlights analysis showing increasing concentrations of certain pollutants and a statewide negative trend toward impaired conditions. In particular, analysis contained in the report “shows median concentrations of [total dissolved solids], chlorides, dissolved nitrate plus nitrite and total nitrogen increased statewide during the assessment period.”<sup>6</sup> Likewise, statewide sampling showed “a slight negative trend toward impaired conditions,” with one of the strongest trends being “the decline of non-impaired (‘Excellent’ and ‘Good’) sites.”<sup>7</sup> In short, the Integrated Report demonstrates a concerning trend toward degradation of non-impaired waters.

A significant contributor to the degradation of New Jersey’s waters is stormwater runoff. Sublists 4 and 5 of New Jersey’s Draft 2014 Integrated List of Waters identify the sources of New Jersey’s water quality impairments.<sup>8</sup> Of particular concern, “Urban Runoff/Storm Sewers” is listed as a source of impairment for 942 of the total 2,560 assessment unit/pollutant combinations identified on that list.<sup>9</sup> (117 of these assessment unit/pollutant combinations were added to the list *after* the 2009 MS4 permits were issued.<sup>10</sup>) Thus, urban runoff and stormwater pollution are contributing sources to over one-third of New Jersey’s impairments. However, only 1,895 of the 2,560 assessment unit/pollutant combinations on the list have *any* source identified at all, meaning that approximately one-half (942 out of 1,895) of *attributed* impairments are caused by stormwater.<sup>11</sup>

EPA’s summary of New Jersey’s water quality assessment confirms the negative impact of urban runoff on the state’s waterways, listing it as a source of impairment for more New Jersey waters than any other source.<sup>12</sup> According to that assessment, urban stormwater is causing impairments in 13,093.9 miles of rivers (over sixty-eight percent of river miles), 26,865.9 acres of lakes, reservoirs, and ponds, 193.7 square miles of bays and estuaries, and 371.9 square miles of ocean and near coastal waters.<sup>13</sup>

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[http://www.state.nj.us/dep/wms/bears/docs/2014\\_draft\\_integrated\\_report\\_with\\_appendices.pdf](http://www.state.nj.us/dep/wms/bears/docs/2014_draft_integrated_report_with_appendices.pdf) (hereinafter “Draft 2014 IR”).

<sup>5</sup> “Statewide, 205 miles of rivers and streams, and 2,197 acres of lakes located within 14 of New Jersey’s 958 subwatersheds fully support all designated uses (except for fish consumption).” In other words, 1.5% of subwatersheds (14 out of 958) are meeting most water quality standards, and zero subwatersheds are meeting standards for fish consumption. NJDEP, “New Jersey 2014 Integrated Water Quality Assessment Report,” [http://www.state.nj.us/dep/wms/bears/2014\\_integrated\\_report.htm](http://www.state.nj.us/dep/wms/bears/2014_integrated_report.htm).

<sup>6</sup> Draft 2014 IR at 52.

<sup>7</sup> *Id.*

<sup>8</sup> NJDEP, 2014 New Jersey Integrated Report, Appendix B: Sources of Parameters Causing Use Impairment (Sublists 4 and 5), [http://www.state.nj.us/dep/wms/bears/docs/2014\\_draft\\_sources\\_and\\_causes\\_of\\_impairment-sublists\\_4\\_and\\_5.pdf](http://www.state.nj.us/dep/wms/bears/docs/2014_draft_sources_and_causes_of_impairment-sublists_4_and_5.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (tally of entries attributed to urban runoff/storm sewers that were added to the list in 2010, 2012, and 2014).

<sup>11</sup> *Id.*

<sup>12</sup> U.S. EPA, “New Jersey Water Quality Assessment Report” (2012), [https://ofmpub.epa.gov/waters10/attains\\_state.control?p\\_state=NJ](https://ofmpub.epa.gov/waters10/attains_state.control?p_state=NJ).

<sup>13</sup> *Id.*

In 2011, the Barnegat Bay Partnership released a report documenting the eutrophic conditions in the Bay.<sup>14</sup> This report found that eutrophication – an increase in the rate of supply of organic matter (nutrients) into an ecosystem, leading to low oxygen levels – is “one of the leading issues facing Barnegat Bay today.”<sup>15</sup> The Partnership’s report also found that eutrophication is “overwhelmingly” driven by increases in nitrogen from runoff pollution generated by development in the watershed.<sup>16</sup> The Partnership also found that stormwater is contributing pathogens to the Bay that impair recreational uses like swimming.<sup>17</sup> After performing an original analysis of recent beach water monitoring, the report concluded, “Non-point source pollution delivered via stormwater is the primary source of contamination at [Bay] beaches.”<sup>18</sup>

The worsening condition of the Navesink River provides another example of stormwater runoff’s continuing impact on New Jersey’s waterways. The Navesink has one of the highest water quality designations in the state (SE1 – Saline Estuarine waters with a Category 1 designation for outstanding recreation and shellfish resources) and harbors one of the last remaining direct shellfish harvesting areas in the region. However, water quality is deteriorating in the Navesink River; its waters do not consistently meet fecal coliform standards, especially during and immediately after rain events, clearly tying this bacterial impairment to stormwater pollution.<sup>19</sup> Most recently, in 2016, DEP downgraded 565.5 acres of the river to “prohibited” for shellfish harvesting.<sup>20</sup> Other recreational and “direct contact” activities such as swimming and paddling are also “unsafe” after a rain event.<sup>21</sup>

This information, together with the state’s own impairment data, proves that New Jersey’s current (2009) MS4 permits are not strong enough to prevent stormwater from degrading water quality throughout the state, much less improve conditions in waterways that are already impaired. The insufficiency of these permits led our organizations to submit a petition,

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<sup>14</sup> Barnegat Bay Partnership, *State of the Bay Report 2011* (2011), available at <http://bbp.ocean.edu/PDFFiles/BarnegatBay/State%20of%20the%20Bay%202011/BBP%202011%20State%20Of%20The%20Bay%20Report.pdf>.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 32.

<sup>18</sup> *Id.* at 33.

<sup>19</sup> Clean Ocean Action, *Pathogen Pollution in the Navesink River: Addressing Fecal Contamination in the Navesink River Watershed* (June 2016), available at [https://www.cleanoceanaction.org/fileadmin/editor\\_group2/Beach\\_Sweeps/COA\\_Navesink\\_Report\\_FINAL\\_\\_1\\_.pdf](https://www.cleanoceanaction.org/fileadmin/editor_group2/Beach_Sweeps/COA_Navesink_Report_FINAL__1_.pdf); NJDEP, *Coastal Nonpoint Source Pollution Monitoring Program, Upper Navesink River Stormwater Study: Microbial Source Tracking* (Feb. 2008), available at <http://www.nj.gov/dep/bmw/Reports/RevisedNavesinkStormFeb.pdf>; see also Monmouth County Board of Health, *Stormwater Runoff Advisory*, <http://co.monmouth.nj.us/documents/118%5CmchdStormwaterRunoffAdvisory.pdf>.

<sup>20</sup> NJDEP, *Shellfish Classification Rule Proposal*, at 18, <http://www.nj.gov/dep/rules/proposals/20151116a.pdf>.

<sup>21</sup> See Clean Ocean Action, *Pathogen Pollution in the Navesink River: Addressing Fecal Contamination in the Navesink River Watershed*, *supra*.

over three years ago, asking DEP to strengthen those permits' requirements.<sup>22</sup> That petition detailed the legal shortcomings in the permits that undercut their efficacy as clean water regulatory tools. In addition, it documented many instances of the permits' requirements not even being routinely enforced.

In the three years since we filed that petition, DEP never officially responded to it, either to grant or to deny it.<sup>23</sup> During that time, the Department has abdicated its responsibility to implement robust and legally sound water pollution controls in other contexts as well. It enacted revisions to the state's Flood Hazard Area Control Rules that significantly undercut protections for riparian zones and high quality waters. In response to considerable public outcry<sup>24</sup> and the New Jersey Legislature's institution of an override, pursuant to the New Jersey Constitution,<sup>25</sup> DEP proposed additional changes to the Flood Hazard Rules on June 20, 2016.<sup>26</sup> Those changes, while an improvement, are not sufficient to address the water quality impacts the 2015 rules allow. Further, the 2016 proposal has not been adopted as of the date of these comments. In November 2016, DEP also adopted new Water Quality Management Planning regulations that are damaging to water quality protection because they allow for increased development and associated water quality impacts from sewers, wastewater treatment plans, and runoff in coastal areas and areas where wastewater capacity is undeveloped or already "built out."<sup>27</sup> And though the Department announced in 2014 that it would update and modernize its stormwater control standards for development sites,<sup>28</sup> that process has stalled, without any regulatory revisions actually proposed. Altogether, this lack of movement on clean water protections has directly and indirectly resulted in the continued impairment of New Jersey's rivers, streams, lakes, and bays.

Now that DEP is finally renewing the expired 2009 MS4 permits, it must take advantage of this critical opportunity to protect and restore New Jersey waters by incorporating stronger requirements that hold municipalities accountable for reducing their discharges of pollution. While the draft permits released for comment do include certain provisions that improve upon

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<sup>22</sup> American Littoral Society, Clean Ocean Action, Delaware Riverkeeper Network, Hackensack Riverkeeper, Natural Resources Defense Council, New Jersey Environmental Lobby, NY/NJ Baykeeper, Pinelands Preservation Alliance & Stony Brook-Millstone Watershed Association, Petition Requesting the Modification (or Revocation and Reissuance) of New Jersey Pollutant Discharge Elimination System Permit Numbers NJ0141852, NJ0141861, NJ0141887, and NJ0141879 (Tier A Municipalities, Tier B Municipalities, Highway Agency, and Public Complex General Stormwater Permits) (Feb. 4, 2014), *available at* <http://switchboard.nrdc.org/blogs/llevine/NJ%20MS4%20Permit%20Petition%202-4-14%20%28with%20exhibits%29.pdf>.

<sup>23</sup> DEP sent us a letter on February 18, 2014, confirming receipt of the petition, but in that letter, DEP neither approved nor denied the petition.

<sup>24</sup> See Politico New Jersey, "Environmentalists Stage Walkout of DEP Flood Rules Hearing" (Mar. 15, 2016), <http://www.capitalnewyork.com/article/new-jersey/2016/03/8593944/environmentalists-stage-walkout-dep-flood-rules-hearing>.

<sup>25</sup> Law 360, "NJ Sens. Vote To Overturn Proposed Flood Zone Rules" (Oct. 22, 2015), <https://www.law360.com/newjersey/articles/717844/nj-sens-vote-to-overturn-proposed-flood-zone-rules>.

<sup>26</sup> 48 N.J. Reg. 1067(a) (June 20, 2016).

<sup>27</sup> 48 N.J. Reg. 2244(a) (Nov. 7, 2016).

<sup>28</sup> Email from Adriana Caldarelli, NJDEP Division of Water Quality, to stakeholders (Aug. 21, 2014).

the requirements of the 2009 permits, they do not go far enough to curb the polluted runoff that continues to degrade New Jersey's natural resources.

## II. We Support Certain New Requirements and Conditions in the Draft Tier A Permit.

We recognize that DEP has revised certain provisions in the draft Tier A permit in order to improve permittee understanding and implementation. We agree that many of these revisions represent significant improvements over the terms of the previous (2009) permit. In particular, we support the reorganization and clarification of the permit's structure; the enhanced public education and outreach requirements; and the focus on municipal enforcement of the post-construction development regulations. We also offer, below, suggestions for further improving some of these new provisions.

### A. Permit Reorganization and Clarification

We support DEP's efforts to help municipalities better understand their obligations by reorganizing and streamlining key permit requirements. In the past, permit noncompliance has resulted from permittees' failure to understand exactly what was required of them.<sup>29</sup> The revisions DEP has proposed to the permit's organization and wording will help to avoid this problem, specifically:

- Throughout, permit language has been simplified, and each requirement is broken out into its own sub-paragraph, significantly improving the readability of the permit's terms.
- The new summary in the section labeled "Permit Overview" consolidates the permit's major requirements into one overarching list. This will help to ensure that obligations are not inadvertently forgotten or skipped over.
- The Statewide Basic Requirements (SBRs) have been reordered to track the order in which they appear in EPA's National Pollutant Discharge Elimination System (NPDES) regulations, which should help to improve understanding of the relationship between federal rules and the permit's requirements.
- The Public Participation SBR now specifies the state public participation laws that apply to MS4s. This should improve compliance compared to the 2009 permit, which did not list any applicable laws or regulations.
- SBR requirements that overlap or otherwise relate to one another have been helpfully consolidated. For example, all requirements that apply to municipal operations (including waste disposal ordinances, street sweeping, storm drain retrofitting, employee training, and maintenance yard operations) have all been consolidated into the Good Housekeeping SBR. Likewise, actions that relate to illicit discharge detection and elimination (IDDE), such as outfall pipe mapping and stream scouring remediation, have been moved into the IDDE SBR section. This consolidation of related permit

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<sup>29</sup> See the audit reports for Hopewell and Tom's River, cited *infra*, for examples.

requirements could help permittees better structure their programs and carry out their duties more efficiently.

Altogether, we support these modifications to the permit because we believe they will improve permittee understanding and increase rates of compliance.

#### B. Enhanced Public Education and Outreach Requirements

We support DEP's decision to increase the minimum number of public outreach activities that permittees must carry out each year, raising the annual "points" target from 10 to 12. MS4 permit requirements should evolve and become more robust with each successive permit cycle in order to drive continual improvements in water quality. Under the "maximum extent practicable" (MEP) standard that applies to MS4 permits,<sup>30</sup> the maximum effort that was practicable in 2009 is not necessarily the maximum that is practicable in 2016, as our understanding of stormwater and the available techniques for addressing runoff have both improved over the last decade of municipal MS4 program implementation. The MEP standard is not a static requirement, but anticipates and in fact requires improved controls to be included with each successive permit. As EPA explained when it established its MS4 permitting regulations, stormwater permits will "evolve and mature over time."<sup>31</sup> EPA "envisions application of the MEP standard as an iterative process" through which permit requirements "continually adapt to current conditions and BMP effectiveness."<sup>32</sup> In other words, successive iterations of permits for a given jurisdiction will necessarily evolve and contain new and more stringent requirements over time, such as the requirement to achieve 12 education and outreach "points" instead of 10.

#### C. Municipal Enforcement of Post-Construction Standards

We support the Department's inclusion of new proposed permit conditions that clarify municipalities' obligation to conduct stormwater reviews and require enhanced training for design engineers and municipal officials. At the same time, however, these improvements in the permit must be coupled with vigorous state enforcement to ensure compliance with the post construction standards.

In our 2014 petition, we documented numerous instances of MS4s failing to enforce the state's post-construction standards for new development and redevelopment (in N.J.A.C. 7:8 et seq.). Specifically, we cited the Delaware Riverkeeper Network's Hamilton Township Case Study, which found widespread and almost uniform "non-compliance with the nonstructural stormwater management strategies, a central tenet of the [stormwater] rules," as well as multiple failures to enforce other requirements such as groundwater recharge and runoff quality and

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<sup>30</sup> 33 U.S.C. § 1342(p)(3)(B)(iii) (mandating that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable").

<sup>31</sup> 55 Fed. Reg. 47,990, 48,052 (Nov. 16, 1990).

<sup>32</sup> 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999).

quantity standards.<sup>33</sup> These instances of noncompliance were attributed to likely “[m]isinterpretation of the [stormwater] rules, incorrect usage of data and apparent carelessness.”<sup>34</sup> As discussed in our petition, these issues were not confined to Hamilton Township; investigations have also found inadequate review of development stormwater plans in municipalities across the state. Indeed, DEP’s recent audit of Hopewell Township’s MS4 program found that it, too, had not been conducting local stormwater reviews because its officials were “uncertain whether major development plans must be reviewed locally for stormwater management compliance if those same plans were also being reviewed by the Department.”<sup>35</sup>

In many cases, municipalities have believed that they did not need to review development applications for stormwater compliance in cases where the developer also requires a DEP permit. Even when municipal staff do review development applications, they often fail to enforce all the requirements of state stormwater regulations due to misinterpretation of the rules or inadvertent oversights. Thus, in order to ensure compliance with the post-construction standards, we called for two additions to the permit: (1) an explicit mandate to conduct stormwater reviews for all residential and commercial development applications, even if a permit is required by DEP for the same activity, and (2) a requirement for municipal engineers and municipal officials to receive adequate training regarding how to apply the performance standards.

We appreciate and strongly support DEP’s decision to include these two new requirements in the draft permit. These requirements will help reinforce a municipality’s obligations under the permit and improve the level of knowledge by staff and board members in applying those requirements. Permit condition IV. B.4.d., which clarifies that municipal officials must review and analyze development applications for compliance with the stormwater rules (N.J.A.C. § 7:8) even if the Department is performing or has performed its own review of the project for a separate state permit, will help eliminate confusion as the municipality’s role in reviewing stormwater plans is clearly articulated. As outlined in our petition, we expect that such explicit confirmation of the municipality’s role as an independent stormwater reviewer will help improve municipal compliance with the stormwater rules.

We agree with DEP that the addition of Attachment D (Major Development Stormwater Management Summary) provides DEP with a tool to assess whether the municipality is complying with the stormwater rules, and that Attachment D provides a concise overview of important criteria to assist municipalities in ensuring compliance with design and performance standards for stormwater management measures in major development. However, we believe

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<sup>33</sup> Delaware Riverkeeper Network, *New Jersey Stormwater Management Implementation: A Case Study of Hamilton Township, Mercer County* at 14 (May 2010), available at [http://www.delawariverkeeper.org/resources/Reports/Hamilton\\_Twp\\_NJ\\_SWM\\_Implementation\\_Report.pdf](http://www.delawariverkeeper.org/resources/Reports/Hamilton_Twp_NJ_SWM_Implementation_Report.pdf) (hereinafter “DRN Hamilton Case Study”).

<sup>34</sup> *Id.*

<sup>35</sup> NJDEP, Preliminary Stormwater Audit of Hopewell Township, Mercer County, NJPDES Permit Number NJG0150622, PI Number 202083 (Mar. 4, 2016).

important information has been omitted from this form that would help further municipal compliance and DEP enforcement efforts. Please see the review by Princeton Hydro, attached to these comments as Exhibit A, which details our recommendations for the inclusion of additional information within Attachment D. (This review refers to an earlier preliminary draft of the MS4 permit, but the recommendations are still applicable as no changes have been made to Attachment D.)

We also generally support the Department's addition of permit conditions IV.B.5.e. and f., which require increased training for design, municipal, and other review engineers, as well as municipal board and council member training on the stormwater management rules. However, because the two day NJDEP Employee Led Stormwater Management Rules & BMP Manual Course is only offered annually, some design engineers, municipal engineers, and other individuals that review the stormwater management design for development and redevelopment projects on behalf of the municipality may go without training for nearly an entire year if they have recently missed the previous class. As such, draft permit condition IV.B.5.e. should be amended to include the additional requirement that untrained individuals who will not be attending the two day course within 3 months of the EDPA must also watch the five videos in the Stormwater Management Rule Video Series available at [www.njstormwater.org/training.htm](http://www.njstormwater.org/training.htm). The five videos have a running time of only approximately 43 minutes, which is a minor time commitment for these review engineers or affected individuals that are likely actively reviewing projects for stormwater compliance and would otherwise go without this training for a significant period of time. The annual certification process should also be amended to require that the Stormwater Coordinator ensures compliance with this additional training requirement. We also recommend that DEP require individuals watching the online videos to take a test or quiz afterward to ensure that they actually watched the video.

With regard to draft permit condition IV.B.5.f., the type of training that municipal board and council members must undertake, after they have performed their initial training, must be more specific. As the language now stands, after the initial training municipal board and council members receive, successive training is required once per term of service thereafter from "at least of one of the tools offered under Post-Construction Stormwater Management found at the website above." This provides too much discretion to municipal board and council members to select their own training. As written, this training requirement could be satisfied by watching only the shortest video in the Stormwater Management Rule Video Series. Instead, IV.B.5.f. should be amended to provide greater specificity on the successive training that municipal board and council members must undertake. For example, the language could be amended to require that a member's successive training can be satisfied by either watching the entire "NJPDDES Municipal Stormwater Regulation Program Employee Training Videos" or the entire "Stormwater Management Rule Video Series (2015)."

Finally, while we agree that the Department will improve municipal compliance with the post-construction stormwater standards through the clarification of municipalities' duty to

conduct stormwater review in permit condition IV.B.4.d. and enhanced training requirements in permit conditions IV.B.5.e. and f., nonetheless we believe that those permit conditions must be accompanied by active and consistent enforcement efforts by the Department in order to achieve an adequate level of compliance with the post-construction stormwater requirements. Active and consistent Department enforcement is necessary because there a number of incentive structures within municipal land use planning and zoning that incentivize developers' and municipalities' noncompliance.

Specifically, local governments rely heavily on property taxes as their primary source of revenue to fund local services, and in their pursuit to maximize local revenue, municipal board and city council members sometimes become more focused on the tax revenue a given project can generate rather than stormwater compliance for that property. Additionally, municipal officials sometimes view new regulatory or permitting obligations as burdensome and intentionally choose noncompliance in lieu of compliance, as they view noncompliance as the least expensive path forward. This is evidenced by the following statement by an engineer that consults for municipalities, who has chosen to remain anonymous:

Here is the major problem that I am facing as a municipal consultant for quite a number of towns. I have to somehow sell compliance to the elected officials who are faced with unrealistic constraints on their budget process brought on by legislative “caps,” mandatory pension and labor contract payments, crumbling infrastructure and decreased state aid. The response I generally get from bringing new regulations to the elected officials is not, “Okay, let us know how much this will cost and we will work it in the budget.” It is usually, “Okay, we simply cannot do this. What will happen if we completely ignore the requirements and how long will it take them to catch us?”

Municipal review engineers face their own pressure to enable noncompliance with the post-construction stormwater standards. One of the recommendations identified in the Delaware Riverkeeper Network's Hamilton Township Case Study, which evaluated twelve development projects for compliance with the applicable N.J.A.C. § 7:8 standards, was to “[e]stablish a system to eliminate pressure on township review engineers to approve non-compliant stormwater systems . . . [because] [c]urrently, the pressure of maintaining an engineer's future ‘employability’ by the development community appears to influence review results.”<sup>36</sup> Consistent state enforcement efforts will help alleviate the pressure facing many municipal engineers.

### III. DEP Still Needs to Significantly Improve the Draft Tier A Permit to Comply with Legal Requirements and Protect Water Quality.

While the changes described above are positive steps in the right direction, other components of the Tier A permit fall short of what is needed to meet Clean Water Act standards

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<sup>36</sup> DRN Hamilton Case Study at 20.

and even to prevent stormwater from worsening the state's water quality even further. In 2014, EPA Region 2 reviewed the current (2009) permit, highlighted various legal deficiencies, and required modifications to the permit in order to bring it into compliance with federal regulations.<sup>37</sup> (Many of the deficiencies that EPA identified were the same ones described in our 2014 petition requesting revisions to the permit.) In this draft, DEP has declined to implement many of EPA's requirements, disregarding the instructions of the federal agency responsible for oversight of the state's permitting program.

Specifically, DEP must adopt a permitting process that complies with the Ninth Circuit's remand of the Phase II permitting regulations; include meaningful water quality-based effluent limitations for discharges into waterways with and without total maximum daily loads (TMDLs); and include monitoring requirements adequate to track compliance with water quality-based effluent limits. In addition, we urge DEP to improve certain additional elements of the permit, beyond those that EPA specifically singled out in its review: the permit's requirements for post-construction controls, stormwater facility maintenance, employee training, sample ordinances, and other miscellaneous provisions.

#### A. Permitting Process

Despite improvements in the clarity and specificity of the permit's terms as compared to the current (2009) version, the draft permit does not fully satisfy requirements for DEP to ensure that all permittees reduce their discharges of pollution to the maximum extent practicable ("the MEP standard"). As EPA noted in its 2014 review of New Jersey's MS4 permits, DEP is required to address the partial remand by the U.S. Court of Appeals for the Ninth Circuit of the "Phase II" federal stormwater rules.<sup>38</sup> The Ninth Circuit ruled that it is the responsibility of the permitting authority to determine whether each municipality seeking coverage under an MS4 permit is meeting the MEP standard.<sup>39</sup> It is not enough for a permit to direct a permittee to make a plan, on its own without regulatory and public oversight, to reduce discharges to the MEP; the permitting authority must verify that the MS4s' plans actually meet the MEP standard. According to the court, "[S]torm water management programs that are designed by regulated parties must, in every instance, but subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable."<sup>40</sup>

EPA has enacted revisions to the Phase II stormwater regulations to implement this ruling, which have been in effect since January 9, 2017 and apply to this permit renewal.<sup>41</sup> In

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<sup>37</sup> U.S. EPA, *New Jersey Department of Environmental Protection MS4 General Stormwater Permit Review* (2014) (hereinafter "EPA Permit Review") (attached as Exhibit B).

<sup>38</sup> *Id.* at 2, 4.

<sup>39</sup> *Environmental Defense Center v. EPA*, 344 F.3d 832, 855-56 (9th Cir. 2003) (hereinafter "EDC").

<sup>40</sup> *Id.* at 856.

<sup>41</sup> National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed. Reg. 89,320 (Dec. 9, 2016).

those revisions, the agency describes the underlying requirement that its revised regulations must meet, according to the Ninth Circuit:

“To address the remand, the regulations must ensure that permitting authorities determine what permit requirements are needed to reduce pollutants from each permitted small MS4 ‘to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act’ (referred to hereinafter as the ‘MS4 permit standard’). The rule must also require NPDES permitting authorities to provide the public with the opportunity to review, submit comments, and request a public hearing on these permit requirements.”<sup>42</sup>

Following from this principle, the agency has established two options for permitting approaches that a regulatory authority can use to issue NPDES general permits for small MS4s and meet the requirements of the court remand. The first option (the “Comprehensive General Permit” approach) is to establish all necessary permit terms and conditions to require the MS4 operator to reduce the discharge of pollutants from its MS4 to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act (“MS4 permit standard”) upfront in one comprehensive permit. The second option (the “Two-Step General Permit approach”) allows the permitting authority to establish the necessary permit terms and conditions in two steps: a first step to issue a base general permit that contains terms and conditions applicable to all small MS4s covered by the permit and a second step to establish necessary permit terms and conditions for individual MS4s that are not in the base general permit.<sup>43</sup>

DEP must follow one of these options when it renews the Tier A permit. DEP apparently does not intend to select the Two-Step General Permit approach, as it does not require existing permittees to submit any information at all, not even a Request for Authorization (RFA) form; for new permittees the RFA form provides only what EPA called, in its 2014 permit review, “the most basic contact information for the permittee.”<sup>44</sup> As a result, no permittees are required to submit any substantive information about their proposed pollution control programs for DEP to evaluate.

Consequently, we infer that DEP has selected the Comprehensive General Permit approach. (Indeed, DEP supported this option in its comments on EPA’s proposed rulemaking.<sup>45</sup>) The Department has succeeded in including many “clear, specific, and measurable” provisions in the permit, such as the public outreach “point system,” minimum frequencies for outfall pipe inspections, and generally more direct and enforceable language

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<sup>42</sup> *Id.* at 89,323.

<sup>43</sup> *Id.* at 89,320.

<sup>44</sup> EPA Permit Review at 2.

<sup>45</sup> NJDEP, *Comments on USEPA Proposed Municipal Separate Storm Sewer System General Permit Remand Rule* at 2-3 (Mar. 21, 2016), available at <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2015-0671-0050>.

throughout the permit. However, some provisions in the permit do not meet the “clear, specific, and measurable” standard that EPA articulated in its proposal – the standard that is necessary to ensure that each permittee *in fact* reduces its discharge of pollution to the maximum extent practicable. As a general matter, the permit should not direct MS4s to “develop” certain programs (as a permit cannot delegate responsibility to a permittee to develop its own pollution control requirements), but rather should direct MS4s to “implement” and/or “enforce” the program elements already required by the permit. This terminology should be changed in sections IV.B.4.g, IV.B.5.a.v, IV.B.5.b, IV.B.5.d, IV.B.6.b, IV.B.6.c, and IV.C.1.a-b. In addition, the following permit terms fall short of the “clear, specific, measurable” standard in other ways:

- On pages 11-12, the permit does not provide specific direction about how DEP’s sample ordinances are to be used by the MS4 in satisfying the permit’s requirements to adopt various types of community ordinances. Nor does it provide clear information about how DEP will use these sample ordinances to assess the sufficiency of the ordinances that an MS4 has adopted. The permit simply states that the MS4 shall “adopt and enforce the following community wide ordinances to address improper disposal of waste,” lists the types of ordinances that are required, and then directs the MS4 to “[s]ee the Tier A Municipal Guidance document . . . for a sample ordinance.” Are the elements of the sample ordinances mandatory, or merely suggestions? The permit must be more clear on this point; as written, it does not obviously apply any specific or measurable standard to the sufficiency of an MS4’s ordinances. (Our comments on the substantive content of DEP’s sample ordinances is discussed separately, below.)
- On page 12, the permit states that under the MS4’s yard waste ordinance, “The frequency of yard waste pickups shall be determined at the discretion of the Tier A Municipality.” EPA’s recent MS4 rule revisions specifically state that such provisions do not meet the “clear, specific, measurable” standard. In the preamble to the rule, the agency discusses permit requirements to take an action “at a frequency determined by the permittee” and concludes: “This type of provision includes no minimum frequency that can be used to measure adequacy and, therefore, would not constitute a measurable requirement for the purposes of the rule.”<sup>46</sup> DEP should establish a minimum frequency for permittees to incorporate into their yard waste ordinances.
- The stormwater facility maintenance requirements on page 17-18 contain no measurable requirements. They state only that the permittee “shall ensure that stormwater facility maintenance is performed pursuant to any maintenance plans, or more frequently as needed.” In order to meet the “clear, specific, measurable” standard, the permit would need to require a measurable component, such as a minimum frequency of maintenance inspections and/or operations. As written, permittees could implement this requirement

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<sup>46</sup> 81 Fed. Reg. at 89,335.

with maintenance protocols of widely varying effectiveness; thus, it fails to ensure that permittees are in fact meeting the MEP standard.

- Other than the requirement to post certain documents online, the public involvement and participation section of the permit contains no specific tasks for the MS4 to complete or measurable, objective performance standards for involving the public. The permit should incorporate a measurable component, such as a requirement to provide a certain number of public engagement activities or public input opportunities each year, or over the permit term. The permit could further provide a list of suggested opportunities for public involvement (like public hearings, volunteer monitoring or clean-up activities, stormwater management panels that include citizen representatives, and the like). We particularly urge DEP to require that permittees provide an annual opportunity for the public to engage in review or implementation of the MS4's SPPP and/or MSWMP.

The common element among these provisions is the fact that they would allow permittees to comply using a range of implementation measures, many of which may not represent the *maximum* effort that is practicable. As a result, they do not ensure, on the face of the permit, that MS4s will meet the MEP standard. The summary of “measurable goals” that DEP has included in Attachments A and A-1 to the draft permit does not cure this defect, as those goals are not actually measurable in many cases. For example, the “measurable goal” for the various community ordinances is described simply as certification in the annual report that such an ordinance has been adopted and is being enforced; but as discussed above, the permit establishes no specific or measurable standards for the contents of those ordinances, nor does it set a deadline for MS4s to adopt such ordinances if they have not already done so. Permittees should be required to enact ordinances within six months of the effective dates of the permit. Along the same lines, the “measurable goal” for stormwater facilities maintenance is to certify that facilities are functioning and maintain a log sufficient to demonstrate compliance; but as discussed above, no measurable performance standards apply to this requirement. Essentially, the “measurable goals” in Attachments A and A-1 simply reiterate the requirements contained within the body of the permit itself and do not add a measurable component to requirements where the permit does not already include one.

We support the use of EPA's Comprehensive General Permit approach for the Statewide Basic Requirements, and we recognize DEP's good faith efforts to comply with that option. In order to implement these intentions in the language of the permit, we urge DEP to strengthen the SBR requirements so that each one of them satisfies the “clear, specific, measurable” standard articulated by EPA. If it does not do so, then the Two-Step General Permit approach will be necessary, meaning that DEP will need to solicit information from permittees about their proposed actions and determine, prior to granting authorization to discharge, whether those proposals would meet the MEP standard.

At the same time, we believe that the Two-Step General Permit approach is appropriate for water quality-based effluent limitations. The water quality-based requirements that DEP has

included in the draft permit, in addition to being substantively deficient (as discussed in the next section), are also self-regulatory in violation of the principles underlying the Ninth Circuit’s ruling and revised EPA rule. This is because the TMDL provisions in Part IV.C.2.a direct permittees to “identify and develop strategies” to address impairment-causing pollutants, without any associated measurable standards, or a requirement for DEP review and approval. As a result, the TMDL requirements in the draft permit do not meet the standard for “clear, specific, measurable” permit conditions articulated in the Comprehensive General Permit approach, nor do they provide for permitting agency oversight as described in the Two-Step General Permit approach.

DEP should remedy this problem by applying the Two-Step General Permit approach to this particular section of the permit. This approach is the best choice where the needs of a particular water body require additional water quality-based effluent limitations tailored to particular MS4 dischargers, as in the case of TMDL-based requirements. The two-step approach, unlike the more comprehensive approach, facilitates the development of such tailored requirements. However, strict procedural safeguards must be established to ensure that the permit does not create a self-regulatory scheme like that of the draft permit at issue here. In addition to the substantive changes to the permit’s water quality-based requirements that we advocate below, DEP should also incorporate procedural safeguards such as the requirement for MS4-developed plans (and their identified “strategies”) to be subject to public comment, an opportunity for a public hearing, and a full review and approval by DEP, with modifications to proposed plans as needed.

## B. Water Quality-Based Effluent Limitations

The proposed permit does not include water quality-based effluent limitations as required by federal and state law. The Clean Water Act and implementing regulations require that all NPDES permits must include conditions adequate to “ensure compliance” with applicable water quality standards.<sup>47</sup> The EPA’s Environmental Appeals Board has held that this requirement applies equally to MS4 permits.<sup>48</sup> In accordance with this federal requirement, New Jersey regulations confirm that NJPDES MS4 permits “shall require at a minimum that the permittee develop, implement, and enforce a stormwater program designed to...satisfy the appropriate water quality requirements of the Federal Act and the State Act.”<sup>49</sup> State regulations also provide that *all* permits regulating discharges into surface water – including Tier B MS4 permits – “shall include ... [w]ater quality based limitations ... when the Department has determined that the discharge causes, has the reasonable potential to cause, or contributes to an excursion above the SWQS [water quality standards].”<sup>50</sup> New Jersey’s Surface Water Quality Standards

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<sup>47</sup> 40 C.F.R. § 122.4(d); *see also* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a).

<sup>48</sup> *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 329, 335-43 (EAB 2002).

<sup>49</sup> N.J.A.C. 7:14A-25.6(a).

<sup>50</sup> N.J.A.C. 7:14A-13.2(a)(2).

regulations, in turn, provide: “Existing uses shall be maintained and protected. Designated uses shall, as soon as technically and economically feasible, be attained wherever these uses are not precluded by natural conditions.”<sup>51</sup> Further, the regulations provide that “[w]ater quality characteristics that are generally worse than the water quality criteria shall be improved to meet the water quality criteria.”<sup>52</sup>

In addition, all NPDES permits must contain requirements “consistent with the assumptions and requirements of any available wasteload allocation.”<sup>53</sup> Wasteload allocations (WLAs) represent the maximum amount of pollutant that a source – such as an MS4 – can discharge into a water body each day and still attain water quality standards, in accordance with that water body’s total maximum daily load (TMDL).<sup>54</sup> Once a point source such as an MS4 is assigned a WLA, that WLA must be implemented through a NPDES permit.<sup>55</sup> The EPA’s MS4 Permit Improvement Guide confirms, “If there are waste load allocations (WLAs) applicable to the permittee, these should be addressed in the permit.”<sup>56</sup> A 2014 EPA policy memorandum addresses this obligation directly:

“[W]here a State or EPA has established a TMDL, NPDES permits must contain effluent limits and conditions consistent with the assumptions and requirements of the WLAs in the TMDL. ... Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective. This could take the form of a numeric limit, or of a measurable, objective BMP-based limit that is projected to achieve the WLA. For MS4 discharges, CWA section 402(p)(3)(B)(iii) provides flexibility for NPDES authorities to set appropriate deadlines for meeting WQBELs consistent with the requirements for compliance schedules in NPDES permits set forth in 40 CFR § 122.47. The permitting authority’s decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information. As discussed in the 2002 memorandum, the permit’s administrative record needs to provide an adequate demonstration that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit will be sufficient to implement applicable WLAs.”<sup>57</sup>

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<sup>51</sup> N.J.A.C. 7:9B-1.5(a)(6).

<sup>52</sup> N.J.A.C. 7:9B-1.5(d)(2)(iv).

<sup>53</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B).

<sup>54</sup> 33 U.S.C. § 1313; 40 C.F.R. § 130.2(h).

<sup>55</sup> See *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 143 (D.C. Cir. 2006) (“Once approved by EPA, TMDLs must be incorporated into permits.”).

<sup>56</sup> U.S. EPA, *MS4 Permit Improvement Guide* at 5.

<sup>57</sup> Memorandum from Andrew D. Sawyers, Director, Office of Wastewater Management, U.S. EPA, and Benita Best-Wong, Director, Office of Wetlands, Oceans and Watersheds, U.S. EPA, to Water Division Directors, EPA

EPA re-stated these obligations directly to DEP in its 2014 memo reviewing the current (2009) permit. In that memo, EPA explicitly stated that DEP “must include water-quality based effluent limits in the MS4 general permits for MS4s with approved WLAs,” including Additional Measures identified in TMDLs.<sup>58</sup> EPA further stated that DEP “must assess [the] adequacy of existing BMPs to achieve the stormwater WLAs,” and that “[i]f the assessment of BMPs indicates that the BMPs used to fulfill the SBRs are not sufficient to achieve the stormwater WLA, NJDEP will either have to prescribe additional BMPs or require the MS4 to identify additional BMPs to achieve further pollutant reductions.”<sup>59</sup> Finally, EPA concluded that DEP “is required to consider requirements for MS4s with stormwater discharges to impaired waterbodies prior to TMDL approval.”<sup>60</sup>

Contrary to EPA’s instructions, DEP has not included any Additional Measures from TMDLs in the permit, nor any other BMPs designed to achieve wasteload allocations. Nor has it provided any analysis indicating that the requirements of the permit are adequate to achieve wasteload allocations. All the draft permit requires of permittees (on page 18) is to “identify stormwater related pollutants” listed in applicable TMDLs; “annually review” applicable TMDLs; use TMDL information to prioritize stormwater facility maintenance; and “identify and develop strategies to address specific sources of stormwater related pollutants contributing to discharges authorized under the Tier A MS4 NJPDES Permit.” Any “strategies” that a permittee identifies is to be incorporated into its Stormwater Pollution Prevention Plan (SPPP) as an “Optional Measure.”

The requirements to “identify” and “review” TMDLs are not requirements to implement any sort of practices or undertake actions that could reduce pollution. The requirement to use TMDLs to prioritize maintenance simply directs permittees to consider an additional source of information when implementing a pre-existing permit requirement. And the mandate to “identify and develop strategies” that are integrated into stormwater plans as *optional* measures does not require MS4s to *implement* the opportunities they have identified. As the Fact Sheet accompanying the draft permit makes clear, any actions following from this “identification of strategies” are purely voluntary: “Optional Measures are required to be identified in the SPPP but failure to implement an Optional Measure identified in the SPPP shall not be considered a violation of this NJPDES permit.”<sup>61</sup>

These provisions satisfy neither EPA’s requirements nor the underlying legal obligations with which the agency has directed DEP to comply. It cannot possibly be “consistent with the assumptions and requirements of any available wasteload allocation”<sup>62</sup> to include no mandatory

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Regions 1-10, at 6 (Nov. 2014), *available at* [https://www.epa.gov/sites/production/files/2015-10/documents/epa\\_sw\\_tmdl\\_memo.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/epa_sw_tmdl_memo.pdf) (hereinafter “Sawyers Memorandum”).

<sup>58</sup> EPA Permit Review at 6.

<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Id.* at 7-8.

<sup>61</sup> NJDEP, Fact Sheet for NJPDES Permit No. NJ0141852, at 59 (Feb. 15, 2017).

<sup>62</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B).

requirements whatsoever for reducing the discharge of pollutants that have been assigned wasteload allocations, when the central premise of a WLA is that pollution reductions are necessary in order to meet water quality standards.

Numerous TMDLs have been developed for New Jersey water bodies that assign wasteload allocations to urban stormwater, as evidenced by the results produced by DEP's new online "TMDL Look-Up Tool."<sup>63</sup> Yet none of these wasteload allocations have been implemented through enforceable permit requirements to date, nor would they be implemented during the next permit term under the proposed provisions. These TMDLs have been developed to restore water bodies with documented impairments caused at least in part by stormwater. DEP's proposal not to include any mandatory permit requirements to implement those TMDLs would relegate those waters to at least another five years of continued degradation. This result is contrary to federal and state law, as well as EPA guidance.

As for impaired waters that lack TMDLs, the draft permit includes no proposed provisions addressing those impairments – neither a prohibition on discharges that cause or contribute to violations of water quality standards, nor effluent limitations demonstrated to be sufficient to ensure compliance with such standards.

DEP cannot argue that meaningful water quality-based effluent limitations are not needed (either for TMDL or non-TMDL waters) on the grounds that additional actions beyond the Statewide Basic Requirements are not needed to meet water quality standards in New Jersey. This is demonstrably false. Water quality continues to deteriorate through the state, and stormwater is a known cause of many impairments, as demonstrated by nearly every document in the permit's administrative record. As discussed above, stormwater is the known cause of at least one-third of the state's impairments (942 out of 2,560 total assessment unit/pollutant combinations), and the number of stormwater-impaired waterways added to the list has grown by over 100 since the previous round of MS4s permits was issued. As a specific example of the permit's failure to stem ongoing degradation, the Navesink River's water quality has continued to deteriorate despite the fact that the river's 2006 bacteria TMDL specifically called on MS4 permit requirements to achieve pollution reductions.<sup>64</sup>

As we stated in our 2014 petition, in order to bring the permit into compliance with the Clean Water Act, DEP must include a prohibition on the discharge of pollutants in amounts that cause or contribute to violations of water quality standards, along with any pollution control measures necessary to meet water quality standards and applicable wasteload allocations – whether they take the form of AMs or other *enforceable* (not optional) requirements. Many other states around the country include such provisions in their small MS4 general permits, and

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<sup>63</sup> DEP, "TMDL Look-Up Tool," <http://www.nj.gov/dep/dwq/msrp-tmdl-rh.htm>.

<sup>64</sup> Five Total Maximum Daily Loads for Total Coliform to Address Shellfish-Impaired Waters in Watershed Management Area 12, Atlantic Coastal Water Region (2006), *available at* [http://www.nj.gov/dep/wms/bear/coastal\\_pathogen\\_tmdls\\_wma12%20for%20adoption.pdf](http://www.nj.gov/dep/wms/bear/coastal_pathogen_tmdls_wma12%20for%20adoption.pdf).

there is no reason why New Jersey cannot follow their lead. Other states' permits also show the feasibility of including meaningful TMDL requirements even when TMDLs do not provide individualized wasteload allocations for specific MS4s. See the Appendix for specific examples.

Any of the approaches illustrated by other states' permits would be viable in New Jersey and would represent a significant improvement over the extremely weak water quality-based requirements DEP has included in the draft permit. DEP could alternatively select a different approach; but ultimately it must incorporate pollution control measures demonstrated to ensure compliance with wasteload allocations and water quality standards.

### C. Monitoring

The draft Tier A permit falls short of federal regulations and EPA requirements because it fails to include any monitoring obligations.

In connection with the water quality-based effluent limitations that must be integrated into the permit, DEP must also incorporate monitoring requirements to ensure compliance with those limits. Under the Clean Water Act, all NPDES permits are required to contain monitoring provisions sufficient to assure compliance with permit conditions, "including conditions on data and information collection, reporting, and such other requirements as [the permitting authority] deems appropriate."<sup>65</sup> Specifically, the Act states:

Whenever required to carry out the objective of this chapter, including but not limited to... (2) determining whether any person is in violation of any ... effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance... (A) the Administrator shall require the owner or operator of any point source to... (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods)... as he may reasonably require.<sup>66</sup>

Accordingly, federal regulations require all NPDES permits to contain monitoring requirements "to assure compliance with permit limitations."<sup>67</sup> Stated differently, these monitoring requirements must be of the "type, intervals, and frequency sufficient to yield data which are representative of the monitored activity."<sup>68</sup>

In line with these federal requirements, New Jersey regulations state, "For small [MS4s], the permittee shall comply with the requirements for evaluation, recordkeeping, and reporting in N.J.A.C. 7:14A-25.6(j) or 25.8(i)..."<sup>69</sup> The requirements in N.J.A.C. 7:14A-11.2(a)(2), in turn, are: "to assure compliance with permit limitations, a permittee shall be required to monitor: i.

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<sup>65</sup> 33 U.S.C. § 1342(a)(2).

<sup>66</sup> 33 U.S.C. § 1318(a).

<sup>67</sup> 40 C.F.R. § 122.44(i); *see also* Sawyers Memorandum at 7.

<sup>68</sup> 40 C.F.R. § 122.48(b).

<sup>69</sup> N.J.A.C. 7:14A-24.9(a).

The mass, or other measurement specified in the permit, for each pollutant limited in the permit;  
ii. The volume of effluent discharged from each outfall; iii. Other measurements as appropriate...”<sup>70</sup>

Accordingly, when EPA Region 2 reviewed the current (2009) permit, it directed DEP to incorporate monitoring requirements:

NJDEP is required to include monitoring requirements for stormwater WLA implementation. . . . NJDEP should include monitoring requirements to assess WLA implementation progress. Monitoring could include BMP effectiveness monitoring, outfall monitoring, or receiving water monitoring or NJDEP could require that MS4s demonstrate compliance with effluent limit BMPs through tracking of BMP implementation and modeling studies. The monitoring conducted should demonstrate the MS4’s compliance in meeting the WLA.<sup>71</sup>

Yet the draft permit contains no monitoring requirements at all, of any of the types that EPA had indicated would be acceptable. The draft permit’s only reference to monitoring is a cross-reference to N.J.A.C. 7:14A-6.5 (with no explanation or associated text), a regulation which only specifies procedures and methods when monitoring is actually required by a permit.

Monitoring of end-of-pipe discharges and/or receiving waters is the only way to know whether permittees’ stormwater management programs are working. Courts have recognized that self-monitoring by permittees is essential to effective enforcement of the Clean Water Act and achievement of the law’s environmental protection objectives.<sup>72</sup> “The effectiveness of the permitting process is heavily dependent on permit holder compliance with the CWA’s monitoring and reporting requirements.”<sup>73</sup> “Clearly, unless there is some method for measuring compliance, there is no way to ensure compliance.”<sup>74</sup>

As a result, when DEP incorporates water quality-based effluent limitations into the permit, it must also require that permittees conduct representative monitoring of receiving waters sufficient to determine the status of compliance with such limits, including TMDL WLAs. Other states around the country include monitoring requirements in their small MS4 general permits, which would be feasible for DEP to include in New Jersey as well. See the Appendix for specific examples. Any of these approaches would be viable in New Jersey, or DEP could select an alternative approach as long as it is sufficient to determine compliance with water quality-based effluent limitations such as progress toward achieving TMDL WLAs.

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<sup>70</sup> N.J.A.C. 7:14A-11.2(a)(2).

<sup>71</sup> EPA Permit Review at 7.

<sup>72</sup> See, e.g., *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491-91 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988) (discussing the statutory structure, federal regulations, and legislative history).

<sup>73</sup> *Piney Run Pres. Ass’n v. County Comm’rs*, 268 F.3d 255, 266 (4th Cir. 2001).

<sup>74</sup> *Champion Int’l Corp. v. North Carolina*, 648 F.Supp. 1390, 1395 (W.D.N.C. 1986), *vacated on other grounds*, 850 F.2d 182 (4th Cir. 1988).

#### D. Post-Construction Standards

As we described in our 2014 petition, the post-construction stormwater management standards in the current (2009) Tier A permit fail to meet the MEP standard, and those standards remain unchanged in the draft permit. The permit continues to cross-reference standards established in state regulations: “The post construction stormwater management program established by the Tier A Municipality shall require compliance with the applicable design, performance and maintenance standards established under N.J.A.C. 7:8 et seq. for major development” (page 9). The draft permit does improve on the 2009 permit by expanding the types of sites to which the standards must apply. While the 2009 permit required MS4s to apply the standards to “non-residential development and redevelopment projects” only, with residential projects that are not preempted by the Residential Site Improvement Standards (RSIS) included only “where necessary to implement the municipal stormwater management plan,” the draft permit now specifies that residential projects not preempted by the RSIS must *always* be included as a minimum element of municipal post-construction ordinances. The size threshold for sites subject to the standard remains the same (1 acre).

The state regulations for municipal stormwater ordinances, cross-referenced by the permit, incorporate design standards for erosion control, groundwater recharge, stormwater runoff quantity, and stormwater runoff quality.<sup>75</sup> Under these standards, development projects must achieve groundwater recharge equivalent to average annual pre-construction groundwater recharge for the site, must meet sediment removal requirements, and must not cause any increase in peak runoff rates from pre-construction conditions.<sup>76</sup> In the case of redevelopment projects where considerable impervious surface coverage already existed, this standard requires no reduction in the quantity of runoff from the redeveloped site. The regulations allow municipalities to grant exemptions and waivers from the standards<sup>77</sup> (although the draft permit does place conditions on their ability to do this, such as having an approved mitigation plan), and waive the groundwater recharge standard entirely for sites located within the “urban redevelopment area.”<sup>78</sup>

These requirements fall short of the pollution reduction that is currently practicable using today’s technologies. Many jurisdictions around the country have demonstrated the feasibility of implementing requirements for the on-site retention of stormwater beyond the “pre-construction” recharge volume. The National Research Council (NRC) has recommended that stormwater management efforts focus on maintaining at least the *pre-development* hydrology of a site – the natural conditions that existed prior to any development occurring there – as opposed to the

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<sup>75</sup> N.J.A.C. 7:8-1.2, 7:8-5.

<sup>76</sup> N.J.A.C. 7:8-5.4.

<sup>77</sup> N.J.A.C. 7:8-4.6.

<sup>78</sup> N.J.A.C. 7:8-5.4(a)(2)(iii).

conditions that existed prior to the specific construction project at issue.<sup>79</sup> Pre-construction conditions may not be sufficient to prevent water quality degradation – and are, by definition, never sufficient to restore water quality in a watershed that is already impaired by stormwater. In many cases, replicating pre-development hydrology may not even be sufficient to protect water quality, because even if the post-development runoff volume is the same, it will carry more pollutants than the same amount of runoff from undeveloped land in a natural state. The NRC emphasizes this focus on reducing runoff volumes due to the “water degradation resulting from the increased volume as well as increased pollutant loadings in stormwater runoff.”<sup>80</sup> Because greater runoff volumes lead to more pollution, reducing stormwater runoff by retaining it on-site can dramatically reduce the pollutant loads from development.<sup>81</sup> In fact, the NRC recommends that stormwater flow be used as a regulatory proxy for the loading of pollutants.<sup>82</sup>

Further, the NRC advocates the use of controls that restore or maintain pre-development hydrology rather than those that simply avoid increases in peak runoff rates, as required by New Jersey regulations. As the NRC has stated, “effective hydrologic mitigation for urban development cannot just aim to reduce post-development peak flows to predevelopment peak flows.”<sup>83</sup> This is because reducing peak discharge leaves the underlying increase in runoff volumes untouched, which “partly explains why evaluation of downstream conditions commonly document little improvement resulting from traditional flow-mitigation measures.”<sup>84</sup>

Additionally, controlling volume has been shown to be more effective than relying on runoff quality standards like those in DEP’s regulations. This is because “the constituents remaining even in ‘treated’ stormwater represent a substantial, but largely unappreciated, impact to downstream watercourses,”<sup>85</sup> and because “flow is itself responsible for additional erosion and sedimentation that adversely impacts surface water quality.”<sup>86</sup> Not only are runoff quality standards inadequately protective of water quality generally, DEP’s specific runoff quality standards are deficient because the quality standards contain narrative standards for nutrients – rather than the “measurable” and “quantifiable” standards that EPA has stated should be included in MS4 permits<sup>87</sup> – and no standards at all for other urban stormwater pollutants that harm water quality, such as lead, copper, zinc, sediment, chemical oxygen demand, and biological oxygen demand.<sup>88</sup>

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<sup>79</sup> See, e.g., National Research Council, *Urban Stormwater Management in the United States* at 119 (2009), available at [http://www.nap.edu/catalog.php?record\\_id=12465](http://www.nap.edu/catalog.php?record_id=12465).

<sup>80</sup> *Id.* at 4.

<sup>81</sup> See *id.* at 9.

<sup>82</sup> See *id.* at 50-51.

<sup>83</sup> *Id.* at 6.

<sup>84</sup> *Id.* at 33.

<sup>85</sup> *Id.* at 25.

<sup>86</sup> *Id.* at 99.

<sup>87</sup> EPA, MS4 Permit Improvement Guide at 5-6.

<sup>88</sup> See Robert Pitt, *The National Stormwater Quality Database, Version 3.1* (2011), available at [http://rpitt.eng.ua.edu/Publications/4\\_Stormwater\\_Characteristics\\_Pollutant\\_Sources\\_and\\_Land\\_Development\\_Cha](http://rpitt.eng.ua.edu/Publications/4_Stormwater_Characteristics_Pollutant_Sources_and_Land_Development_Cha)

Recognizing that additional benefits can be achieved by retention, a number of small MS4 general permits around the country include post-construction retention standards. The plain meaning of the phrase “maximum extent practicable” dictates that, if a permit in another state includes a pollution control requirement that achieves greater pollution reduction than what New Jersey requires, DEP must either adopt that more effective requirement or explain why such requirement would not be “practicable” in New Jersey.<sup>89</sup> See the Appendix for examples of other states’ permits that include post-construction retention standards.

Many jurisdictions have also demonstrated the practicability of applying these requirements to sites that disturb less than 1 acre of land. In fact, at least two municipalities within New Jersey set a lower threshold. The Borough of Hightstown applies its stormwater ordinance to projects disturbing 1,000 square feet or more of soil, or the construction or redevelopment of 250 square feet or more of impervious surface;<sup>90</sup> the Township of Bernards applies its ordinance to projects in excess of 1,000 square feet or more of new impervious surface, as well as projects that disturb in excess of 2,500 square feet of land.<sup>91</sup> We appreciate that the draft permit at least provides for the *option* of applying the standards to smaller sites (directing MS4s to “address stormwater runoff from the following types of major development unless a more stringent standard is specified by the municipality’s stormwater control ordinance”), but we believe that the threshold should be lowered universally throughout the state because doing so would be practicable and result in greater pollution control. We also believe that a retention standard should be applied to all residential sites, including those to which the Residential Site Improvement Standards apply. As discussed above, the permit assumes that residential standards “preempted” by the RSIS cannot be held to any other standard, but the RSIS

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acteristics/Stormwater\_characteristics\_and\_the\_NSQD/NSQD%203.1%20summary%20for%20EPA%20Cadmus.pdf; Earl Shaver et al., *Fundamentals of Urban Runoff Management: Technical and Institutional Issues* (2007), available at [http://www.ilma-lakes.org/PDF/Fundamentals\\_full\\_manual\\_lowres.pdf](http://www.ilma-lakes.org/PDF/Fundamentals_full_manual_lowres.pdf); Robert Pitt et al., *The National Stormwater Quality Database (NSQD, Version 1.1)* (2004), available at <http://rpitt.eng.ua.edu/Research/ms4/Paper/MS4%20Feb%2016%202004%20paper.pdf>; G.A. Burton & R.E. Pitt, *Stormwater Effects Handbook* (2002).

<sup>89</sup> This interpretation of the MEP standard is consistent with judicial interpretations of other regulatory standards using the phrase “maximum extent practicable” or similar comparative words such as “best.” See *Southwest Center for Biological Diversity v. Bartel*, 470 F.Supp.2d 1118, 1157-58 (S.D. Cal. 2006) (ruling that a permittee-developed plan subject to the Endangered Species Act’s requirement to minimize harm “to the maximum extent practicable” would not meet the standard if there was “...another alternative that would have provided more mitigation or caused less harm to the endangered species and ... the rejected alternative was in fact feasible...”); see also *NRDC v. U.S. EPA*, 808 F.3d 556, 570 (2d Cir. 2015) (holding that EPA could not make a required determination, under the Clean Water Act, that permit terms were based on the “best technology economically achievable” where the agency did not “adequately explain[] why standards higher than the [standard in the permit] should not be used given available technology,” and agreeing with petitioners that “EPA should have first considered what ‘available’ technology was capable of achieving, and then created standards based on that capability”).

<sup>90</sup> Borough of Hightstown, Ordinance 2012-12, [http://www.hightstownborough.com/Ordinances/2012/2012-12\\_SW\\_Control.pdf](http://www.hightstownborough.com/Ordinances/2012/2012-12_SW_Control.pdf).

<sup>91</sup> Bernards Township, Stormwater Management Ordinance, [http://www.bernards.org/Departments\\_Services/Engineering/eng\\_stormwater\\_mo.aspx](http://www.bernards.org/Departments_Services/Engineering/eng_stormwater_mo.aspx).

regulations specifically state that DEP has the authority to impose different, more stringent standards through the terms of a permit.<sup>92</sup>

The New Jersey state regulations cross-referenced in the permit were finalized twelve years ago, in 2004. Their requirements are vastly out-of-date. DEP has implicitly acknowledged that they need to be updated by initiating rulemaking efforts, in late 2014, with the express goal of strengthening the rules and adopting new standards based on the reduction of stormwater volume through the reduction of effective impervious cover.<sup>93</sup> That rulemaking has apparently stalled. DEP must complete it quickly, as the Tier A permit will fail to meet the MEP standard as soon as it is issued if the regulations are not updated to include a post-construction retention standard. This standard should require on-site retention of the water quality design volume, using any combination of infiltration, evapotranspiration, and rainwater harvesting, and should apply to both small and large sites (e.g., all projects that add or replace (alone or in combination) greater than 5,000 square feet of impervious surface. This is what EPA recommended in its 2014 review of the current permit:

“EPA recommends a more stringent post-construction standard which lowers the applicability threshold (i.e. 5,000 square feet of created or replaced impervious surface for new or redevelopment) and requires on-site retention of 85th percentile storm events through infiltration, evapotranspiration, and rainwater harvesting. For projects that cannot meet 100 percent of the retention requirements (which must be documented), the remainder must be treated prior to discharge with measures have been determined to be of equal water quality value or which remove 80 percent of TSS from the same quantity of runoff. Stormwater impacts from developed sites can be reduced by using stormwater management practices often referred to as ‘green infrastructure’ or ‘low impact development’ practices that retain water on-site and mimic the natural hydrology.”<sup>94</sup>

The fact that New Jersey regulations state that compliance with the existing, insufficient stormwater management requirements constitutes compliance with the MEP standard does not make it true.<sup>95</sup> States may not adopt or enforce any effluent limitation or standard of performance that is less stringent than required by the federal Clean Water Act.<sup>96</sup> If state

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<sup>92</sup> N.J.A.C. 5:21-1.5(b) (“*Except as otherwise required by rules or other permit requirements of the Department of Environmental Protection regarding storm water management, the rules are to be interpreted as the minimum required to ensure public health and safety, and the maximum that may be required in connection with residential development*” (emphasis added)).

<sup>93</sup> Email from Adriana Caldarelli, NJDEP Division of Water Quality, to stakeholders (Aug. 21, 2014) (announcing stakeholder meetings on the development of new regulations); Email from Adriana Caldarelli, NJDEP Division of Water Quality, to stakeholders (Nov. 14, 2014) (transmitting a list of references and research that were used to develop a draft low impact development (LID) standard); Email from Adriana Caldarelli, NJDEP Division of Water Quality, to stakeholders (Dec. 15, 2014) (transmitting a PowerPoint presentation from a stakeholder meeting that describes options under consideration based on the concept of reducing Effective Impervious Cover).

<sup>94</sup> EPA Permit Review at 12.

<sup>95</sup> N.J.A.C. 7:14A-25.6(a)(1).

<sup>96</sup> 33 U.S.C. § 1370.

regulations fall short of the federal MEP standard, then DEP must incorporate additional, stronger requirements into the permit in order to make sure that permittees are reducing their pollutant discharges to the maximum extent practicable.

#### E. Stormwater Facility Maintenance

The draft permit's requirements for maintenance of public and private stormwater facilities have been improved compared to the current (2009) permit, but they must be strengthened even further to guarantee that all facilities are maintained and functioning as designed.

While the 2009 permit required only that MS4s “[e]nsure adequate long-term operation and maintenance of BMPs,” with no further detail, the draft permit now proposes to require that stormwater facility maintenance is “performed pursuant to any maintenance plans, or more frequently as needed, to ensure the proper function and operation of the stormwater facility,” and to require that MS4s “maintain a log sufficient to demonstrate compliance with this section” (with a list of specific information to be logged). (Part IV.C.1.a-b.) For municipally owned or operated facilities—but not privately owned facilities—the draft permit also requires inspections to be carried out.

Based on this language, it appears that DEP does intend for permittees to develop and implement meaningful maintenance plans and programs, but we are concerned that this proposed language leaves too much discretion for permittees to decide on their own maintenance enforcement activities (if any).

The language should be tightened to set out clear instructions for the steps that municipalities must take to ensure that facilities are maintained. For example, DEP should explicitly state that maintenance plans are required for all regulated major development pursuant to N.J.A.C. 7:8-5.8, so that MS4s understand the applicability of this regulatory requirement. EPA recommended such a provision in its 2014 permit review: “EPA recommends permits require operation and maintenance plans to be submitted and approved with new private BMPs. . . . In many cases, controls may be located on private property, and it is necessary to establish some provision to assure responsibility and accountability for the operation and maintenance of these controls.”<sup>97</sup>

DEP should also require *all* stormwater facilities to be inspected, not just municipally owned or operated facilities, and that they be inspected at a specific minimum frequency. Such a requirement is important because, as DEP's own audit reports show, when MS4s do not inspect stormwater facilities they cannot enforce any violations and are generally unaware of the

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<sup>97</sup> EPA Permit Review at 14.

functionality of the practices within their jurisdictions.<sup>98</sup> EPA specifically recommended an inspection requirement in its 2014 review of the current permit:

“EPA recommends inspection of all privately-owned post-construction practices and tracking of conditions. . . . Structural post-construction BMPs must be inspected and maintained to remain effective. Tracking the locations, conditions, ages of BMPs as well as the inspection findings is critical to ensuring the proper maintenance occurs for the life of the BMP. Comprehensive ‘as built’ inspections are necessary at the conclusion of a project to ensure the BMP has been built properly and regular inspections are critical to ensure the BMP is being maintained as needed. NJDEP may choose to require permittees to also inspect private BMPs themselves or allow that the owners/operators of the facility be required to inspect them as specified in maintenance agreements or other mechanisms. If the permit allows self-inspections, the permit should require that the program require facility owner/operators submit documentation detailing inspection dates and maintenance performed.”<sup>99</sup>

EPA further reiterated the need for regular inspections in its comments on an earlier preliminary draft of this permit renewal: “EPA believes ‘maintenance plans’ should require that all facilities are inspected once per year, for both the water quality of their effluent (based-on amount of siltation, or monitoring, or both), as well as their hydraulic performance (based-on ponding, drain-down, etc.). . . . All facilities should be inspected at the owner’s expense by licensed and experienced third-party engineers, and resulting reports should be submitted to the municipality for compliance review.”<sup>100</sup>

Inspections of stormwater facilities are required in several other states’ permits; see the Appendix for specific examples. The fact that inspections are required in many other states proves that inspections are practicable and must be included in the Tier A permit in order to satisfy the MEP standard. Moreover, other states’ permits provide instruction as to how DEP can address the issue of its ability, or the ability of its representatives, to legally enter private property to conduct those inspections. See the Appendix for examples of provisions that address this issue.

If an inspection reveals that a practice is not functioning, the permittee should be required to repair the practice if it is municipally owned, or inform the owner of a privately owned practice that repairs are required; if the owner does not comply, the MS4 must perform the repairs itself. (The draft permit does require municipalities to “document and prioritize” a maintenance schedule for necessary repairs, but it should be more explicit in requiring the repairs

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<sup>98</sup> NJDEP, Preliminary Stormwater Audit of South Toms River Borough, Ocean County, NJPDES Permit Number NJG0150622, PI Number 202083, at 12-13 (Mar. 2, 2015).

<sup>99</sup> EPA Permit Review at 13-14.

<sup>100</sup> U.S. EPA Region 2, Comments on NJDEP Preliminary Draft Tier A MS4 Permit, at 5 (Apr. 15, 2016) (included in the administrative record for this draft permit).

to be carried out within a reasonable timeframe.) We also urge DEP to require municipalities to provide information to owners of stormwater facilities about the importance of proper maintenance. Currently, the draft permit includes this as an optional requirement in the Public Education and Outreach section, but it should be made mandatory for all MS4s because it is so critical to ensuring that facilities function properly.

Finally, we urge DEP to restore the requirement it had proposed in an earlier preliminary draft of this permit—but then deleted—requiring MS4 permittees to develop a stormwater facilities inventory and map. At present, many municipalities throughout the state are hampered in their ability to ensure proper facility maintenance by the fact that they do not even know which facilities exist within their borders or where such facilities are located. In order to avoid this problem, EPA recommends including inventory and mapping requirements like the one DEP has proposed to incorporate into the permit:

“Creating an inventory of post-construction structural stormwater control measures, including tracking of specific information, will first enable permittees to know what control measures they are responsible for. Without this information the permittee will not be protecting water quality to their full potential since inspections, maintenance, and follow-up changes cannot be performed. Tracking information such as the latitude/longitude, maintenance and inspection requirements and follow-up will allow the permittee to be able to better allocate their resources for those activities that are immediately necessary.”<sup>101</sup>

A requirement to complete an inventory and map would further these goals. In fact, the permit must include such a requirement in order to meet the Clean Water Act’s maximum extent practicable standard. An inventory of facilities is key to ensuring facilities are maintained, and thus to reducing the discharge of pollution; and carrying out an inventory is a practicable action that is required of municipalities in many other jurisdictions (see Appendix). It is also necessary in order to “protect water quality” in accordance with federal MS4 permitting regulations.<sup>102</sup>

We understand that the proposed inventory and mapping requirement has raised concerns that it would create an unfunded mandate for municipalities in contravention of the New Jersey Constitution.<sup>103</sup> However, the state’s prohibition on unfunded mandates does not, and cannot, create a barrier preventing DEP from including this requirement in the MS4 permit. As an initial matter, federal courts have clearly held that state law cannot trump a NPDES-delegated state’s implementation of federal law. “A state law[] cannot be the justification for [the state’s] failure to comply with the CWA. It is a bedrock principle of American federalism enshrined in Article VI of the Constitution that a state law in itself cannot limit the scope of an otherwise

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<sup>101</sup> U.S. EPA, *MS4 Permit Improvement Guide* at 62 (Apr. 2010), available at [https://www3.epa.gov/npdes/pubs/ms4permit\\_improvement\\_guide.pdf](https://www3.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf).

<sup>102</sup> 40 C.F.R. § 122.34(c)(1).

<sup>103</sup> N.J. Const. Art. VIII, § II, ¶ 5.

constitutional federal law.”<sup>104</sup> “Absent statutory authority in the CWA ... it cannot possibly be urged that ... state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution’s Supremacy Clause.”<sup>105</sup> Moreover, it is highly likely that funding sources are available for carrying out a stormwater facilities inventory, meaning that the requirement would not necessarily be “unfunded.” For example, any municipality is entitled by law to apply to DEP for a grant to prepare a map and inventory of their stormwater sewer system, under the Sewage Infrastructure Improvement Act grant program.<sup>106</sup> The definition of “stormwater sewer system” in DEP’s regulations clearly encompasses stormwater treatment and retention facilities. DEP should explore all available funding sources before deleting requirements that are necessary to comply with federal law.

#### F. Employee Training Requirements

The draft permit proposes to reduce municipal employee training requirements from once per year (as required in the 2009 permit) to once every two years, for most types of training. DEP offers no explanation for this change. Absent any such explanation, the reduced requirement violates the MEP standard, because if annual training was practicable between 2009 and now, then presumably it will continue to be practicable during the upcoming permit term as well. If DEP believes that the reduced training frequency is justified on MEP grounds (e.g., because the permit’s terms will result in better, more role-oriented training that better prepares municipal staff for their duties despite the decrease in frequency), then it must say so and back up this assertion with supporting information.

#### G. Sample Ordinances

Not only does the permit fail to provide specific directions regarding MS4s’ usage of the sample ordinances DEP has provided (as discussed above in section III.A), but the sample ordinances themselves are substantively too weak. For example, these ordinances leave too many details to the permittees in terms of enforcement procedures and penalties for noncompliance.<sup>107</sup> DEP should provide more specific enforcement provisions in the sample ordinances. For example, EPA has a “Model Illicit Discharge and Connection Stormwater Ordinance” that contains much greater detail. EPA’s model ordinance specifically outlines enforcement actions that the municipality could undertake, including requiring the following: the performance of monitoring, analyses, and reporting; the elimination of illicit connections or discharges; ordering violating discharges, practices, or operations to cease and desist; the

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<sup>104</sup> *Ohio Valley Environmental Coalition v. McCarthy*, No. 3:15-0271, 2017 WL 600102, at \*13 (S.D.W.V. Feb. 14, 2017).

<sup>105</sup> *N. Plains Res. Council v. Fidelity Expl. & Dev. Co.*, 325 F.3d 1155, 1165 (9th Cir. 2003) (citing U.S. Const. art. VI, cl. 2; *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 851 (9th Cir. 2002)).

<sup>106</sup> N.J.A.C. 22A, [http://www.nj.gov/dep/rules/rules/njac7\\_22a.pdf](http://www.nj.gov/dep/rules/rules/njac7_22a.pdf).

<sup>107</sup> In the sample ordinances, the “Enforcement” section provides: “This ordinance shall be enforced by the [Police Department and/or other Municipal Officials] of [insert name of municipality].” The “Penalties” section of the sample ordinances provides: “Any person(s) who is found to be in violation of the provisions of this ordinance shall be subject to a fine not to exceed [insert amount].”

abatement or remediation of storm water pollution or contamination hazards and the restoration of any affected property; payment of a fine to cover administrative and remediation costs; and the implementation of source control or treatment BMPs.<sup>108</sup> DEP should require permittees to select from a similar list of options in its sample ordinances to provide clearer direction.

The draft permit also proposes to make the refuse/dumpster ordinance optional, when before it was mandatory for permittees to adopt. As with the reduced employee training requirement, discussed above, weakening this requirement violates the MEP standard because the adoption of these ordinances was deemed practicable in the previous permit, and DEP has not explained why it is not also practicable during this permit term. If DEP's reason for removing this mandatory requirement is that it could constitute an unfunded mandate, we reiterate, per the discussion above in Section III.E, that state law provisions cannot interfere with a NPDES-delegated state's duty to carry out federal law.

#### H. Annual Reports & Access to Information

While we recognize that DEP is barred from requesting a new Request for Authorization (RFA) form from existing permittees when a permit is renewed,<sup>109</sup> we nonetheless believe that there are important reasons to request updated information from permittees who have not submitted an RFA to DEP in at least the past eight years (since the 2009 permits were issued). DEP should use the first Annual Report as an opportunity to collect such information. For example, DEP should require permittees' first Annual Report under the new permit to provide a heightened level of detail about compliance with new permit provisions which they are implementing for the first time. Additionally, DEP should require the Annual Report to update the potentially outdated contact information from the previously submitted RFA.

Additionally, DEP should require permittees to post their SWMPs and all stormwater ordinances on their websites, without exception. The draft permit currently requires permittees to post these documents online "or otherwise comply with the notification requirements of N.J.A.C. 7:8-4.4(e)." However, that regulatory provision states that municipalities can simply submit copies of these documents to DEP instead of placing them on their websites. Citizens must have access to the SWMP and all stormwater-related ordinances in order for municipal programs to be transparent and accountable. DEP should revise this requirement to eliminate the "or otherwise comply" loophole.

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<sup>108</sup> EPA, Model Illicit Discharge and Connection Stormwater Ordinance, *available at* <https://www.epa.gov/sites/production/files/2015-12/documents/modelillicit.pdf>.

<sup>109</sup> N.J.A.C. 7:14A-25.4(a)(3).

IV. The Tier B Draft Permit Shares Common Elements with the Tier A Permit, Which Must Likewise Be Strengthened, and It Should Incorporate Additional Requirements from the Tier A Permit.

Our comments above relating to the common elements that the Tier B draft permit shares with the Tier A permit – namely, the public outreach “points system,” the post-construction standards for new and redevelopment, and stormwater facility maintenance – apply equally to the Tier B draft permit. We urge DEP to strengthen the Tier B permit in the same manner as we recommend for the Tier A permit.

Additionally, we believe that the Tier B permit should incorporate additional requirements that are currently contained in the Tier A permit but are not required for smaller MS4s subject to Tier B. Specifically, Tier B MS4s should equally be required to conduct training of municipal employees, and particularly, training of engineers and council members regarding post-construction design standards, the importance of which we discussed above in section II.C of these comments. That training is no less important in smaller MS4s, where engineers and council members are required to apply the very same design standards. While the draft Tier B permit includes a new “stormwater training component” action in the points system for the public education and outreach SBR, it would not be a mandatory requirement for all Tier B permittees. DEP should make such training obligatory under the Tier B permit, as it is under Tier A.

Finally, we urge DEP to incorporate water quality-based requirements into the Tier B permit along with Tier A. New Jersey regulations provide that *all* permits regulating discharges into surface water – including Tier B MS4 permits – “shall include ... [w]ater quality based limitations ... when the Department has determined that the discharge causes, has the reasonable potential to cause, or contributes to an excursion above the SWQS [water quality standards].”<sup>110</sup> Water quality is impaired throughout the state, including in Tier B communities, and stronger water quality-based requirements are needed in order to address this ongoing source of pollution.

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<sup>110</sup> N.J.A.C. 7:14A-13.2(a)(2).

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Thank you again for the opportunity to offer comments on the draft MS4 permits. We recognize the effort that DEP has put into improving these permits and urge the Department to follow through on these intentions by strengthening the permits further. We look forward to engaging with DEP throughout the permit renewal process. Please do not hesitate to contact us with questions.

Sincerely,

Tim Dillingham, Executive Director  
*American Littoral Society*

Jennifer Coffey, Executive Director  
*Association of New Jersey Environmental Commissions*

Cindy Zipf, Executive Director  
*Clean Ocean Action*

Maya van Rossum, the Delaware Riverkeeper  
Fred Stine, Citizen Action Coordinator  
Nicholas Patton, Staff Attorney  
*Delaware Riverkeeper Network*

Captain Bill Sheehan, Executive Director & Riverkeeper  
*Hackensack Riverkeeper*

Rebecca Hammer, Staff Attorney  
Lawrence Levine, Senior Attorney  
*Natural Resources Defense Council*

Noemi de la Puente, Executive Director  
*New Jersey Environmental Lobby*

Debbie Mans, Executive Director & Baykeeper  
*NY/NJ Baykeeper*

Rich Bizub, Director for Water Programs  
*Pinelands Preservation Alliance*

Michael Pisauro, Jr., Policy Director  
*Stony Brook-Millstone Watershed Association*

Appendix: Example Permit Conditions from Other States  
for NJDEP to Consider When Revising the Draft Permits

*Water Quality-Based Effluent Limitations:* prohibitions on the discharge of pollutants in amounts that cause or contribute to violations of water quality standards, and/or pollution control measures necessary to meet water quality standards and applicable wasteload allocations:

- The 2013 California general permit for discharges from small MS4s incorporates numeric WLAs that apply to individual small MS4s. It also provides near-term actions, in the form of specific management measures, which constitute the bulk of what the permittee must do to be consistent with the WLAs during the permit term. These requirements are deemed by the permitting authority to be consistent with applicable TMDLs. The requirements are individualized for each pollutant of concern, and different requirements apply to each impaired watershed and contributing MS4 dischargers.<sup>111</sup>
- The 2013 Virginia general permit for discharges from small MS4s requires permittees discharging to the Chesapeake Bay watershed to achieve 5% of the total pollutant reductions called for under the Chesapeake Bay TMDL during the permit term. The permit also requires a 5% offset of increased loads from certain new and grandfathered development projects. The general permit includes tables with loading rates to be used by the permittee to calculate required load reductions from existing sources. Load reductions are to be accomplished through the implementation of a Chesapeake Bay TMDL Action Plan that outlines the means and methods by which the permittee will achieve the required reductions. Permittees are also required to develop Action Plans for other TMDLs, which may be implemented over multiple permit terms but which must identify best management practices and milestones to be achieved during the current permit term.<sup>112</sup>
- The 2013 Minnesota general permit for discharges from small MS4s requires each regulated small MS4 to submit a compliance schedule with its permit application showing what BMPs will be implemented and when during the permit term to address applicable WLAs, and target dates for when the WLAs will be achieved.<sup>113</sup>
- The Pennsylvania general permit for discharges from small MS4s (finalized last year, but not in effect until 2018) will require the implementation of Pollutant Control Measures (PCMs) and Pollutant Reduction Plans (PRPs) for stormwater discharges to impaired surface waters. PCMs are activities specifically listed in the permit and undertaken by the MS4 permittee to identify and control pollutant loading to impaired waters from

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<sup>111</sup> California State Water Resources Control Board, Phase II Small MS4 General Permit, NPDES General Permit No. S000004, at Attachment G (2013), *available at* [http://www.waterboards.ca.gov/water\\_issues/programs/stormwater/phase\\_ii\\_municipal.shtml](http://www.waterboards.ca.gov/water_issues/programs/stormwater/phase_ii_municipal.shtml).

<sup>112</sup> Virginia Department of Environmental Quality, Phase II Small MS4 General Permit, 9VAC25-890-40 (2013), *available at* <http://lis.virginia.gov/cgi-bin/legp604.exe?000+reg+9VAC25-890-40>.

<sup>113</sup> Minnesota Pollution Control Agency, Phase II Small MS4 General Permit, Permit No. MNR040000, at II.D.6, III.E (2013), *available at* <https://www.pca.state.mn.us/sites/default/files/wq-strm4-59k.pdf>.

MS4s, regardless of whether a TMDL has been approved. They include BMPs and other strategies that are required in addition to the basic stormwater program elements. A PRP is a planning document prepared by the permittee which guides the selection and implementation of specific BMPs to reduce pollutant loading to surface waters. Permittees discharging to waters impaired for nutrients and/or sediment that lack TMDLs, as well as permittees discharging to the Chesapeake Bay watershed, will be required to develop a Pollutant Reduction Plan to reduce pollutant loadings for the cause(s) of impairment. (The permit will not provide coverage for MS4s with individual wasteload allocations under TMDLs for nutrients or sediment; such MS4s will be required to obtain individual permits with individualized control requirements.) In a PRP, baseline pollutant loadings must be estimated and the MS4 must select BMPs that will achieve a minimum 5% and 10% pollutant loading reduction for TP and sediment, respectively, within five years.<sup>114</sup>

- The 2012 Georgia general permit for discharges from small MS4s requires existing permittees discharging to impaired waters with an approved TMDL to develop and submit for review and approval to the permitting authority an Impaired Waters Plan (for MS4s with a population of <10,000) or a Monitoring and Implementation Plan (for MS4s with a population of >10,000). An Impaired Waters Plan must include a list of the impaired waters and the pollutant(s) of concern, a map showing the locations of the impaired waters and all MS4 outfalls discharging to those waters, BMPs that will be implemented to address each pollutant of concern, and a schedule for implementing the BMPs. A Monitoring and Implementation Plan must identify where wet weather monitoring will occur, sample type, frequency, schedule to begin monitoring, and a description of the BMPs that will be implemented to address each pollutant of concern. Upon approval of the plans, the permittees must implement the chosen BMPs.<sup>115</sup>
- The pending draft New Mexico small MS4 general permit (issued by EPA Region 6) explicitly would not authorize discharges that EPA determines will cause or contribute to a violation of water quality standards. In the event that EPA determines an MS4 is causing or contributing to a violation, the permittee would have 60 days to submit a report describing current and future proposed controls that will be implemented to prevent pollution sufficient to remedy the violation; after approval, the proposed additional controls must be implemented. The permit would also require MS4s to propose and implement practices during each year of the permit term designed to ultimately achieve applicable TMDL wasteload allocations. For permittees discharging into non-TMDL impaired waters, it would require them to implement focused BMPs,

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<sup>114</sup> Pennsylvania Department of Environmental Protection, Small MS4 General Permit (PAG-13) (DRAFT), at Part C.II and Appendices A-E (2015), *available at* <http://www.elibrary.dep.state.pa.us/dsweb/View/Collection-12476>.

<sup>115</sup> Georgia Department of Natural Resources, Small MS4 General Permit, Permit No. GAG610000, at 4.4.1-4.4.2 (2012), *available at* [https://epd.georgia.gov/sites/epd.georgia.gov/files/related\\_files/site\\_page/FINAL\\_GAEPD\\_NPDES\\_MS4\\_PhaseIISmall\\_GAG610000\\_Y2012Dec6.pdf](https://epd.georgia.gov/sites/epd.georgia.gov/files/related_files/site_page/FINAL_GAEPD_NPDES_MS4_PhaseIISmall_GAG610000_Y2012Dec6.pdf).

along with corresponding measurable goals, to reduce the discharge of pollutants of concern.<sup>116</sup>

- The 2015 New York general permit for discharges from small MS4s requires permittees to achieve pollutant load reductions identified in applicable TMDLs, by deadlines established within the permit. Associated with this requirement, the permit directs MS4s to establish Watershed Improvement Strategies and retrofit plans for achieving the mandatory load reductions.<sup>117</sup>

*Water Quality-Based Effluent Limitations:* TMDL requirements included when TMDLs do not provide individualized wasteload allocations for specific MS4s:

- The pending general permit for New Mexico, issued by EPA Region 6, states that where a WLA is expressed in the aggregate for all or a class of MS4 stormwater sources, “all affected MS4 operators are jointly responsible for progress in meeting the [WLA] and shall (jointly or individually) develop a monitoring/assessment plan.”<sup>118</sup> Alternatively, “the MS4s may combine or share efforts, in consultation with/and the approval of [the New Mexico Environment Department], to determine an alternative sub-measurable goal derived from the WLA for the pollutant(s) of concern (e.g., bacteria) for their respective MS4. The SWMP must clearly define this alternative approach and must describe how the sub-measurable goals would cumulatively support the aggregate WLA. Where an aggregate WLA measurable goal has been broken into sub-measurable goals for individual MS4s, each permittee is only responsible for progress in meeting its WLA sub-measurable goal.”<sup>119</sup>
- New York’s permit lists the overall pollutant reduction required by each aggregate stormwater WLA, in the form of a percent reduction, and requires each MS4 subject to the aggregate WLA to either meet the percent reduction individually or to form coalitions and achieve the reduction on a regional basis.<sup>120</sup>

*Monitoring:* water quality and/or discharge monitoring requirements:

- The 2013 California general permit for discharges from small MS4s includes tailored requirements for monitoring in certain watersheds. The permit specifies which permittees are affected by the tailored requirements, and the receiving streams where the monitoring must be performed. In some watersheds, the monitoring is intended to establish baseline pollutant loading information, while in a number of others, the

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<sup>116</sup> EPA Region 6, Small MS4 General Permit for New Mexico, NPDES General Permit No. NMR040000 (DRAFT), at Part C (2015), *available at* [https://www3.epa.gov/region6/water/npdes/sw/sms4/pdf/nmr040000\\_draft\\_permit.pdf](https://www3.epa.gov/region6/water/npdes/sw/sms4/pdf/nmr040000_draft_permit.pdf).

<sup>117</sup> New York Department of Environmental Conservation, Small MS4 General Permit, Permit No. GP-0-15-003, at III.B, Part IX (2015), *available at* [http://www.dec.ny.gov/docs/water\\_pdf/ms4permit.pdf](http://www.dec.ny.gov/docs/water_pdf/ms4permit.pdf).

<sup>118</sup> Small MS4 General Permit for New Mexico (Draft) at Part C.2.b.i.

<sup>119</sup> *Id.*

<sup>120</sup> New York Small MS4 General Permit at Part IX.

monitoring program (which is submitted to the state as part of a Wasteload Allocation Attainment Program) is intended show whether the MS4's program is meeting interim targets or WLA-based limits. In a number of watersheds, in addition to the effluent monitoring requirements, permittees are required to submit a quantifiable numeric analysis demonstrating that the BMPs selected for implementation will likely achieve the applicable WLA according to the schedule for implementing the TMDL, based on modeling, published BMP pollutant removal performance estimates, best professional judgment, and/or other available tools.<sup>121</sup>

- The 2012 Georgia general permit for discharges from small MS4s requires permittees with a population of >10,000 that discharge to an impaired water either with or without an approved TMDL to implement a monitoring plan for all pollutants of concern. The monitoring plan, which must be submitted to the permitting authority for review and approval, is required to specify the sampling locations, sample type and frequency, implementation schedule, and the BMPs that will be implemented to control and reduce the pollutants of concern. Annual reports are required to include an assessment of the data trends for each pollutant of concern. The assessment must initially include a characterization of baseline conditions to determine the effectiveness of the BMPs employed and what, if any, additional adaptive BMP measures may be necessary to return the waters to comply with state water quality standards.<sup>122</sup>
- The 2013 Western Washington small MS4 general permit requires a number of its permittees to conduct discharge or surface water monitoring for fecal coliform and to electronically submit the results to the state.<sup>123</sup>
- The pending draft New Mexico small MS4 general permit (issued by EPA Region 6) would require permittees to design and implement a comprehensive monitoring program. The permittee would be required to select specific monitoring locations sufficient to assess effects of stormwater discharges on receiving waters. The program would have to include wet weather monitoring (either performed individually, with sampling done 10 times during the permit term at specified locations, or cooperatively with other permittees, with sampling done 7 times per permit term at specified locations), as well as dry weather discharge screening and floatable monitoring. For impaired waters with TMDLs, MS4s would be required to monitor or assess progress toward meeting wasteload allocations.<sup>124</sup>

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<sup>121</sup> California Small MS4 Permit at Attachment G.

<sup>122</sup> Georgia Small MS4 Permit at 4.4.2.

<sup>123</sup> Washington State Department of Ecology, Western Washington Phase II Municipal Stormwater Permit, at Appendix 2 (2013), *available at*

<http://www.ecy.wa.gov/programs/wq/stormwater/municipal/phaseIIww/wwphiipermit.html>.

<sup>124</sup> New Mexico Small MS4 Permit (DRAFT) at I.C.2, III.A.

*Post-Construction Standards for Development:* permit requirements that include on-site retention standards for post-construction stormwater controls:

- West Virginia's permit requires regulated sites to keep and manage on-site the first 1 inch of rainfall with no discharge to surface waters.<sup>125</sup>
- Montana's permit requires regulated sites over one acre to use low impact development to retain 0.5 inches of rainfall, which represents the 90th percentile storm event in Montana.<sup>126</sup>
- The Massachusetts general small MS4 permit, issued by EPA Region 1, includes a numeric performance standard for on-site retention of post-construction runoff.<sup>127</sup>
- New York's permit requires projects to meet standards contained in the state's construction stormwater permit and its state stormwater manual, requiring new development to reduce runoff by infiltration, ground water recharge, reuse, recycling, or evaporation of 100% of the post-development water quality volume (calculated from the 90th percentile storm), unless infeasible.<sup>128</sup>
- Connecticut's permit requires new and redevelopment sites to retain the volume generated by 1 inch of rainfall (the water quality volume), except redevelopment sites with greater than 40% impervious cover are required to retain the volume generated by 0.5 inch of rainfall.<sup>129</sup>
- California's permit requires regulated sites to evapotranspire, infiltrate, harvest and reuse, or biotreat either the 85th percentile storm volume, the volume of annual runoff required to achieve 80% capture, the runoff from a 0.2-inch per hour storm event, or the runoff produced from a storm twice the hourly intensity of the 85th percentile storm.<sup>130</sup>
- Tennessee's permit requires new and redevelopment sites to infiltrate, evapotranspire, harvest and/or use the first 1 inch of every rainfall event with no discharge to surface waters.<sup>131</sup>

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<sup>125</sup> West Virginia Department of Environmental Protection, General NPDES Permit for Stormwater Discharges from Small MS4s, Permit No. WV0116025, at 24 (July 2014), *available at* <http://www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Documents/MS4%20GP%202014.pdf>.

<sup>126</sup> Montana Department of Environmental Quality, General Permit for Storm Water Discharges Associated with Small MS4s, Permit No. MTR 040000, at 29 (2017), *available at* <http://deq.mt.gov/Portals/112/Water/WPB/MPDES/StormWater/pdf/MTR040000FPER.pdf>.

<sup>127</sup> EPA Region 1, General Permit for Stormwater Discharges from Small MS4s in Massachusetts, Section 2.3.6.a (Apr. 2016, effective July 1, 2017), *available at* <https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/final-2016-ma-sms4-gp.pdf>.

<sup>128</sup> New York Small MS4 Permit at 63.

<sup>129</sup> Connecticut Department of Energy and Environmental Protection, General Permit for the Discharge of Stormwater from Small MS4s, at 27-29 (Jan. 2016, effective July 1, 2017), *available at* [http://www.ct.gov/deep/lib/deep/permits\\_and\\_licenses/water\\_discharge\\_general\\_permits/ms4\\_gp.pdf](http://www.ct.gov/deep/lib/deep/permits_and_licenses/water_discharge_general_permits/ms4_gp.pdf).

<sup>130</sup> California Small MS4 Permit at 53, 95-96.

<sup>131</sup> Tennessee Department of Environment and Conservation, NPDES General Permit for Discharges from Small MS4s, Permit No. TNS000000, at 17-18 (Sept. 2016), *available at* [http://environment-online.state.tn.us:8080/pls/enf\\_reports/f?p=9034:34051::NO:34051:P34051\\_PERMIT\\_NUMBER:TNS000000](http://environment-online.state.tn.us:8080/pls/enf_reports/f?p=9034:34051::NO:34051:P34051_PERMIT_NUMBER:TNS000000).

- Maryland’s permit requires permittees to comply with and enforce state regulations that require development to use environmental site design (green infrastructure) practices to manage the runoff from a 1 inch storm event.<sup>132</sup>
- EPA Region 6’s proposed draft permit for New Mexico would require on-site management of the 90th percentile storm event discharge volume for new development sites and the 80th percentile storm event discharge volume for redevelopment sites, through stormwater controls that infiltrate, evapotranspire and/or beneficially reuse.<sup>133</sup>

*Stormwater Facility Maintenance:* requirements for inspections of stormwater facilities:

- Georgia’s permit requires the MS4 to inspect 100% of post-construction stormwater management structures during the five-year permit term.<sup>134</sup>
- Virginia’s small MS4 general permit requires MS4s to inspect all privately owned stormwater management facilities at least once every five years, and all municipally owned stormwater management facilities annually.<sup>135</sup>
- West Virginia’s small MS4 permit requires permittees to inspect all privately owned stormwater practices at least once during the permit cycle.<sup>136</sup>

*Stormwater Facility Maintenance:* requirements for inventories of stormwater facilities:

- Minnesota’s permit requires permittees to map all structural stormwater BMPs that are part of the MS4 system, and to inventory all stormwater ponds within the permittee’s jurisdiction.<sup>137</sup>
- New York’s small MS4 permit requires permittees to maintain an inventory of post-construction stormwater management practices within the permittee’s jurisdiction. At a minimum this must include practices discharging to the small MS4 that have been installed since 2003, all practices owned by the permittee, and practices found to cause or contribute to water quality standard violations.<sup>138</sup>
- Montana’s small MS4 permit requires permittee to develop and maintain an inventory of all new permittee-owned and privately-owned stormwater controls installed since the effective date of the permit, as well as all existing permittee-owned and “high priority” privately-owned stormwater controls installed before the effective date of the permit.<sup>139</sup>

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<sup>132</sup> Maryland Department of the Environment, General Permit for Discharges from Small MS4s, Permit No. MDR055500, at 5 (Apr. 2003), *available at* <http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Documents/www.mde.state.md.us/asets/document/NPDES%20Phase%20II%20General%20Permit.pdf>.

<sup>133</sup> EPA Region 6, General Permit for Small MS4s in New Mexico (DRAFT) at 24.

<sup>134</sup> Georgia Small MS4 Permit at Table 4.2.5(a).

<sup>135</sup> Virginia Small MS4 Permit at II.B.5.c-d.

<sup>136</sup> West Virginia Small MS4 Permit at 31.

<sup>137</sup> Minnesota Small MS4 Permit at III.C.1-2.

<sup>138</sup> New York Small MS4 Permit at 44.

<sup>139</sup> Montana Small MS4 Permit at 31-32.

- Georgia’s small MS4 permit requires permittees to develop an inventory of all publicly-owned stormwater controls, as well as privately-owned controls designed after the adoption of the Georgia Stormwater Management Manual in 2008.<sup>140</sup>

*Stormwater Facility Maintenance*: addressing the issue of the municipality’s ability, or the ability of its representatives, to legally enter private property to conduct inspections:

- West Virginia’s general permit requires private property owners to sign legally enforceable agreements that accept or assign responsibility for maintenance, and that “allow the permittee, or designee, or conduct inspections of the stormwater management practices.”<sup>141</sup>
- The 2013 California general permit for discharges from small MS4s requires, as a component of each permittee’s stormwater facility operation and maintenance program, “Conditions of approval or other legally enforceable agreements or mechanisms for all Regulated Projects that require the granting of site access to all representatives of the Permittee for the sole purpose of performing O&M inspections of the installed treatment system(s) and hydromodification control(s) (if any).”<sup>142</sup>
- The 2013 Minnesota general permit for discharges from small MS4s requires permittees to establish a legal mechanism between the permittee and the owner/operator of a private stormwater facility, which must include provisions that “[a]llow the permittee to conduct inspections of structural stormwater BMPs not owned or operated by the permittee, perform necessary maintenance, and assess costs for those structural stormwater BMPs when the permittee determines that the owner and/or operator of that structural stormwater BMP has not conducted maintenance.”<sup>143</sup>

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<sup>140</sup> Georgia Small MS4 Permit at Table 4.2.5(a).

<sup>141</sup> West Virginia Small MS4 Permit at 29-30.

<sup>142</sup> California Small MS4 Permit at 59.

<sup>143</sup> Minnesota Small MS4 Permit at III.D.5.a.5.