To Be Argued By:
LAWRENCE M. LEVINE
Time Requested: 30 Minutes

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Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

NATURAL RESOURCES DEFENSE COUNCIL, INC.; RIVERKEEPER, INC.; WATERKEEPER ALLIANCE, INC.; SOUNDKEEPER, INC.; SAVE THE SOUND; PECONIC BAYKEEPER, INC.; RARITAN BAYKEEPER, INC. (d/b/a NY/NJ BAYKEEPER); HACKENSACK RIVERKEEPER, INC.,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78
of the Civil Practice Law & Rules

—against—

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent-Respondent.

BRIEF FOR PETITIONERS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f) of the Rules of the Court of Appeals, Natural Resources Defense Council, Inc., Riverkeeper, Inc., Waterkeeper Alliance, Inc., Soundkeeper, Inc., Save the Sound, Peconic Baykeeper, Inc., Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper), and Hackensack Riverkeeper, Inc., state that they have no parent corporations, subsidiaries or affiliates.

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PRELIMINARY STATEMENT

Every time it rains, rivers, lakes, beaches and bays across New York are inundated with pollution. Storm runoff washes contamination from surfaces like roads, roofs, parking lots, lawns, and dog parks. Municipal storm sewers collect and deliver it directly to local water bodies, typically without any treatment. This polluted "stormwater" – loaded with bacteria, heavy metals, motor oil, fertilizer, pesticides, litter, and more – is one of the biggest sources of water pollution in the state and, indeed, the nation.

The federal Clean Water Act (CWA) and state Environmental Conservation Law (ECL) charge the New York State Department of Conservation (DEC) with making sure that the state's waters are safe for drinking, fishing, swimming, and other uses. These laws require DEC to ensure that municipalities adequately control the stormwater pollution coming from their sewer systems. DEC must do this by issuing permits that require compliance with two different types of requirements – first, limitations that "reduce the discharge of pollutants to the maximum extent practicable," and, second, further limitations necessary to ensure compliance with state water quality standards. In the absence of a robust and legally compliant set of water quality-based limitations, polluted waters are relegated to perpetual degradation, contrary to the plainly expressed intent of Congress and the New York State Legislature.

Indeed, Congress, followed by the State Legislature, was particularly concerned with pollution of our nation's and state's waters, and designed a complex regulatory scheme that hinges entirely on enforceable permit limitations. Unfortunately, the DEC-issued permit in this case flouts the very essence of the Clean Water Act regulatory system, and thereby fails to protect New York's waters from the state's most pervasive source of pollution.

QUESTIONS PRESENTED

1. For most municipalities that contribute to violations of state water quality standards, the Permit requires "no net increase" in pollution levels, rather than decreases in pollution. For the few municipalities required to reduce current pollution levels, the Permit neither specifies a baseline against which reductions can be measured nor allocates required pollution reductions to each municipality. In light of those facts, did DEC violate the Clean Water Act and Environmental Conservation Law requirements to include limitations in water pollution control permits that ensure compliance with water quality standards?

Supreme Court and the Appellate Division ruled that the Permit did not violate those requirements.

2. Did DEC violate the requirement in 6 NYCRR § 750-1.14 to include in water pollution control permits a compliance schedule with interim deadlines, designed to ensure compliance with applicable limitations within the shortest

reasonable time? And does DEC's explicit decision not to appeal this issue mean that Supreme Court's ruling on this issue must be reinstated?

Supreme Court ruled that the Permit violates 6 NYCRR § 750-1.14. The Appellate Division reversed, even though DEC expressly declined to appeal that issue.

3. The Permit allows municipalities to decide for themselves, without the need for DEC review or approval, what pollution controls would meet the "maximum extent practicable" standard and what controls should be implemented to meet water quality standards. The Permit does not provide the opportunity for a public hearing to contest the adequacy of any municipality's pollution controls; in some instances, it does not even allow for public comment. Did DEC create an impermissible self-regulatory system? Did DEC violate mandatory public participation requirements?

Supreme Court ruled that the Permit creates an impermissible self-regulatory system. Supreme Court also ruled that DEC violated mandatory public participation requirements by denying the opportunity for public hearings on municipalities' "notices of intent" to be covered by the Permit, but that public hearings and public comment are not required on every effluent limitation a municipality proposes to implement. The Appellate Division reversed.

4. The Permit does not require any monitoring of pollution discharges or effects on receiving water bodies. Does that violate federal and state requirements to include in permits such monitoring requirements as may be needed to determine compliance with effluent limitations and water quality standards?

Supreme Court and the Appellate Division ruled that it does not violate federal or state law.

JURISDICTION

The Court has jurisdiction over this appeal, having granted Petitioners' timely motion for appeal from the final Decision and Order of the Appellate Division, which is appealable to this Court pursuant to CPLR 5602(a)(1)(i) (A. vii). The questions presented were specifically raised in Petitioners' memoranda of law in Supreme Court and in their briefs on appeal.[1]

SUMMARY OF ARGUMENT

In 1972, Congress understood that pollution of our nation's waters significantly and adversely affected human health and safety, quality of life, the economy, wildlife, and other resources. Congress therefore went to great lengths to establish an enormously complex and sophisticated regulatory program, which has at its heart a system of enforceable permit limitations aimed at reducing and

[1] *See* Petitioners' Sup. Ct. Opening Brief at 16-44 (Nov. 5, 2010); Petitioners' Sup. Ct. Reply Brief at 3-27 (Mar. 2, 2011); Petitioners' Opening Appeal Brief at 16-56 (Sept. 24, 2012); Petitioners' Appellate Reply Brief at 3-22 (Nov. 5, 2012).

eventually eliminating this pollution. The people of New York, acting through their Legislature, enthusiastically agreed to Congress's regime. Both Congress and the State Legislature not only embraced a general goal of fishable, swimmable waters. They also but also mandated particular regulatory mechanisms to achieve that goal, centered around the pollution discharge permit and its enforceable technology-based and water-quality-based "effluent limitations."

This case is about DEC's unlawful decision to exempt every small municipal stormwater system in the State of New York from key elements of that regime. DEC, without a statutory or regulatory basis for doing so, replaced a system of individually tailored, enforceable standards with a permit that merely asks permittees to promise to comply with a list of vague, ill-defined (and even self-defined) goals. Accordingly, when it came to addressing what is perhaps the state's most significant water pollution problem, DEC abdicated its responsibility to regulate in the statutorily prescribed manner.

In particular, despite the fact that municipal stormwater discharges cause hundreds of water bodies in New York to violate state water quality standards, DEC issued a Permit that fails to comply with federal and state mandates requiring measures to bring those discharges into compliance with those standards. The Permit's legal inadequacies relegate hundreds of water bodies around the state to a

near-permanent state of degradation, rather than ensuring their safety and suitability for drinking, fishing, swimming, and other uses.

First, for most of the municipalities whose runoff is presently impairing water quality, the Permit fails to require any net reductions in pollution as is unambiguously required by the Clean Water Act and the Environmental Conservation Law. Instead, the Permit requires "no net increase" in pollution levels. This unlawfully allows excessive pollution to continue indefinitely. For dozens of other municipalities whose discharges are impairing water quality, the Permit's terms purport to require compliance with previously established numeric pollution reduction targets. But those terms are missing two crucial elements – a specified baseline and a pollutant reduction allocation to each municipality – without which the required reductions are impossible to implement and enforce.

Second, DEC's regulations require that, with respect to any non-compliant discharge, the Permit must establish specific steps in a schedule of compliance designed to attain compliance within the shortest reasonable time. The Permit sets deadlines, ranging up to 3 years, for certain municipalities to submit plans describing how they will achieve pollution reductions, and gives them up to 13 years to achieve those limits. However, the Permit does not include a schedule of compliance establishing specific steps designed to attain compliance within the shortest reasonable time. Thus, even if the water quality-based requirements

specified a baseline and a municipality-by-municipality allocation, they would still be legally inadequate. Supreme Court ruled for Petitioners on this issue. DEC did not appeal that ruling and the parties did not brief or argue it in the Appellate Division. Thus, this Court should reinstate Supreme Court's ruling that the permit lacks the necessary compliance schedules.

Third, federal and state law require DEC to include in permits controls that DEC has determined will reduce pollution to the maximum extent practicable and ensure compliance with water quality standards. DEC has not done this. Instead, the Permit's provisions are extremely vague, leaving permittees to decide for themselves, without the need for DEC review and approval, and without the requisite opportunities for public participation, what pollution controls should be implemented to meet applicable standards. The Permit therefore creates an impermissible self-regulatory system, as several federal and state courts have held when reviewing similar permitting regimes. Indeed, the U.S. Court of Appeals for the Ninth Circuit has found that an identical scheme for small MS4 permits violated the Clean Water Act, for exactly this reason.

Fourth, the Permit does not require any municipalities to monitor pollution levels in their discharges or effects on receiving waters. This violates federal and state requirements to include monitoring requirements as needed to determine compliance with effluent limitations and applicable water quality standards. Many

other states require such monitoring in their stormwater permits for small municipalities. DEC's Permit makes compliance determinations impossible, and DEC's decision not to require any monitoring is arbitrary and capricious.

For all of those reasons, this Court should declare the Permit unlawful and remand it to DEC.

STATEMENT OF THE CASE

DEC has identified urban stormwater runoff as one of the leading causes of poor water quality in rivers, streams, lakes, and coastal waters throughout New York (A. 97, 103-104).[2] This pollution is created when precipitation from rain and snowmelt flows over impervious surfaces like streets and parking lots, without infiltrating into the ground or being taken up by plants as it would in a natural setting (A. 96). As stormwater flows across the land, it picks up debris, chemicals, bacteria, sediment, and other pollutants and carries them directly into nearby water bodies (A. 50, 96).[3] At the state's coastal and Great Lakes beaches, for example, it

[2] *See also* N.Y. State Dep't of Envtl. Conservation, *Urban Stormwater Runoff*, http://www.dec.ny.gov/chemical/69422.html (last visited Aug. 12, 2014); N.Y. State Dep't of Envtl. Conservation, *Top Ten Water Quality Issues in New York State*, http://www.dec.ny.gov/docs/water_pdf/305btopten10.pdf (last visited Aug. 12, 2014).

[3] *See also Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 840-41 (9th Cir. 2003) [hereinafter *EDC*] (explaining the nationwide problem of stormwater pollution).

is the dominant cause of closings and water quality advisories, harming public health and the state's economy (A. 96, 110-121).

All in all, DEC has identified over 200 water body segments in 47 of New York's 62 counties as being "impaired" – i.e., not meeting state water quality standards – due to pollutants in municipal stormwater discharges (A. 354-361).[4] The offending pollutants are pathogens, phosphorous (in fresh water), nitrogen (in salt water), silt/sediment, "floatables" (i.e., trash), as well as copper and oil and grease. (*Id*.) The water bodies impaired by stormwater runoff include 38 on Long Island; 27 in New York City; 23 in Westchester County, which borders the Hudson River and Long Island Sound; 18 in the Mid-Hudson Valley and Catskills counties of Orange, Putnam, Dutchess, Ulster, Columbia and Delaware; 19 in the Lake Erie counties of Niagara, Erie and Chautauqua; and dozens more in counties on Lake Ontario, Lake George, and Lake Champlain, and in the Finger Lakes region, among other places. (*Id*.)

[4] *See also* N.Y. State Dep't of Envtl. Conservation, Response to Comments: The 2012 NYS Section 303(d) List of Impaired Waters Requiring a TMDL, at 15 (Sept. 2012), *available at* http://www.dec.ny.gov/docs/water_pdf/303drespsumm12.pdf ("As for the MS4 Permit Appendix 2, this list is limited to waters that are impaired by specific pollutants related to stormwater.").

A. Statutory Framework

The discharge of pollutants into surface waters in New York is governed by both federal and state law. The federal Clean Water Act (the Act)[5] created a nationwide, mandatory permitting program for discharges of water pollutants to surface waters, known as the national pollutant discharge elimination system (NPDES).[6] As the U.S. Supreme Court has explained:

> In 1972, prompted by the conclusion of the Senate Committee on Public Works that "the Federal water pollution control program . . . has been inadequate in every vital aspect," Congress enacted the [Clean Water Act] Amendments . . . [which] introduced two major changes in the methods to set and enforce standards to abate and control water pollution. First, the Amendments are aimed at achieving maximum "effluent limitations" on "point sources," as well as achieving acceptable water quality standards. . . . [A] discharger's performance is now measured against strict technology-based effluent limitations specified levels of treatment to which it must conform, rather than [solely] against limitations derived from water quality standards to which it and other polluters must collectively conform.
>
> Second, the Amendments establish the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. *An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. . . . In short, the permit defines, and facilitates*

[5] 33 U.S.C. § 1251 *et seq*.

[6] *See id.* §§ 1311 & 1342.

> *compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Clean Water Act] Amendments.*[7]

Under the Act, the federal Environmental Protection Agency (EPA) can delegate permitting authority to states, provided that the state permitting program ensures compliance with the substantive and procedural requirements of the Act.[8] Like most states, New York has been delegated to administer the permitting regime within the state (A. 847-880), via the state pollutant discharge elimination system (SPDES).[9] This program, administered by DEC, must "meet all applicable requirements" of the federal Clean Water Act and all "rules, regulations, guidelines, criteria, standards and limitations adopted pursuant thereto."[10] Accordingly, the permitting requirements summarized below derive from both New York state and federal law.

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[7] *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203-05 (1976) (emphasis added); *see also Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 490-92 (2d Cir. 2005).

[8] *Id.* § 1342(b).

[9] *See* 6 N.Y.C.R.R. § 750-1.1(a).

[10] ECL § 17-0801; *see also, e.g., id.* §§ 17-0807(4) (prohibiting all discharges not permitted by the Clean Water Act), 17-0809(1) (providing that State Pollutant Discharge Elimination System (SPDES) permits for water pollution discharges shall include all "applicable effluent limitations as required by the [Clean Water] Act"), and 17-0815(7)-(8) (providing that SPDES permits shall include any other requirements applicable under the Act).

The Clean Water Act permitting program covers municipal separate storm sewer systems (MS4s), which convey huge quantities of polluted stormwater runoff from urban and suburban areas into New York waters.[11] DEC may regulate MS4s through a single, statewide "general permit,"[12] provided such permit satisfies the same substantive requirements as an individual permit issued to a single discharger.[13]

All permits – whether general permits or individual permits – must include "effluent limitations," which are substantive requirements for pollution control. Effluent limitations can take the form of numeric limits on pollution discharges, or narrative instructions for permittees to follow.[14]

Municipal stormwater permits, in particular, must specify effluent limitations that "reduce the discharge of pollutants to the maximum extent

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[11] ECL § 17-0808; 6 N.Y.C.R.R. § 750-1.4(b); 40 C.F.R. § 122.26.

[12] ECL § 70-0117(6)(b)(i); 6 N.Y.C.R.R. § 750-1.21(b)(5).

[13] 6 N.Y.C.R.R. § 750-1.21(f).

[14] ECL § 17-0105(15) ("any restriction"); 40 C.F.R. § 122.34(a) ("[N]arrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations [for small MS4s]…."). *See also Citizens Coal Council v. EPA*, 447 F.3d 879 (6th Cir. 2006) (en banc) (upholding EPA's inclusion of both numeric and non-numeric (best management practice) effluent limitations in effluent limitation guidelines for the coal mining industry).

practicable."[15] This is an example of a "technology-based" standard, which defines a minimum standard applicable to all MS4 permits, regardless of where the MS4 discharges its pollution. To meet this standard, permits for small MS4s – systems that serve communities with populations under 100,000 people – must address each of six "Minimum Control Measures."[16]

Technology-based standards are not the only standards that apply to Clean Water Act permits. Rather, on a case-by-case basis, where limits derived from the applicable technology-based standard are insufficient to ensure compliance with state water quality standards, a permit must include more stringent "water quality-based" effluent limitations, as necessary to ensure such compliance.[17] State water quality standards define the goals of each water body, by designating the uses to be made of the water body (such as drinking water supply or recreational use) and setting water quality criteria (such as maximum pollutant concentrations) to protect each use.[18] Whereas technology-based standards set a floor for pollution control

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[15] 33 U.S.C. § 1342(p)(3)(B)(iii); ECL § 17-0808(3)(c); *see also* 40 C.F.R. §§ 122.26(d)(2)(iv), 122.34(a); 6 N.Y.C.R.R. § 750-1.11(a)(9) (requiring SPDES permits to comply with the enumerated federal regulations).

[16] 40 C.F.R. § 122.34(a)-(b) (incorporated into state law by 6 N.Y.C.R.R. § 750-1.11(a)(9)).

[17] ECL § 17-0811(5); 6 N.Y.C.R.R. § 750-1.11(a)(5)(i); 40 C.F.R. § 122.4(d); *see also* 40 C.F.R. § 123.25(a)(1); 33 U.S.C. §§ 1311(b)(1)(C), 1342(a).

[18] *Niagara Mohawk Power Corp. v. DEC*, 82 N.Y.2d 191, 194 (1993).

requirements based on the type of discharger, water quality standards define protections based on the needs of a particular water body and its users.[19] Thus, water quality-based effluent limits provide a critical backstop to ensure that permitted discharges do not individually or collectively harm the state's water resources.[20]

For water bodies that do not meet their designated water quality standards – "impaired waters" – DEC is required to establish pollution budgets, known as Total Maximum Daily Loads (TMDLs). These TMDLs define the maximum amount of pollution that may be discharged into each water body while still achieving water quality standards.[21] TMDLs must include "waste load

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[19] *See* EPA, "NPDES Permit Writers' Manual" 3 (Sept. 2010), *available at* http://water.epa.gov/polwaste/npdes/basics/upload/pwm_chapt_01.pdf ("A permit provides two types of control: technology-based limitations (based on the technological and economic ability of dischargers in the same category to control the discharge of pollutants in wastewater) and water quality-based limitations (to protect the quality of the specific waterbody receiving the discharge)."). The Court can take judicial notice of this government document because it is "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." *People v. Jones*, 73 N.Y.2d 427, 431-32 (1989) (internal citations omitted); *cf.* CPLR § 4511.

[20] *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 n.12 (1976) ("Water quality standards are retained as a supplementary basis for effluent limitations, . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.").

[21] 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7.

allocations," which apportion the acceptable pollution load among permitted dischargers (or categories of dischargers), including MS4s.[22] To render TMDLs enforceable against such dischargers, DEC must include effluent limitations in permits that are consistent with any applicable waste load allocation.[23]

With respect to any discharge that is not in compliance with permit limitations, water quality standards, or other applicable requirements, DEC "shall establish specific steps in a compliance schedule designed to attain compliance within the shortest reasonable time."[24] Where that time frame exceeds nine months, "a schedule of compliance shall be specified in the permit, which will set forth interim requirements and the dates for their achievement. In no event shall more than nine months elapse between interim dates."[25] Compliance schedules, including these interim requirements, are essential to ensure that adequate progress is being made and to avoid situations where permittees fail to meet requirements by the applicable deadline.

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[22] 40 C.F.R. § 130.2(h)-(i).

[23] 6 N.Y.C.R.R. § 750-1.11(a)(5)(ii); *see also* 40 C.F.R. § 130.12(a); *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 94 (2d Cir. 2001) (explaining the Clean Water Act's TMDL scheme).

[24] 6 N.Y.C.R.R. § 750-1.14(a); *see also* 40 C.F.R. § 122.47(a)(1) (compliance schedules must be designed to achieve compliance "as soon as possible, but not later than the applicable statutory deadline under the CWA").

[25] 6 N.Y.C.R.R. § 750-1.14(b).

Further, to measure compliance with all permit limits and enable enforcement when there are violations, the Clean Water Act "fundamentally relies on self-monitoring" by permittees of their discharges.[26] In particular, federal regulations provide that "[a]ll permits shall specify . . . [r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity . . . ."[27] Consistent with that requirement, New York law provides that "permits shall include . . . recording, reporting, monitoring, and sampling requirements applicable under the [Clean Water] Act."[28] DEC's regulations mandate that permits "shall be subject to such requirements for monitoring the intake, discharge, waters of the State or other source or sink as may be reasonably required by the department to determine compliance with effluent

[26] *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *reinstated and amended on other grounds*, 853 F.2d 667 (9th Cir. 1988).

[27] 40 C.F.R. § 122.48(b); *see also id.* §§ 122.44(i)(1) ("[E]ach … permit shall include conditions meeting the following requirements when applicable. . . . To assure compliance with permit limitations, requirements to monitor: (i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit; (ii) The volume of effluent discharged from each outfall; (iii) Other measurements as appropriate . . . ."), 123.25(a)(15), (19) ("All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each . . . : § 122.44[;] . . . § 122.48 . . . .").

[28] ECL § 17-0815(8).

limitations and water quality standards that are or may be [a]ffected by the discharge."[29]

One final Clean Water Act principle is at stake in this case. The law guarantees the public a meaningful opportunity to participate "in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program established by [EPA] or any State . . . ."[30] Accordingly, state law requires public notice of, and an opportunity to comment on, applications for discharge permits.[31] At the time of public notice, DEC must issue a draft permit containing all pertinent information, such as proposed effluent limitations.[32] If the public's comments raise "substantive and significant" issues, DEC is required to hold an adjudicatory public hearing on the adequacy of the draft permit.[33] These public participation requirements ensure transparency and accountability in the permitting process.

[29] 6 N.Y.C.R.R. § 750-1.13(a).

[30] 33 U.S.C. § 1251(e); *see also id.* §§ 1342(a), 1342(b)(3), 1342(j).

[31] ECL § 17-0805(1).

[32] 6 N.Y.C.R.R. § 621.7(b)(7)(i)(a), 750-1.9(a).

[33] *Id.* § 621.8(b).

B. The Permit

Petitioners challenge DEC's general permit for small MS4s, which covers more than 500 municipal storm sewer systems statewide. The Permit is DEC's third iteration of a statewide MS4 permit, each issued upon expiration of the preceding one. The Permit expires on April 30, 2015 (A. 254), at which time it will need to be extended, renewed, and/or reissued – either with or without modifications, depending, in large part, upon the outcome of this appeal.[34]

The Permit directs each municipality to develop and implement its own Stormwater Management Program that employs "best management practices" sufficient to reduce pollutant discharges to the maximum extent practicable. The Permit enumerates – typically in vague and general terms – the types of practices each municipality's program must include. But the selection of particular practices is, for the most part, left to each municipality. Municipalities obtain authorization to discharge under the Permit merely by submitting a "complete" Notice of Intent form, in which the municipality self-certifies that it has developed and will implement a Stormwater Management Program consistent with the Permit (A.

[34] Because municipal storm sewers cannot cease to operate – and because their operation necessarily entails the discharge of some amount of pollution, which requires a Clean Water Act discharge permit – no one (least of all DEC) would suggest that the current Permit either should be, or will be, allowed to terminate without a replacement permit.

255).[35] The Notice of Intent form, however, is a bare-bones checklist that does not inform DEC or the public what specific pollution control measures the municipality plans to undertake to reduce pollution and meet water quality standards (A. 552-565).[36]

The Permit authorizes municipalities to discharge without DEC ever having reviewed, much less approved as legally sufficient, the elements of their Stormwater Management Programs (A. 261). Likewise, the Permit does not afford concerned citizens an opportunity to seek a public hearing to determine whether the measures contained in a Stormwater Management Program – i.e., the particular effluent limitations that will bind the permittee – are sufficient. The Permit's vague provisions, coupled with its self-certification scheme, lacking in DEC oversight or opportunity for public hearings, enables permittees to choose and implement controls that fall short of the Clean Water Act's "maximum extent practicable" standard and fail to achieve compliance with state water quality standards.

[35] For any municipality that was authorized to discharge under the 2008 permit, the Permit provided that submission of the next, upcoming Annual Report (due in June 2010, shortly after the new Permit took effect) would function as submission of a Notice of Intent (A. 25 n.12).

[36] The Annual Report form that, for most MS4s, serves in lieu of the Notice of Intent form, is little better (A. 571-602).

The Permit applies additional requirements to municipalities whose discharges violate water quality standards, but those provisions are patently insufficient to ensure compliance with those standards. In most such cases – for MS4s discharging to the hundreds of badly polluted water bodies where DEC has not yet developed a TMDL – the Permit requires municipalities to ensure "no net increase" in their discharge of pollutants (A. 264). In other words, it allows those municipalities to continue discharging at levels that are already unlawfully high. For dozens of other MS4s, which discharge into waters where DEC has developed a TMDL, the Permit's terms concerning "Pollutant Load Reductions" purport to require compliance with the TMDLs' waste load allocations. But the Permit fails to incorporate a baseline from which to calculate the Pollutant Load Reductions (A. 328, 331-33, 337), and fails to allocate responsibility for meeting the Pollutant Load Reductions among individual MS4s (A. 322, 328, 331-333, 337), rendering them practically unenforceable.

Even if the Pollutant Load Reductions were expressed in enforceable terms, the Permit lacks lawful compliance schedules to achieve those reductions. It establishes Pollutant Load Reduction Deadlines of up to 13 years in length (A. 322, 328, 331-333, 337), but it fails to include the requisite interim compliance milestones, which must be spaced no more than nine months apart.

The Permit also does not require municipalities to conduct any monitoring of their stormwater discharges or of the pollutant levels in the water bodies to which they discharge (A. 761-764), making it impossible to determine compliance with water quality-based effluent limits.

C. Decisions Below

In January 2012, the Environmental Claims Part of the Westchester County Supreme Court granted Petitioners' Article 78 petition in part and remanded the Permit to DEC. The court found the Permit unlawful on several grounds, holding in pertinent part:

> The . . . Permit is unlawful to the extent that it incorporates a permitting scheme that creates an impermissible self-regulatory system in violation of 33 USC § 1342(p)(3)(B)(iii) and ECL 17-0808(3)(c).
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> . . .
>
> [N]othing in the . . . Permit requires DEC to review the control measures which any given MS4 operator allegedly plans to develop to ensure that such measures will in fact reduce pollutant discharge to the [maximum extent practicable] . . . . [E]ach operator that submits a complete [notice of intent] decides for itself what reduction in pollutant discharge would meet the [maximum extent practicable] standard, what control measures should be utilized, and whether that standard will in fact be met. . . . [This] does not satisfy DEC's statutory mandate (A. 19, 22-23).
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> * * *
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> The . . . Permit is unlawful to the extent that it incorporates a permitting scheme that violates the CWA's public participation requirements. . . . To the extent that the . . . Permit fails to provide an

> opportunity for public hearings on the contents of [Notices of Intent] before [municipal] operators are authorized to discharge thereunder[,] it violates both 33 USC § 1342(a)(1) and ECL 17-0805(1)(a) (A. 32-33).
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> The . . . Permit was affected by an error of law within the meaning of CPLR 7803(3) to the extent that it fails to specify schedules for covered entities to achieve compliance with applicable effluent limitations and water quality standards. . . . The . . . Permit . . . assumes that some, if not all, of the discharges by MS4s covered thereunder are not in compliance with applicable effluent limitations and water quality standards at the time of authorization, yet all of the dates for compliance provided in the . . . timetables are more than nine months from the effective date of the permit. Consequently, the specification in the permit of compliance schedules was mandatory and the failure to do so was unlawful (A. 30-31) (internal citations omitted)).

Supreme Court denied the petition as to Petitioners' remaining claims.

DEC and Petitioners cross-appealed. The Second Department denied the petition in full. It reversed Supreme Court's order with respect to the issues on which Petitioners had prevailed (including one, the compliance schedule issue, which DEC had expressly declined to appeal) and affirmed Supreme Court's order with respect to the issues on which DEC had prevailed. This Court granted Petitioners leave to appeal.

ARGUMENT

Under Article 78, where a claim is predicated on alleged misapplication of statutory or regulatory requirements to a set of undisputed facts, "[t]he issue [to be

decided by the Court of Appeals] is simply whether the [agency] properly analyzed the law."[37] Where a claim involves review of whether an agency's determination is "without foundation in fact," this Court applies the arbitrary and capricious test if, as in this case, the determination was not "made after [a] quasi-judicial hearing[]."[38] The Court is limited to reviewing the grounds the agency used to make its decisions, and cannot substitute a different reason for the decision than the one the agency used.[39]

This Court owes no deference to agency interpretations that contradict the plain meaning of the Clean Water Act or state law. It is axiomatic that, where the text of a statute is clear and unambiguous, courts must give effect to the plain meaning of the statute, not a contrary agency interpretation.[40] Likewise, if an agency interprets its own regulation in a manner inconsistent with the regulation's

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[37] *N.Y. Times Co. v. City of N.Y. Comm'n on Human Rights*, 41 N.Y.2d 345, 349 (1977).

[38] *Pell v. Bd. of Educ. of Union Free School Dist. No. 1*, 34 N.Y.2d 222, 231 (1974).

[39] *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991).

[40] *See, e.g., Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 100, 107 (1997) (applying the "long-established rule" that a court must give effect to the plain meaning of words used in a statute, rather than a contrary agency interpretation); *Brown v. N.Y. State Racing & Wagering Bd.*, 60 A.D.3d 107, 115 (2d Dep't 2009) (citing *Raritan*).

plain meaning, a court owes the agency no deference.[41] Even if a statute is ambiguous, courts should accord little or no deference to an agency's interpretation if the issue does not implicate any special competence or expertise of the agency, but rather presents a question of pure statutory interpretation.[42]

Nor does this Court owe any deference to the Appellate Division's ruling. Rather, this Court's review of the decisions below is de novo.[43]

POINT I

THE PERMIT UNLAWFULLY FAILS TO ENSURE COMPLIANCE WITH STATE WATER QUALITY STANDARDS

The Permit violates the Clean Water Act and the Environmental Conservation Law because it fails to include effluent limitations necessary to meet

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[41] *See, e.g.*, *Visiting Nurse Serv. of N.Y. Home Care v. N.Y. State Dep't of Health*, 5 N.Y.3d 499, 506 (2005); *E. Acupuncture, P.C. v. Allstate Ins. Co.*, 61 A.D.3d 202, 209 (2d Dep't 2009) (quoting *Visiting Nurse Serv.).*

[42] *See, e.g.*, *Belmonte v. Snashall*, 2 N.Y.3d 560, 566 (2004) (holding that there is little basis to rely on agency competence or expertise where the question depends only on reading a statute in light of legislative intent); *Claim of Gruber*, 89 N.Y.2d 225, 232 (1996) (holding that there is no "interpretative gap" triggering agency deference where interpretation of a statute may be resolved by considering its language, design, and purpose); *Indus. Liaison Comm. v. Williams*, 72 N.Y.2d 137, 143-44 (1988) ("As specialized knowledge is not necessarily implicated, the courts use their own competence to decide issues of law raised, since those questions are of ordinary statutory reading and analysis.").

[43] *See Mashreqbank PSC v. Ahmend Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014) ("[W]here an Appellate Division decision is premised on errors of law, this Court does not defer to it.").

state water quality standards. The courts below erred in deferring to DEC determinations that are contrary to clear statutory mandates.

The ECL provides that all SPDES permits "shall include provisions requiring compliance with . . . any further limitations necessary to insure compliance with water quality standards adopted pursuant to state law."[44] This includes, but is not limited to, any limitations "necessary to implement a total maximum daily load/wasteload allocation . . . ."[45] Likewise, federal Clean Water Act regulations, which apply to DEC-issued SPDES permits, provide that "[n]o permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."[46]

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[44] ECL § 17-0811; *see also* 6 N.Y.C.R.R. § 750-1.3(f) (stating that no SPDES permit shall issue "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States").

[45] 6 N.Y.C.R.R. § 750-1.11(a)(5)(ii); *see also id.* § 750-1.11(a)(9) (requiring that SPDES permits ensure compliance with, inter alia, 40 C.F.R. Part 122.44; in turn, 40 C.F.R. § 122.44(d)(1)(vii)(B) provides that permits must contain water quality-based effluent limitations "consistent with the assumptions and requirements of any available wasteload allocation prepared by the State and approved by EPA pursuant to 40 CFR 130.7 [concerning TMDLs]").

[46] 40 C.F.R. §§ 122.4(d), 123.25(a)(1) (rendering § 122.4 applicable to delegated state programs); *see also id.* §§ 122.44 ("[E]ach NPDES permit shall include . . . any requirements . . . necessary to: (1) Achieve water quality standards established under section 303 of the CWA . . . ."), 123.25(a)(15) (rendering § 122.44 applicable to delegated state programs); *see also* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a).

DEC does not dispute that the Permit must satisfy these water quality-based requirements.[47] To the extent the Appellate Division's opinion below suggests that MS4 permits are not bound by these requirements,[48] it was incorrect.

Moreover, regardless of the Appellate Division's rationale, that court erred in holding that the Permit "does not fail to ensure compliance with State water quality standards" (A. xviii). The Permit manifestly fails to do so. First, where MS4s discharging into the hundreds of impaired water bodies for which DEC has not yet issued TMDLs, the Permit does not mandate that they eliminate their contribution to those water quality violations. Instead, it allows them to continue their current levels of pollution. Second, for dozens of other MS4s, which discharge into impaired water bodies where DEC has issued TMDLs, the Permit's terms purport to require compliance with the TMDLs' numeric pollution reduction

[47] DEC's Mem. of Law in Opp'n to Motion for Leave to Appeal 28 (Jan. 16, 2014) ("DEC has never asserted that stormwater permits need not comply with water quality standards-based statutes and regulations . . . ."); DEC's Appellate Reply Brief at 21-22 (Oct. 25, 2012) ("A stormwater discharge permit must include conditions to bring the discharging municipality into compliance with water quality standards within a reasonable period of time.").

[48] Certain statements in the Appellate Division's opinion suggest that the court upheld the Permit because the Permit was not required to ensure compliance with water quality standards, while others suggest that the Permit was subject to – and satisfied – this requirement. (*Compare* A. xix ("Congress . . . vested the EPA and the States with discretion in imposing pollution controls sufficient to meet water quality standards . . . ."), *with* A. xviii ("[T]he General Permit does not fail to ensure compliance with State water quality standards . . . .")).

targets – but those permit terms cannot ensure compliance with water quality standards because their lack of detail frustrates accountability for any individual permittee.

A. For Most MS4s that Contribute to Violations of Water Quality Standards, the Permit Requires "No Net Increase" in Pollution Levels, Rather than the Decreases Required By Law.

DEC has identified over 200 water body segments in New York where discharges from MS4s contribute to violations of water quality standards, and for which there are no TMDLs (A. 354-361). For MS4s discharging a "stormwater pollutant of concern" (i.e., a pollutant responsible for the violation of water quality standards) into these waters, the Permit requires – "[i]n addition to implementation of the six minimum control measures" applicable to all MS4s (A. 163) – that the MS4 "must ensure no net increase in its discharge of the listed [pollutant] to that water" (A. 264). DEC conceded below that, for these MS4s, "[t]he 'no net increase' requirement is applied *rather than an explicit requirement for pollutant reduction* . . ." (A. 163 (emphasis added)).

By definition, a permit term that guarantees only "no net increase" in pollution – "rather than an explicit requirement for pollution reduction" – fails to "ensure" these MS4s will comply with water quality standards. Because DEC has identified these MS4s as causing or contributing to water quality violations, they must be required actually to *reduce* their pollution discharges to eliminate their

contribution to the impairment, regardless of whether DEC has developed a TMDL with a comprehensive pollution budget for the receiving water body.

Even in combination with other permit terms, the "no net increase" provision remains legally inadequate. In DEC's formal response to public comments on the Permit, the agency said it "believes that implementation of" the no net increase requirement and the six minimum control measures "will result in [pollutant] load reduction" to impaired water bodies (A. 717). A "belief" in "reduction" is a far cry from *ensuring* a reduction *sufficient to eliminate the permittee's contribution to water quality violations,* which DEC is indisputably required to do, under state and federal law.[49]

Notwithstanding any "belief" DEC may assert in this Court, a SPDES permit must be supported by a record, which must provide a rational basis for the agency to find that the terms and conditions of the permit satisfy all legal requirements.[50] Nothing in the record supports a conclusion that the Permit will ensure compliance with water quality standards. Indeed, the courts below did not purport to find any such evidence in the record.

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[49] ECL § 17-0811; 6 N.Y.C.R.R. § 750-1.3(f); 40 C.F.R. §§ 122.4(d), 122.44.

[50] *See, e.g., Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974); *Flacke v. Onandaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363-64 (1987).

Instead, Supreme Court credited DEC's claim that "ensur[ing] that these waters do not become more polluted while DEC continues [efforts to establish TMDLs]" is, in essence, the best DEC could do at this time (A. 29). The court concluded "that the 'no net increase' limitation represents a rational and reasonable interpretation of DEC's statutory mandate [to ensure compliance with water quality standards] during the interim . . . [until] the establishment of a TMDL" (A. 29). This was an error. Deference to DEC's statutory interpretation is not appropriate here, where the Permit directly contradicts a clear and unambiguous provision of the law. The statutory mandate to ensure compliance with water quality standards is not susceptible to an agency "interpretation" that would allow standards violations to continue indefinitely. As the Third Department has held, "there is no regulatory authority that allows for the inclusion of multiple exemptions from . . . state water quality standards in a SPDES permit."[51]

The plain language of the ECL and federal regulations, set forth above, preclude DEC's interpretation. Federal and state law require that all SPDES permits ensure compliance with standards; they do not provide for a grace period

[51] *In re Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 71 A.D.3d 235, 240 (3d Dep't 2010).

excusing permittees from compliance, simply because DEC has failed to meet its own obligations in developing TMDLs. That plain language is conclusive.[52]

Moreover, the applicable DEC regulation makes clear that the obligation to ensure water quality standards applies even in the absence of a TMDL:

> The provisions of each issued SPDES permit shall ensure compliance with all of the following, whenever applicable: . . . (5) any more stringent limitations . . . (i) necessary to meet water quality standards . . . (ii) necessary to implement a total maximum daily load/wasteload allocation . . . ; or (iii) necessary to meet any other State or Federal law or regulation.[53]

The use of the disjunctive "or" illustrates that each of these three clauses applies independently; where there is no TMDL or waste load allocation, a permit must still include such limitations as are "necessary to meet water quality standards." Reading the regulation not to require compliance with water quality standards in the absence of a TMDL would render subsection (i) superfluous, contravening a fundamental principle of textual interpretation.[54]

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[52] *Raritan Dev. Corp.*, 91 N.Y.2d at 107 ("We have provided further clear teaching and guidance that '[a]bsent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute,' because 'no rule of construction gives the court discretion to declare the intent of the law *when the words are unequivocal*' (*Bender v Jamaica Hosp.*, 40 NY2d 560, 562 [emphasis added] [citations omitted].")

[53] 6 N.Y.C.R.R. § 750-1.11(a)(5).

[54] *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 100 (1989) ("Words are not to be rejected as superfluous where it is practicable to give each a distinct and separate meaning . . . ."); *see also Garzilli v. Mills*, 250 A.D.2d 131, 137 (3rd Dep't 1998)

In addition to this plain legal error, the contrast between the Permit's "no net increase" provision and other Permit terms related to water quality violations shows that the "no net increase" standard is arbitrary and capricious. The section of the Permit preceding the "no net increase" provision states:

> Where a discharge is already authorized under this SPDES general permit and is *later* determined to directly or indirectly cause or have the reasonable potential to cause or contribute to the violation of an applicable water quality standard, . . . [t]he covered entity must take all necessary actions to ensure future discharges do not directly or indirectly cause or contribute to the violation of a water quality standard.

(A. 263 (emphasis added)). Thus, even in the absence of a TMDL, the Permit requires an MS4 to eliminate discharges that contribute to a water quality standard violation, if that violation is discovered *in the future*. But if the same MS4's contribution to a water quality violation *had already been identified* when DEC issued the Permit, the MS4 would be required only to ensure "no net increase" in its pollution levels. This distinction is entirely irrational. It belies DEC's claim that nothing more can be done absent a TMDL.

Other states' MS4 general permits also disprove this claim, by requiring permittees to remedy their contributions to violations of water quality standards even when no TMDL exists. For example, the MS4 general permits for Vermont

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("Generally, the same canons of construction are applicable to legislation and administrative regulations . . . .").

and Mississippi, as well as a pending draft permit for New Hampshire, all contain explicit prohibitions against causing violations of standards, regardless of the existence of TMDLs.[55] The Vermont and New Hampshire permits specifically require MS4s discharging into waters without TMDLs to develop and implement plans to remedy the violations.[56] By showing that compliance with standards can be required even in the absence of a TMDL, these other permits plainly show that the Permit's "no net increase" provision is arbitrary and capricious.

Finally, were DEC's position to prevail on this issue, it would truly represent a case of "justice delayed is justice denied." Sixteen years ago, a lawsuit challenging DEC's failure to develop TMDLs culminated in DEC's commitment to an eight-year timeline for completing TMDLs for all water bodies on the state's

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[55] Vt. Agency of Natural Resources, NPDES General Permit 3-9014, at 9 (2012), *available at* http://www.vtwaterquality.org/stormwater/docs/ms4/sw_Final_MS4_permit_12_5_12_adminrevised.pdf (hereinafter Vermont Permit); U.S. EPA, New Hampshire Small MS4 Draft General Permit at 13 (2013), *available at* http://www.epa.gov/region1/npdes/stormwater/nh/2013/NHMS4-NewDraftPermit-2013.pdf (hereinafter New Hampshire Draft Permit); Mississippi Environmental Quality Permit Board, Mississippi Small MS4 General Permit at 4 (2009), *available at* http://www.deq.state.ms.us/mdeq.nsf/pdf/epd_MS4PhaseIIStormWaterGeneralPermit/$File/22General.pdf?OpenElement. The Court can take judicial notice of these government documents and all other MS4 permits cited herein. *See* footnote 19, *supra*.

[56] Vermont Permit at 16; New Hampshire Draft Permit at 17-23.

list of impaired waters.[57] DEC did not meet this timeline.[58] Instead, the record shows that at least 55 water bodies on DEC's 2008 list of impaired waters had been awaiting a TMDL since that lawsuit concluded a decade earlier (A. 1044-1065). Moreover, while Appendix 2 of Permit identifies 292 water quality violations as awaiting TMDLs to address stormwater pollution (A. 354-361), DEC has completed TMDLs for only nine of these in the four years since it issued the Permit.[59] At a rate of nine completed every four years, it would take DEC 129 years to develop TMDLs to address all of the water quality violations listed in

[57] *Natural Res. Def. Council, Inc. v. Fox*, 30 F. Supp. 2d 369, 379 (S.D.N.Y. 1998) ("[T]he State . . . executed a Memorandum of Agreement establishing a schedule for development of all TMDLs by December 31, 2005, and, even more recently, has established a rolling schedule for completion of all TMDLs by 2008"); *aff'd Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

[58] Letter from Sandra Allen, Director, Division of Water, N.Y. State Dep't of Envtl. Conservation, to Walter Mugdan, Director, Division of Envtl. Planning & Prot., U.S. EPA Reg. II, "Schedule for Development of TMDLs and/or Other Appropriate Strategies" (May 12, 2005) (ADD. 1-23). The Court can take judicial notice of this government document. *See* footnote 19, *supra*.

[59] N.Y. State Dep't of Envtl. Conservation, "Total Maximum Daily Loads (TMDLs)," http://www.dec.ny.gov/chemical/23835.html (last visited Aug. 12, 2014). Appendix 2 of the Permit contains 292 pollutant/water body combinations that require TMDLs. The seven TMDLs that DEC has finalized since issuance of the Permit address nine of those pollutant-water body combinations.

Appendix 2.[60] New Yorkers should not have to wait that long for clean water. The Clean Water Act exists to ensure they do not.

B. For MS4s that Contribute to Violations of Water Quality Standards in Waters with TMDLs, the Permit Fails to Ensure Compliance with Applicable Waste Load Allocations.

State and federal law mandate that, where DEC has established a TMDL for an impaired water body, SPDES permits must ensure that MS4s will achieve waste load allocations, the numeric pollutant limits that the TMDL identifies as needed to comply with water quality standards. Specifically, DEC regulations, derived from federal law, provide that "[t]he provisions of each issued SPDES permit shall ensure compliance with . . . any more stringent limitations . . . necessary to implement a . . . total maximum daily load/wasteload allocation . . . ."[61] Because the Permit does not translate TMDLs' waste load allocations into performance targets that individual MS4s can be held accountable for meeting, it fails this test.

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[60] Because state and federal law require DEC to issue a Permit that ensures compliance with water quality standards – regardless of whether a TMDL has been developed – Petitioners need not obtain here, and do not seek from this Court, any judicial relief to compel the development of TMDLs.

[61] 6 N.Y.C.R.R. § 750-1.11(a)(5)(ii). *See also id.* § 750-1.11(a)(9) (requiring that SPDES permits ensure compliance with, inter alia, 40 C.F.R. Part 122.44; in turn, 40 C.F.R. § 122.44(d)(1)(vii)(B) provides that permits must contain water quality-based effluent limitations "consistent with the assumptions and requirements of any available wasteload allocation prepared by the State and approved by EPA pursuant to 40 CFR 130.7 [concerning TMDLs]").

Each of the applicable TMDLs expressed waste load allocations in the form of a "percentage reduction," from a defined baseline, of the aggregate pollution loading from all MS4s to a given water body. (These TMDLs were adopted prior to the Permit and are not challenged in this case.) In two critical respects, the Permit fails to implement these waste load allocations.

First, the Permit, unlike the TMDLs, fails to specify baseline levels of pollution from which the percentage is to be calculated (A. 322, 328, 331-333, 337). The Permit refers to the TMDLs' waste load allocations as "Pollutant Load Reductions" and, for each water body, establishes a mandatory "Pollutant Load Reduction Deadline" (A. 321). But the Permit does not say whether the baselines for measuring compliance with the Pollutant Load Reductions are the discharge levels on the date of permit issuance (which are not quantified anywhere in the Permit or in the record), or the baseline levels utilized in the TMDLs (which are stated in the TMDLs, but not in the permit), or some other yardstick altogether.

The Permit's Pollutant Load Reduction Deadlines would be unenforceable without defined baselines from which the percentage reductions are to be measured. DEC does not, apparently, dispute that fact. And DEC has never contended that the Permit itself defines the necessary baselines. Instead, DEC explained to Supreme Court that that the baselines set forth in the TMDLs must be used; based on DEC's representation, Supreme Court held that the failure to

specify a baseline in the Permit was not unlawful (A. 30). If this Court definitively construes the Permit's Pollutant Load Reductions as incorporating the baselines from the TMDLs, then Petitioners' legal claim on this point would be satisfied. However, on a plain reading of the Permit language, there is no indication that the TMDLs' baselines – or any other baselines – are enforceable under the Permit. As such, the Pollutant Load Reduction Deadlines are unenforceable, rendering the Permit arbitrary, capricious, and contrary to law.

Second, even if the Permit's Pollutant Load Reductions had a defined baseline, the Permit does not allocate responsibility for achieving those reductions among individual MS4s. Rather, it expresses the Pollutant Load Reductions only as an aggregate of discharges from all MS4s, cumulatively, to each affected water body (A. 322, 328, 331-333, 337). While this approach may suffice for the expression of waste load allocations in a TMDL, it does not suffice for a SPDES permit. Permits must establish, for each permittee, "limitations . . . necessary to *implement* a . . . wasteload allocation."[62] A TMDL is not self-implementing.[63] Where a TMDL provides waste load allocations in the aggregate for a category of dischargers, such as MS4s, a SPDES permit cannot merely 'cut and paste' from the

[62] 6 N.Y.C.R.R. § 750-1.11(a)(5)(ii) (emphasis added).

[63] *See* Water Quality Planning and Management, 50 Fed. Reg. 1774, 1774 (Jan. 11, 1985) ("Once a TMDL has been completed, a wasteload allocation or load allocation (WLA/LA) for that TMDL forms the basis for permit limitations for individual dischargers.").

TMDL. Rather, the permit writer is responsible for developing permit limits, enforceable against the permittee, that implement the waste load allocation.

Because the Permit's Pollutant Load Reductions merely duplicate the TMDLs' *aggregate* waste load allocations, the Permit provides no metric by which *each MS4's* compliance can be determined. Consider, for example, nitrogen discharges to Peconic Bay, for which the Pollutant Load Reduction is 15 percent (A. 337). The Permit identifies at least three MS4s subject to this Pollutant Load Reduction (A. 367). Are they jointly and severally liable for achieving the 15 percent reduction? If two of the MS4s reduce their pollution by 15%, but the third only by 10%, are they all in violation because the Pollutant Load Reduction – which the Permit assigns to "Peconic Bay," rather than to any individual MS4 – has not been met? In that situation, would the first two be penalized for the performance of the third? Alternatively, suppose two of the MS4s reduce their pollution by 30%, and the third one by 5%, but the resulting aggregate reduction to Peconic Bay exceeds 15 percent. Is the third MS4 in compliance with the permit, despite being a free-rider on the backs of the other two? Without knowing the answer to these questions – which the Permit does not provide – how is any single MS4 to know what it must do to comply with the Permit? How is DEC (or EPA,

or citizen groups, which also have rights to enforce permit violations[64]) to know when an MS4 has violated Pollutant Load Reduction Deadlines? How is a court to know? The Permit fails as a matter of law because it provides no answers to these basic questions.

When DEC issued the Permit, it was not lost on the agency that Pollutant Load Reductions would need to be allocated to each individual MS4. Indeed, the Permit itself states that "[e]ach regulated MS4 is responsible for an individual load reduction, which is a fraction of the total required load reduction in the TMDL" (A. 265). But what is that fraction for any given MS4? The Permit does not say; nor does any other document in the record.

Instead, facing questions from both Petitioners and the regulated community of municipalities, DEC claimed that, in a separate process following Permit issuance, it "will provide the per MS4 allocation based on the contributing areas of each MS4, estimated time frame for compliance, the pollutant contribution from each MS4, etc." (A. 729; *see also* A. 728, 734). There is no evidence DEC has done so, more than four years into the five-year term of the Permit.[65] In any event,

[64] *See* 33 U.S.C. § 1319(a) (authoring EPA enforcement of state-issued permits); *id.* § 1365 (a)(1) (authorizing citizen enforcement).

[65] Upon issuing the Permit, DEC stated that allocations would be made "as part of Watershed Improvement Strategy guidance," which was then under development. (A. 734). DEC has since issued a guidance document addressing the development of "retrofit plans," which are a requirement component of Watershed Improvement

state and federal law are clear that SPDES *permits* must include all terms necessary to implement a TMDL waste load allocation. The Permit here fails that test.

POINT II

THE PERMIT FAILS TO ESTABLISH THE NECESSARY COMPLIANCE SCHEDULES, AND DEC ABANDONED ITS APPEAL OF THIS ISSUE

Supreme Court ruled that the Permit failed to establish compliance schedules for MS4s to achieve compliance with applicable limitations, as required by 6 N.Y.C.R.R. § 750-1.14, and ordered DEC to revise the Permit accordingly (A. 30-31). Although DEC expressly abandoned its appeal as to that issue, the Appellate Division reversed the trial court's ruling without any briefing or argument on the point (A. xviii). As explained below, this Court should reinstate Supreme Court's ruling on this issue because DEC abandoned its appeal and because the ruling was correct.

Strategies. That guidance, however, applies only to certain permittees located on Long Island and, even for those MS4s, does not provide individual pollutant reduction allocations. Instead, the guidance describes such allocation as a task DEC will complete at some unspecified date in the future, after the MS4s submit additional information to DEC. N.Y. State Dep't of Envtl. Conservation, *Retrofit Program Plan Guidance Document for Pathogen Impaired Watershed MS4s on Long Island* 5 (Dec. 2013), *available at* http://www.dec.ny.gov/docs/water_pdf/rppgdpiwms4li.pdf.

A. DEC Abandoned its Appeal of Supreme Court's Ruling on Compliance Schedules.

Petitioners alleged that the Permit failed to incorporate a sufficient schedule of compliance for achieving Pollutant Load Reductions.[66] The parties briefed this issue before the trial court.[67] Supreme Court ruled in Petitioners' favor:

> The 2010 MS4 Permit was affected by an error of law within the meaning of CPLR 7803(3) to the extent that it fails to specify schedules for covered entities to achieve compliance with applicable effluent limitations and water quality standards. In general, as DEC contends (see MOL Opp at 30), the inclusion of compliance schedules in a SPDES permit is not mandatory. . . . However, "[w]ith respect to any discharge that is not in compliance with applicable limitations, applicable water quality standards, or other applicable requirements, [DEC] shall establish specific steps in a compliance schedule designed to attain compliance within the shortest reasonable time." 6 NYCRR 750-1.14(a). And where the time in which compliance must be attained exceeds nine months, "a schedule of compliance shall be specified in the permit." 6 NYCRR 750-1.14(b). The inclusion in the 2010 MS4 Permit of timetables for the submission of [Watershed Improvement Strategies[68]] and achievement of [Pollutant Load Reductions] assumes that some, if not all, of the discharges by MS4s covered thereunder are not in compliance with applicable effluent limitations and water quality standards at the time of authorization,

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[66] A schedule of compliance (or a compliance schedule) is "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 6 N.Y.C.R.R. § 750-1.2(a)(74); *see also* 33 U.S.C. § 1362(17).

[67] Petitioners' Sup. Ct. Opening Brief at 36-38 (Nov. 5, 2010); DEC's Sup. Ct. Brief at 30 (Jan. 10, 2012); Petitioners' Sup. Ct. Reply Brief at 16-17 (Mar. 2, 2011).

[68] The Permit defines Watershed Improvement Strategies as plans for achieving Pollutant Load Reductions (A. 321).

> yet all of the dates for compliance provided in the [Watershed Improvement Strategy] and [Pollutant Load Reduction] timetables are more than nine months from the effective date of the permit. (See 2010 MS4 Permit, Part IX, Rec Ex at 68-86 [A. 321-329]). Consequently, the specification in the permit of compliance schedules was mandatory and the failure to do so was unlawful.

(A.30-31 (bracketed material within internal quotations in original)).

In its opening brief below, DEC informed the Appellate Division that "DEC does not challenge this aspect of the trial court's ruling on appeal."[69] DEC's reply brief reiterated that it had abandoned the issue, stating that DEC "will implement that aspect of the ruling on remand."[70] Therefore, neither party briefed or argued this issue before the Appellate Division.

Nonetheless, the Second Department stated incorrectly that that "DEC appeals from so much of the order and judgment . . . as was adverse to it" (A. xiv), and proceeded summarily to reverse Supreme Court's decision on the compliance schedule issue, in a two-sentence ruling:

> The order and judgment of the Supreme Court was also in favor of the petitioners and against the DEC declaring that the general permit failed to specify compliance schedules with respect to effluent limitations and water quality standards, as required by 6 NYCRR 750-1.14). The General Permit did not, however violate that provision (*see Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 US 837, 842-843; 40 CFR 123.35[e]).

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[69] DEC's Appellate Opening Brief at 27 n.38 (Aug. 22, 2012).

[70] DEC's Appellate Reply Brief at 25 n.42 (Oct. 25, 2012).

(A. xviii).

Because DEC did not appeal the compliance schedule issue, the Second Department should have deemed it abandoned and not ruled on it. Failure to challenge a lower court ruling on an issue in an appellate brief routinely results in the abandonment of that issue on appellate review.[71] Moreover, as noted, because DEC did not appeal this issue, Petitioners had no opportunity to brief or argue it before the Second Department. The reversal was therefore improper.

On December 16, 2013, Petitioners filed a motion to reargue on the grounds that the Second Department had overlooked or misapprehended DEC's failure to appeal that issue. Petitioners asked the Second Department to dismiss as abandoned the branch of DEC's appeal that relates to compliance schedules.[72]

DEC did not oppose the motion to reargue, but rather conceded again that the trial court's ruling should stand:

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[71] *See, e.g.*, *Nassau Point Prop. Owners Ass'n, Inc. v. Tirado*, 29 A.D.3d 754, 757 (2d Dep't 2006) ("Since the plaintiff did not raise the issue of ownership in its brief, the plaintiff abandoned this issue and thus effectively conceded ownership of the disputed street to the defendants." (internal citation omitted).); *Poughkeepsie-Highland R.R. Bridge Co., Inc. v. Cent. Hudson Gas & Elec. Corp*., 278 A.D.2d 468, 470 (2d Dep't 2000) ("Initially, we note that PHRB failed to raise any issues concerning the amended order dated July 28, 1999, in its brief. Accordingly, its cross appeal from that order is deemed abandoned. . . .").

[72] Petitioners informed this Court of their motion to reargue in: (i) their Motion for Leave to Appeal, at 25-26; (ii) an April 7, 2014, letter responding to a March 31, 2014 letter from Chief Clerk Andrew W. Klein; and (iii) their Preliminary Appeal Statement, at Question 11.

> DEC acknowledges that its brief on appeal did not argue that the trial court had erred in ruling (J.A. 31) that the compliance schedules set out in its general permit did not comply with 6 N.Y.C.R.R. § 750-1.14. Instead, the agency stated that it did "not challenge [that] aspect of the trial court's ruling on appeal," Opening Br. for DEC, at 27 n.38 (Aug. 22, 2012), and stated that it "will implement that aspect of the ruling on remand." Reply & Opp'n Br. for DEC, at 25 n.42 (Oct. 25, 2013). Accordingly, DEC does not oppose the specific relief sought in petitioners' motion for reargument, *i.e.*, that this Court "dismiss as abandoned the branch of DEC's appeal that relates to the compliance schedules required by 6 N.Y.C.R.R. § 750-1.14." Petitioners' Mem. at 4.[73]

The Appellate Division has not yet decided the motion to reargue.

Accordingly, because DEC has stated on multiple occasions that it did not appeal the trial court's ruling with respect to compliance schedules and will implement that ruling on remand, this Court should reverse the Second Department's decision and reinstate Supreme Court's ruling on that issue, thereby directing DEC to revise the Permit to establish schedules of compliance that meet all of the requirements of 6 N.Y.C.R.R. § 750-1.14.

B. The Permit Fails to Include Lawful Compliance Schedules.

This Court need not reach the merits of the compliance schedule issue. If, however, this Court chooses to consider the merits, it should affirm the trial court's ruling as correct on the law.

Federal and state law allow DEC to issue or renew a SPDES permit even if

[73] Affirmation [of DEC] in Response to Motion for Reargument, at 2-3, ¶ 3 (Jan. 16, 2014).

the discharger cannot immediately comply with water quality standards – but only if the permit contains certain requirements (A. 122-24). In particular, Section 750-1.14 of the New York State SPDES regulations provides in relevant part:

> (a) . . . With respect to any discharge that is not in compliance with applicable limitations, applicable water quality standards, or other applicable requirements, the department *shall* establish specific steps in a compliance schedule designed to attain compliance within the shortest reasonable time, consistent with the [Clean Water] Act and ECL, Article 17.
>
> (b) Where the time for compliance specified in subdivision (a) of this section exceeds nine months, a schedule of compliance *shall* be specified in the permit, which will set forth interim requirements and the dates for their achievement. In no event shall more than nine months elapse between interim dates. . . .[74]

It is undisputed that the Permit authorizes discharges that are presently violating water quality standards. Some of these discharges flow into water bodies with TMDLs, which specify the level of pollution reduction needed to comply with water quality standards. In these instances, the Permit sets deadlines, ranging up to 3 years, for MS4s to submit plans (called "Watershed Improvement Strategies" and "Retrofit Plans") describing how they will achieve Pollutant Load Reductions derived from the TMDLs. The Permit also sets Pollutant Load Reduction Deadlines, ranging up to 13 years, for the ultimate achievement of pollution limits needed to comply with water quality standards (A. 322, 328, 331-333, 337). But

[74] 6 N.Y.C.R.R. § 750-1.14(a), (b) (emphasis added); *see also* ECL § 17-0813(2).

the Permit does not impose a "compliance schedule," as that term is defined by state and federal law and regulations, to meet those deadlines.

In particular, the permit fails to set forth, as required by law, "specific steps,"[75] including "interim requirements and the dates for their achievement" not more than nine months apart,[76] that constitute "remedial measures including an enforceable sequence of actions or operations leading to compliance" with water quality standards.[77] The Permit lacks, for example, any interim pollution reduction targets or other benchmarks, such as numbers of pollution control measures installed, by which progress could be judged and MS4s held accountable. The Permit does not even indicate how much of the long-term pollution reduction MS4s must achieve by the end of the five-year term of the Permit.

Accordingly, if the Court finds occasion to consider the merits of this issue, it should remand the Permit for failure to contain lawful schedules of compliance.

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[75] 6 N.Y.C.R.R. § 750-1.14(a); ECL § 17-0813(2). *See also* 40 C.F.R. § 122.47(a) ("The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.").

[76] 6 N.Y.C.R.R. § 750-1.14(b).

[77] 6 N.Y.C.R.R. § 750-1.2(a)(74); 33 U.S.C. § 1362(17).

POINT III

THE PERMIT CREATES AN IMPERMISSIBLE SELF-REGULATORY SYSTEM AND VIOLATES PUBLIC PARTICIPATION REQUIREMENTS

The trial court correctly ruled that, by allowing permittees to set their own pollution control requirements without review and approval by DEC, the Permit "creates an impermissible self-regulatory system" (A. 19, 33). The issue is straightforward: All SPDES permits must include effluent limitations. In the municipal stormwater context, effluent limitations must reduce the discharge of pollutants to the "maximum extent practicable" and also ensure compliance with water quality standards. The permitting agency, not the permittee, must establish these limitations, subject to opportunities for public comment and public hearing.

Accordingly, when issuing a general permit for MS4s, DEC has two permissible options for establishing effluent limitations. It can either (i) set forth in the permit specific, objective and enforceable control requirements that it has determined will meet the applicable legal standards; *or* (ii) issue a more flexible permit that affords each MS4 a larger role in developing its own pollution controls, *provided that* DEC reviews the MS4's proposed controls and approves them, with any modifications necessary to ensure they meet the applicable legal standards.

Here, DEC chose neither option. Hence the Permit is unlawful, as several federal and state courts have held when reviewing similar permitting systems.

A. The Permit Unlawfully Allows Permittees to Decide for Themselves, Without DEC Review or Oversight, What Pollution Controls Satisfy Statutorily Mandated Standards.

New York law requires that SPDES permits "shall contain applicable effluent limitations as required by the [Clean Water] Act and as may be promulgated by [DEC]."[78] As discussed above, an "effluent limitation" is a numeric or narrative pollution control requirement.[79] Permits authorizing stormwater discharges from MS4s, in particular, "[s]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design and engineering methods, and such other provisions as the commissioner [of DEC] determines appropriate for the control of such pollutants."[80] As EPA explained upon issuing the small MS4 regulations, "*the NPDES permitting authority* will establish requirements for each of the minimum control measures."[81] In addition, as

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[78] ECL § 17-0809(1).

[79] ECL § 17-0105(15) ("any restriction"); 40 C.F.R. § 122.34(a) ("[N]arrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations [for small MS4s] . . . ."). *See also Citizens Coal Council v. EPA*, 447 F.3d 879 (6th Cir. 2006) (en banc) (upholding EPA's inclusion of both numeric and non-numeric (best management practice) effluent limitations in effluent limitation guidelines for the coal mining industry).

[80] ECL § 17-0808(3)(c); *see also* 33 U.S.C. § 1342(p)(3)(B)(iii).

[81] National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Stormwater Discharges, 64 Fed.

discussed above, DEC is required to establish in an MS4 permit any additional "limitations necessary to insure compliance with water quality standards adopted pursuant to state law."[82]

Thus, federal and state law both clearly mandate that the *permit writer* – not the permit applicant – must determine which pollution controls will be necessary and sufficient to ensure that each MS4 will reduce its stormwater pollution to the maximum extent practicable and comply with water quality standards.

The Permit fails this test. It does not ensure that each MS4 will implement specific pollution controls that DEC has found sufficient to satisfy the mandates of the Clean Water Act and the ECL.

The Permit directs each MS4 operator to develop its own Storm Water Management Program (SWMP), documented in a Storm Water Management Program Plan (SWMP Plan), that describes how the MS4 will control stormwater pollution (A. 267-70, 321).[83] This is not itself unlawful or objectionable. Indeed,

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Reg. 68,722, 68,754 (Dec. 8, 1999) (emphasis added). EPA's comments in 2009 to DEC on the draft of the General Permit also emphasized this point: "NYSDEC should determine what is the MEP not the permittee, and the general permit should, to the extent practicable, specify in objective terms what is expected of an MS4 in order to meet the MEP standard" (A. 842).

[82] ECL § 17-0811; *see also* 40 C.F.R. § 122.44.

[83] *See also* DEC's Sup. Ct. Brief at 6 (Jan. 10, 2011) (The General Permit "principally operates by requiring each MS4 operator to create a [SWMP] . . . .").

affording MS4 operators a role in developing stormwater pollution controls, tailored to their particular circumstances, is laudable and can be an effective approach. It would be legally permissible here, *if* the Permit had preserved DEC's essential role as the permitting authority – to declare, prospectively (not merely retrospectively through audits or enforcement actions), whether a permittee's proposed pollution controls are necessary and sufficient to satisfy statutory requirements. Instead, DEC abdicated this responsibility – a choice it was not authorized to make.

Many of the Permit's key provisions are so hopelessly vague that, absent DEC review and approval of each SWMP, the Permit provides no assurance that MS4s will select controls that reduce their stormwater pollution to the maximum extent practicable and comply with water quality standards. The Permit provides that each MS4's SWMP must be "designed to reduce the discharge of pollutants . . . to the maximum extent practicable" (A. 267), but provides no objective definition of that standard. Rather, the Permit's definition of "maximum extent practicable" states:

> Since *no precise definition of MEP exists*, it allows for *maximum flexibility on the part of MS4 operators* as they develop their programs. . . . When trying to reduce pollutants to the MEP, there must be a serious attempt to comply, and practical solutions may not be lightly rejected. If a covered entity chooses only a few of the least expensive methods, it is likely that MEP has not been met. On the other hand, if a covered entity employs all applicable BMPs except those where it can be shown that they are not technically feasible in

> the locality, or whose cost would exceed any benefit to be derived, it would have met the statndard [sic]. MEP required covered entities to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive.

(A. 344, emphasis added). This so-called definition is rife with qualitative language that can only be applied through the exercise of substantial discretion – e.g., "*serious attempt* to comply," "only *a few* of the least expensive methods," "where it *can be shown*," "*effective*," "technically *feasible*," "cost would be *prohibitive*." Yet the Permit calls on MS4s, rather than DEC, to make those qualitative judgments and exercise that discretion.

Part VII of the Permit provides some additional guidance. But this section, too, leaves virtually all of the critical decisions to the permittees. It provides that each SWMP "must be comprised of the 6 [minimum control measures]" (A. 281).[84] Then, for each of the six minimum measures, the Permit directs MS4s to: "Select and implement appropriate . . . [activities and/or best management practices] and measurable goals to ensure the reduction of all [pollutants of concern] in stormwater discharges to the [maximum extent practicable]" (A. 282, 286, 288, 292, 296, 299; Permit Parts VII.A.1.d, VII.A.2.f, VII.A.3.k, VII.A.4.a.xiv,

[84] Words in brackets are a full version of an acronym used in the Permit (i.e., MCM).

VII.A.5.d, VII.A.6.d).[85] This vague language provides no objective standard to guide permittees' selection of practices – or even their selection of *goals* that those measures must achieve[86] – leaving it entirely to the permittees to discern the level of effort or results that would represent the "maximum extent practicable."

Part VII also includes, for each of the six minimum measures, *types* of activities or best management practices that must be included in the SWMP. But many of these are vague at best, and circular at worst.[87] The most specific provisions are those that cross-reference standards from other DEC technical standards, model ordinances, or permits (A. 287, 290-91, 293, 294, 295-96, 298, 299; Permit Parts VII.A.3.f, VII.A.4.a.i, VII.A.4.a.iii, VII.A.4.a.vii, VII.A.4.a.ix,

[85] Phrases in brackets are full versions of the acronyms used in the permit (*i.e.*, BMP, POCs, MEP).

[86] Other than meeting the Permit's "definition" of the maximum extent practicable standard, the Permit provides no metric to evaluate the adequacy of a "measurable goal." It defines the term "measurable goals" in a circular fashion, as "the goals of the SWMP that should reflect the needs and characteristics of the covered entity and the areas served by its small MS4. Furthermore, the goals should be chosen using an integrated approach that fully addresses the requirements and intent of the [minimum control measure]" (A. 344).

[87] For example, for the minimum control measure concerning "illicit discharge detection and elimination," only a few provisions related to actual elimination of illicit discharges (as opposed to merely detecting them). But those provisions add little or nothing to the vague permit provisions quoted above. For example, Part VII.A.3.g provides that permittees must "develop . . . and implement a program . . . [that] must include: . . . procedures for eliminating illicit discharges" (A. 309) – i.e., it specifies only that pollution reduction measures must be comprised of "procedures."

VII.A.5.a.i, VII.A.5.a.iii, VII.A.5.a.iv (second bullet), VII.A.5.a.v-vii, VII.A.6.a.iii, VII.A.6.a.viii). But nearly all of those provisions describe the referenced materials merely as "guidance" or allow the permittee to adopt some alternative approach, such as any approach the permittee deems "equivalent" (*id.*).[88]

Still, it is not the vagueness of the Permit terms, alone, that renders the Permit an unlawful self-regulatory scheme. DEC could lawfully allow MS4 operators to choose their own stormwater controls in the absence of objective criteria in the Permit *if* (and only if) DEC were to review and make a determination as to whether the proposed controls will satisfy the statutory standards.

But DEC failed to provide for that necessary oversight as well. MS4s obtain authorization under the Permit by submitting a Notice of Intent (NOI), which serves as "an affirmation that an initial SWMP has been developed and will be implemented in accordance with the terms of th[e] SPDES general permit" (A. 255, 261). DEC does not substantively evaluate the NOI form – or Annual Report that, in 2010, served as the NOIs for most MS4s (A. 261) – to determine whether it meets legal standards. It reviews the forms only for "complete[ness]," to verify that no question was left blank (*see* A. 261-63). Nor does DEC review permittees' SWMPs to determine whether they are adequate before granting discharge

[88] Further, even if use of the cross-referenced materials were mandatory, many of those materials suffer from the same sort of vagueness as the Permit, or are even inconsistent with the Permit (A. 883 n.2 & 891 (section X)).

authorization, since the Permit nowhere requires submission of the full SWMP Plans (*see* A. 267).

Moreover, DEC's NOI and Annual Report forms do not request sufficient information to determine the adequacy of an MS4's pollution control measures, even if DEC reviewed MS4s' submissions for that purpose before granting authorization to discharge.

The NOI is a simple form, consisting primarily of a bare-bones checklist, which demands virtually no detail about MS4's pollution control measures beyond the vague terms set forth in the Permit itself. The substantive portion of the NOI form (i.e., apart from pages seeking basic identifying information about the submitter) paraphrases items (selectively) from the Permit's "Minimum Control Measures" sections and instructs each MS4 to "[c]heck the management practices that you have selected to meet the requirements for each Minimum Control Measure" (A. 552-65 (form), A. 566 (instructions)). It requests no narrative explanations, except for a one-third of a page space, for each of the six minimum measures, where the form instructs the MS4 to "[p]rovide a narrative description of the measurable goals, with start and end dates, that will be used for each best management practice" (A. 563-64 (form), A. 566 (instructions)).[89]

[89] The fine print in the instructions allows MS4s to "[a]ttach additional pages as necessary" (A. 566); the unmistakable impression the form leaves, however, is that one-third of a page is generally sufficient from DEC's perspective. Indeed, since

The Annual Reports filed in lieu of an NOI are similarly insufficient to evaluate compliance with applicable statutory standards. DEC's Annual Report form, like the NOI, seeks little narrative description of an MS4's SWMP. It consists largely of "fill-in-the-blank" and "checkbox" questions, with no room for explanation; these provide, at best, a limited snapshot in time of certain activities (e.g., number of miles of streets swept in the last year), rather than a description of an overall stormwater management program (A. 571-602).

DEC points to its random, *after-the-fact* compliance audits and enforcement actions as a viable mechanism to ensure that SWMPs are meeting applicable regulatory standards (A. 165). But this approach – permit first, and determine pollution controls later – turns the NPDES program on its head. The United States Supreme Court has explained that the core function of a NPDES permit is to

> transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger . . . . In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Clean Water Act].[90]

DEC reviews the forms only for "completeness," one must assume that filling in the blank space with *anything*, rather than nothing, would be deemed sufficient.

[90] *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976); *see also id.* at 202-03 (describing how Congress designed the NPDES permitting program to replace an earlier system that had made it "very difficult to develop and enforce standards to govern the conduct of individual polluters" and was "inadequate in every vital aspect").

DEC's approach flies in the face of this carefully constructed statutory scheme. DEC failed to use the Permit, and the process of authorizing MS4 discharges thereunder, to "transform generally applicable . . . standards . . . into the obligations . . . of the individual discharger[s]." Rather, it used the Permit to instruct MS4s to develop their own particularized obligations consistent with generally applicable standards, subject to DEC's oversight only after the MS4s receive authorization to discharge. This is unlawful. DEC cannot rely on subsequent audits and enforcement activities to do the job the agency was required to do upon authorizing discharges under the Permit.

Further, as a practical matter, random audits cannot guarantee compliance by all MS4s. By DEC's own account, the agency audits "up to 10% of all MS4s each year" (A. 165). Thus, at least half of all MS4s will never be audited during the Permit's five-year term.

In sum, when DEC authorized cities and towns across the state to discharge stormwater pollution into local water bodies, it had only the vaguest idea of what pollution controls those MS4 operators would implement. What little information DEC did have, in an NOI or Annual Report submitted in lieu of an NOI, was deemed of no consequence to these MS4s' entitlement to discharge under the permit, so long as the MS4 left no questions blank on the NOI or Annual Report form. With regard to most of the 513 municipalities covered by the Permit, DEC

likely has just as little information about their stormwater programs today. Without soliciting more information about each permittee's pollution controls – whether in the form of a full SWMP or, potentially, a much more detailed NOI – DEC cannot determine whether every permittee's pollution controls are legally sufficient. Delegating to the permittees the crucial task of developing pollution controls without providing objective standards for them to follow, or subjecting their choices to scrutiny before authorizing a discharge, violates the spirit and the letter of the law.

B. The Permit Violates Public Participation Requirements by Failing to Provide Opportunities for Public Comment and Hearing on MS4s' Pollution Control Plans.

Not only does DEC fail to adequately review municipalities' proposed pollution controls, but the Permit's self-regulatory system also deprives members of the public of their rights to contest the sufficiency of those controls. It is a bedrock principle of the Clean Water Act that the public be guaranteed the opportunity to participate "in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program established by [EPA] or any State . . . ."[91] The United States Supreme Court has emphasized Congress's

[91] 33 U.S.C. § 1251(e). Section 1342(b)(3) requires States "[t]o insure that the public, and any other State the waters of which may be affected, receiving notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application." *See also id.* §§ 1342(a), 1342(j).

intent that public participation, including opportunities for public hearings on proposed permits, is "an essential element of the NPDES program."[92]

Courts have consistently held that "[d]enying citizens any opportunity to register their opinions, submit evidence, or challenge the environmental conclusions reached by the government or permit applicants would . . . undermine one of the foundations of the Clean Water Act, the public's role in safeguarding the integrity and security of our nation's waters and wetlands."[93]

The public's pivotal role in development of effluent limitations is likewise enshrined in the ECL, which specifically requires public notice of, and an opportunity to comment on, applications for SPDES permits.[94] As Supreme Court correctly held, this requirement also applies to NOIs, which are "functionally equivalent to detailed applications for individual NPDES permits" (A. 33).

At the time of public notice, DEC must issue a draft permit containing all

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[92] *Costle v. Pac. Legal Found.*, 445 U.S. 198, 216 (1980).

[93] *Orange Env't, Inc. v. County of Orange*, 811 F. Supp. 926, 935 (S.D.N.Y. 1993); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, No. 06-3601, 2008 WL 5592764, slip op. at 11 (Ulster Cty. Sup. Ct. Aug. 5, 2008) (A. 135) (emphasizing the "obvious preference for meaningful public participation in all stages of the [SPDES permitting] process"), *aff'd*, 71 A.D.3d 235 (3rd Dep't 2010).

[94] ECL § 17-0805(1).

"information required to be in [SPDES] permits."[95] Citizens are also afforded an opportunity for public hearing before any SPDES permit issues if they identify any substantive and significant issues concerning the draft permit.[96]

These guaranteed avenues for public participation are "intended to alert [the permitting agency] to potential problems with the draft permit and to ensure that it has an opportunity to address those problems before the permit becomes final."[97] DEC may not issue a final SPDES permit unless it complies with these essential procedural requirements.[98]

In this case, the Permit allows municipalities to develop their own pollution control requirements in SWMPs, after the public process around the Permit's issuance has concluded. The contents of the SWMP, once developed by the Permittee, comprise effluent limitations that are binding and enforceable against an individual permittee (*see, e.g.*, A. 269 ("Each [permittee] is *required to . . . implement* a SWMP that satisfies the . . . minimum control measures" (emphasis added)).[99] Therefore, DEC must make the SWMP Plans – or at least a more robust

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[95] 6 N.Y.C.R.R. §§ 621.7(b)(7)(i)(a), 750-1.9(a).

[96] 6 N.Y.C.R.R. § 621.8(b); *see also* 33 U.S.C. §§ 1342(a), 1342(b)(3).

[97] *Adams v. EPA*, 38 F.3d 43, 51 (1st Cir. 1994).

[98] ECL § 17-0701(3).

[99] *Cf. Waterkeeper*, 399 F.3d at 501 ("[T]he terms of the nutrient management plans are *themselves* effluent limitations . . . .").

NOI that describes the elements of the SWMP in detail – available to the public for review, comment, and an opportunity for a hearing.[100] DEC cannot create an end-run around public participation requirements by deferring the development of substantive pollution reduction plans until after the Permit has been finalized and issued.

Indeed, New York courts have specifically held that the CWA's public participation requirements apply whenever pollution controls applicable to a SPDES permittee are selected, even when those controls are not included within the permit itself at the time of permit issuance.[101] In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, Supreme Court, Ulster County, heard a challenge to a SPDES permit authorizing New York City to discharge muddy water from a tunnel into a creek.[102] The specific pollution controls necessary to comply with the CWA were not identified in the permit itself, but rather were to be selected by permittee – much like an MS4's SWMP. But the permit did not give the public a

[100] The same is true of the Watershed Improvement Strategies and Retrofit Plans that permittees develop under the Permit. Although these are developed subsequent to the initial SWMP, the Permit defines them as modifications to the SWMP (A. 321). And they are not trivial modifications; they are the primary vehicle for meeting the Pollutant Load Reductions (*Id.*).

[101] *Catskill Mountains Chapter of Trout Unlimited, Inc.*, No. 06-3601, 2008 WL 5592764, slip op. at 11 (A. 135).

[102] *Id.* at 2 (A. 126).

right to participate, through public notice and comment, in the process of choosing the control technology. Therefore, Supreme Court held that the permit in that case violated the CWA's public participation requirements.[103]

Taking a similarly unlawful approach, the Permit in this case provides no mechanism for the public to participate in a DEC evaluation of permittees' pollution controls. The Permit does not allow the public either to comment to DEC on SWMP Plans or to request a hearing before DEC on whether they meet applicable legal standards, even though it is the SWMPs, rather than the Permit, that set forth each MS4's particular pollution controls. Further, while the Permit allows for public comment to DEC on NOIs, it affords no opportunity for a hearing before DEC to contest whether the pollution control measures vaguely identified in an MS4's NOI form meet applicable legal standards (*See* A. 261). These omissions violate the state and federal statutory mandates for public participation.

C. Federal Courts and Other State Courts Have Found Similar Self-Regulatory Systems to Be Unlawful.

While the issues presented here are largely of first impression in this Court, decisions of the federal courts[104] and those of other states are in accord with

[103] *Id.* at 11 (A. 135) (holding that, "in light of the obvious preference for meaningful public participation in all stages of this process," the permit violated 33 U.S.C. § 1251(e)).

[104] New York courts will "usually give due and great respect to" federal court interpretations of federal statutes. *Myer v. Shields & Co.*, 25 A.D.2d 126, 128 (1st

Petitioners' contentions. For example, in *Waterkeeper Alliance v. EPA*, the U.S. Court of Appeals for the Second Circuit held that the terms of pollution control plans developed by permittees are themselves effluent limitations that must be reviewed by the permitting authority to ensure that they satisfy applicable statutory requirements.[105] In *Waterkeeper*, the court invalidated an EPA rule that required applicants for certain NPDES permit to develop "nutrient management plans" setting out their proposed pollution control measures, but did not require them to submit those plans for review by the permitting agency. To gain coverage under those permits, applicants (like MS4s applying for coverage under the Permit here) needed only to submit a brief NOI that lacked any detailed account of their pollution control plans. The court found that this was an "impermissible self-regulatory permitting regime,"[106] forbidden by the CWA, because it failed to ensure that each permittee "has, in fact, developed and implemented a nutrient

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Dep't 1966) (relying on "well-reasoned opinions" by federal courts as "sufficiently persuasive authority" for the court's holding); *see also*, *e.g.*, *Pierre v. Providence Wash. Ins. Co.*, 99 N.Y.2d 222, 231 (2002) ("Three federal cases are particularly helpful in resolving the issue before us.").

[105] *Waterkeeper*, 399 F.3d at 498-502.

[106] *Id.* at 498.

management plan that satisfies the . . . requirements" of the Clean Water Act regulations.[107]

The *Waterkeeper* court also found that the permitting scheme violated the CWA's public participation requirements, including the opportunity for a hearing, because it "effectively shields the nutrient management plans from public scrutiny and comment."[108] The court explained that the Act's public participation requirements apply because "the terms of the nutrient management plans constitute effluent limitations. . . ."[109] The court continued, "even assuming, arguendo, that the nutrient management plans did not themselves constitute effluent limitations, [the court] would still hold that the . . . Rule violates the Act's public participation requirements" because the plans are "a critical indispensable feature of the [regulatory program]."[110]

The *Waterkeeper* court adopted the reasoning of an earlier federal case that addressed MS4 permits specifically. In *Environmental Defense Center v. EPA*, the U.S. Court of Appeals for the Ninth Circuit invalidated part of an EPA rule that allowed small MS4s to obtain coverage under general permits on the basis of

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[107] *Id.* at 501.

[108] *Id.* at 503.

[109] *Id.* at 503.

[110] *Id.* at 504.

unreviewed NOIs.[111] The *EDC* court found the rule to be fatally flawed because, even though it allowed for the "information on an individualized pollution control program"[112] to be developed by the permittee and detailed in the permittee's NOI, the rule did not require permitting authorities to review each pollution control program "to ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable."[113] The court held that this scheme "violate[d] the clear intent of Congress"[114] by creating "an impermissible self-regulatory system."[115] Further, the court held that "NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements,"[116] and, therefore, "clear Congressional intent requires that NOIs be subject to the Clean Water Act's public availability and

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[111] *EDC*, 344 F.3d 832; *Waterkeeper*, 399 F.3d at 499-500 (analogizing nutrient management plans to the stormwater management plans at issue in *EDC*).

[112] *EDC*, 344 F.3d at 853.

[113] *Id.* at 855; *see also Waterkeeper*, 399 F.3d at 501 (holding that the EPA rule, "by failing to provide for permitting authority review—still does not *ensure* that each [permittee] has, in fact, developed and implemented a nutrient management plan that satisfied the requirements of [CWA regulations]").

[114] *EDC*, 344 F.3d at 857.

[115] *Id.* at 854.

[116] *Id*. at 857.

public hearings requirements."[117] Accordingly, the Ninth Circuit vacated EPA's small MS4 permitting regulation insofar as it authorized self-regulatory systems like the one established by the Permit.[118] Following that decision, EPA has advised states not to rely on the vacated portions of the EPA regulation, but rather to comply with the Ninth Circuit's holding.[119]

Like the courts in *Waterkeeper* and *EDC*, in this case Supreme Court found the Permit illegal because it fails to provide for a meaningful review by DEC of permittees' NOIs[120] and Stormwater Management Programs (A. 21-27). Supreme Court also ruled that the failure to provide an opportunity for public hearings on

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[117] *Id.* at 856.

[118] *Id.* at 858 ("We therefore vacate those portions of the Phase II Rule that address these procedural issues relating to the issuance of NOIs under the Small MS4 General Permit option . . . .").

[119] Memorandum from James A. Hanlon, Director, EPA Office of Wastewater Management, to EPA Regional Water Management Division Directors, Regions I-X, "Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s" (Apr. 16, 2004), *available at* http://www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf (ADD. 27-30) (advising that permitting authorities should no longer follow the regulatory provisions the *EDC* court vacated, since they fail to comply with Clean Water Act requirements). The Court can take judicial notice of this government document. *See* footnote 19, *supra*.

[120] For MS4s already covered under the 2008 permit, which submitted their 2009 Annual Reports in lieu of NOIs, the trial court ruled that there was a similarly illegal lack of meaningful review (A. 25 n.12).

the contents of NOIs before MS4 operators are authorized to discharge violates both 33 U.S.C. § 1342(a)(1) and ECL 17-0805(1)(a) (A. 32-34).

Citing the two federal cases, Supreme Court explained that the Permit, like the permitting schemes at issue in *Waterkeeper* and *EDC*, is fundamentally flawed because:

> the initial determinations of what particular control measures would be implemented and whether those measures would in fact reduce pollutant discharge to the level mandated by the applicable statute or regulation were left to each operator to make after it had already been authorized to discharge. Thus, each scheme was defective because of the possibility that under it the permitting agency might determine that the submission which constituted the functional equivalent to a permit application was complete or adequate without conducting a meaningful review, so nothing prevented a newly authorized discharger from misunderstanding, misrepresenting or misapplying the terms of the general permit or its own situation, and proposing or adopting a set of control measures for itself that would reduce pollutant discharges by less than the applicable standard. (A. 25)

Similarly, a Michigan appellate court has held that a state-issued water pollution permit violates the federal Clean Water Act for the same reasons. Following *Waterkeeper*, the Michigan court rejected a permit that called for polluters to develop their own pollution control plans after permit issuance, without review by the state regulatory agency, and without opportunity for public participation.[121]

[121] *Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality*, 747 N.W.2d 321, 332-35 (Mich. Ct. App. 2008).

Most recently, a circuit court of the State of Maryland applied the same rationale in concluding that a municipal stormwater permit violated the Clean Water Act.[122] Like New York (and Michigan), Maryland has been delegated permitting authority from EPA. In *Anacostia Riverkeeper v. Maryland Department of the Environment*, the court held that the state permitting agency had violated the Clean Water Act because it issued an MS4 permit that lacked specific requirements and allowed pollution control measures to be developed without sufficient review. The court explained:

> Specific, enforceable standards, benchmarks, and deadlines for meeting applicable requirements must be stated in the permit. *Permit requirements that are developed or modified outside of the permit process frustrate the public participation and judicial review requirements adopted by the General Assembly*. * * * The Court finds that it is not sufficient for the permit to require that permittees engage in best management practices and file annual reports on their activities. Manuals and policies that exist outside of the permit change frequently, and do not inform the public or the Court of what the permit specifically requires. While it is allowable for the permit to require best management practices, *specific requirements for meeting water quality standards must be stated in the permit*.[123]

[122] *Anacostia Riverkeeper v. Md. Dep't of the Env't*, No. 339466-V, Opinion and Order (Circ. Ct., Montgomery Cty., Md. Dec. 3, 2013) (ADD. 24-26).

[123] *Id.* at 1-2 (emphasis added) (ADD. 25). Notably, with respect to the standard of review, the court also recognized that "when an agency's decision is predicated on an error of law, deference is not appropriate." *Id.* at 1.

In sum, the Permit contravenes the basic principles of Clean Water Act permitting recognized by federal and state courts. This Court should uphold the same principles in this case.

POINT IV

THE PERMIT ARBITRARILY FAILS TO REQUIRE ANY MONITORING OF POLLUTION DISCHARGES OR EFFECTS ON RECEIVING WATER BODIES

DEC regulations require SPDES permits to include any monitoring requirements needed to ensure compliance with permit limits and water quality standards. Although the Permit imposes numeric limits on discharges that contribute to water quality standards violations – i.e., the "no net increase" and Pollutant Load Reduction limits – it contains no requirements for monitoring to ensure compliance. It does not require municipalities to monitor either pollution levels in their discharges or how those releases affect pollution levels in receiving water bodies. DEC's omission of any monitoring requirements is arbitrary, capricious and an abuse of discretion. Supreme Court erred in finding that DEC's choice to omit monitoring requirements was not arbitrary and capricious (A. 31-32); the Appellate Division erroneously affirmed, without discussion (A. xix).

DEC regulations provide that SPDES permits "shall be subject to such requirements for monitoring the intake, discharge, waters of the State or other source or sink as may be reasonably required by the department to determine

compliance with effluent limitations and water quality standards that are or may be [a]ffected by the discharge."[124] Federal law also provides that a permitting agency "shall require" dischargers to monitor "as [the agency] may reasonably require" "whenever [it is] required to carry out the objective of the [Clean Water Act].[125] In this case, in the absence of water quality monitoring, DEC cannot reasonably determine compliance with the Permit's effluent limitations or with applicable water quality standards. Yet DEC decided to forego monitoring requirements in the Permit. That was an arbitrary action.

Self-monitoring and reporting by permittees are essential to achieve and enforce Clean Water Act objectives. The legislative history of the Act confirms the fundamental role of monitoring to the regulatory scheme: "A necessary adjunct to the establishment of effective water pollution requirements and the enforcement of such requirements is authority to require information, data, and reports, as well as to establish monitoring requirements."[126] As the U.S. Court of Appeals for the Ninth Circuit has explained, "the NPDES program fundamentally relies on self-monitoring," and a "self-monitoring report is . . . conclusive evidence of an

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[124] 6 N.Y.C.R.R. § 750-1.13(a).

[125] 33 U.S.C. § 1318(a)(1).

[126] *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 452 (D. Md. 1985) (quoting S. Rep. No. 92-414, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. Ad. News 3728, 3730).

exceedance of a permit limitation."[127] The U.S. Court of Appeals for the Fourth Circuit agrees: "The effectiveness of the permitting process is heavily dependent on permit holder compliance with the CWA's monitoring and reporting requirements."[128]

Monitoring is especially critical where MS4s are already contributing to water quality standards violations. As explained above, in such cases, the Permit must ensure pollution reductions sufficient to meet water quality standards. "Clearly, unless there is some method for measuring compliance, there is no way to ensure compliance" with the Permit terms requiring such reductions.[129] In this case, compliance cannot be measured without monitoring the amount of pollution released by the MS4s, or the resulting ambient pollutant levels in receiving water bodies, or both. Without monitoring, the Permit terms are little more than wishful thinking.

Many other states require small MS4s to monitor their discharges. For example, statewide small MS4 general permits issued by the states of

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[127] *Sierra Club*, 813 F.2d at 1491-92.

[128] *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 268 F.3d 255, 266 (4th Cir. 2001).

[129] *Champion Int'l Corp. v. EPA*, 648 F. Supp. 1390, 1395 (W.D.N.C. 1986), *vacated on other grounds*, 850 F.2d 182 (4th Cir. 1988) (upholding EPA's objection to a state-issued NPDES permit that failed to include adequate monitoring provisions, among other issues).

Connecticut,[130] California,[131] Georgia,[132] South Carolina,[133] and Montana,[134] as well as one issued for MS4s in Western Washington State[135] and one draft permit

[130] Conn. Dep't of Energy & Envtl. Protection, General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems at § 6(h) (Jan. 9, 2009), *available at* http://www.ct.gov/deep/lib/deep/Permits_and_Licenses/Water_Discharge_General_Permits/MS4_gp.pdf. A proposed revision of this permit imposes even stricter monitoring requirements on MS4s with a population of greater than one thousand people. *See* Conn. Dep't of Energy & Envtl. Protection, Draft General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems at § 6(j), App'x A-1, App'x A-2 (July 8, 2014), *available at* http://www.ct.gov/deep/lib/deep/public_notice_attachments/general_permits/2014july7ms4generalpermit.pdf.

[131] Cal. State Water Resources Control Bd., Water Quality Order No. 2013-0001-DWQ National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000004 Waste Discharge Requirements (WDRs) for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) at § E.13 (Feb. 5, 2013), *available at* http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf.

[132] Ga. Dep't of Natural Res. Envtl. Prot. Div., Authorization to Discharge Under the National Pollutant Discharge Elimination System: Storm Water Discharges Associated with Municipal Separate Storm Sewer Systems, General NPDES Stormwater Permit No. GAR041000 at §§ 4.2.3, 4.4.2 (Jan. 3, 2012), *available at* http://epd.georgia.gov/sites/epd.georgia.gov/files/related_files/site_page/FINAL_GAEPD_NPDES_MS4_PhaseIISmall_GAG610000_Y2012Dec6.pdf.

[133] S.C. Dep't of Health & Envtl. Control, State of South Carolina NPDES General Permit for Storm Water Discharges From Regulated Small Municipal Separate Storm Sewer Systems (SMS4), Permit No.: SCR030000 at §§ 3.2.1, 5.1 (Nov.1, 2013) (hereinafter "South Carolina Permit"); *available at* http://www.scdhec.gov/Environment/docs/Final_SMS4_Permit.pdf.

[134] Mont. Dep't of Envtl. Quality, General Permit For Storm Water Discharge Associated With Small Municipal Separate Storm Sewer System (MS4) Permit Number MTR 040000 at IV.A (Dec. 30, 2009), *available at*

proposed by EPA for New Hampshire,[136] require some or all small MS4s to conduct monitoring of pollution in their discharges or in receiving water bodies.[137] In South Carolina, for example, the permit requires all small MS4s to monitor their discharges to evaluate program compliance, effectiveness of BMPs, and progress toward achieving SWMP goals,[138] and requires additional monitoring for MS4s discharging to a waterway with an approved TMDL.[139]

To be clear, the Court need not decide here whether monitoring requirements are necessary in *all* MS4 permits. However, for this Permit, DEC could not reasonably conclude that "compliance with [the Permit's] effluent limitations and water quality standards" can be determined in the absence of monitoring requirements in the Permit.

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http://deq.mt.gov/wqinfo/MPDES/StormWater/pdf/MTR040000_GeneralPermit_2010.pdf.

[135] Wash. Dep't of Ecology, Western Washington Phase II Municipal Stormwater Permit at §§ S8, G9 (Aug. 1, 2012), *available at* http://www.ecy.wa.gov/programs/wq/stormwater/municipal/phaseiiww/5YR/WWAPhaseIIPermit2013.pdf.

[136] New Hampshire Draft Permit at § 4.3.

[137] Appellants do not express a view on the adequacy of the particular monitoring requirements in these permits.

[138] South Carolina Permit at 5.1.1, 5.2.1, 5.2.2, 5.3.1.

[139] *Id*. at 3.2, 3.2.1, 3.2.1.2.1(b), 3.2.1.2.2, 3.3.3.

The trial court below, adopting DEC's arguments, held that DEC permissibly chose to "satisfy its statutory mandate" by means other than "a requirement that [MS4s] self-monitor their discharges" – in particular, by means of "myriad recording and reporting requirements, ambient monitoring of affected waterbodies, and computer modeling of pollutant loading" (A. 31-32 (internal citations omitted)).[140] But none of these rationales holds water.

First, all of the Permit's reporting and recording requirements relate to *actions* taken by the permittee – not to *results*, such as achievement of Pollutant Load Reductions. All of the recordkeeping in the world will not allow enforcement of objective pollution reduction targets, if it does not include records of water quality monitoring.

Second, while water quality monitoring in affected water bodies could satisfy legal requirements, the Permit does not require MS4s to conduct, or even contribute to, any such monitoring activities. Rather, DEC purports to "rely on collective efforts of all monitoring activities related to the impaired waters, which *may* include ambient monitoring conducted by the Department, special projects for monitoring, and publicly funded monitoring projects" (A. 735) (emphasis added). Unlike specific monitoring requirements imposed by a SPDES permit on a

[140] The Appellate Division provided no reasons for rejecting Petitioners' claims concerning monitoring (A. xix).

permittee – such as those imposed by the other states listed above – monitoring activities conducted by DEC and others are neither mandatory nor are they necessarily tailored to measuring compliance with MS4 permit requirements. Hypothetical, voluntary monitoring programs by third parties can provide no lawful basis for DEC to find that specific monitoring requirements, in the Permit, are not "reasonably required . . . to determine compliance with effluent limitations and water quality standards."[141] Such a finding is "without foundation in fact."[142]

Third, computer modeling to estimate pollution levels, which the Permit requires in certain instances, cannot take the place of actual monitoring sufficient to characterize pollutant loadings from the MS4 (*see* A. 164-165). DEC's own statements in the record belie the agency's post hoc litigation position that "modeling" is simply a form of "monitoring." As DEC conceded upon issuing the Permit, real-world monitoring data, such as water quality or end-of-pipe monitoring, is an essential prerequisite to accurate modeling (A. 720).[143] Accordingly, desktop computer modeling exercises alone, absent any requirements

[141] 6 N.Y.C.R.R. § 750-1.13(a).

[142] *Pell*, 34 N.Y.2d at 231.

[143] "The Department agrees that monitoring water quality data is essential in establishing a calibrated model of a watershed and will seek any monitoring efforts available that could assist with verifying the model and the water quality condition of the impaired waters" (A. 720).

to collect representative data on actual pollution levels, cannot be considered a form of monitoring. DEC also takes pains, in its periodic technical reports on statewide water quality, to "distinguish between water quality assessments based on monitoring data, and assessments based on other information," which may include "predictive modeling" (A. 199, 208). This reinforces DEC's own, more accurate view – expressed prior to this litigation – that modeling is an "other" source of information, categorically distinct from monitoring.

In sum, the trial court's cursory finding – and the Appellate Division's summary affirmance – that DEC had discretion to exclude monitoring requirements from the Permit were without basis. DEC cannot plausibly "carry out the objective of the [Clean Water Act]"[144] without imposing any monitoring requirements on permittees. Such an interpretation of law is beyond the agency's discretion.

[144] 33 U.S.C. § 1318(a)(1).

CONCLUSION

For the reasons stated above, this Court should reverse the Appellate Division's decision, uphold in part and reverse in part Supreme Court's decision, grant Petitioners' petition in full, and remand the Permit to DEC.

In particular, the Court should hold that the following determinations were "affected by an error of law," CPLR § 7803[3], because the facts are undisputed and DEC misinterpreted or misapplied the law or acted contrary to its plain meaning:

1. DEC's decision to set a "no net increase" standard in the Permit, rather than a pollution-reduction standard, for MS4s discharging into impaired waters lacking a TMDL (Point I.A); [145]

2. DEC's decision to issue the Permit without specifying a pollution baseline against which reductions can be measured or allocating required pollution reductions to each MS4 discharging into impaired waters with a TMDL (Point I.B);

3. DEC's decision to issue a Permit that neither sets forth specific, objective and enforceable control requirements nor provides for DEC review and approval of the control measures developed by the permittees (Point III.A); and

4. DEC's decision to deny the opportunity for public comment and public hearing on any permittee's pollution controls (Point III.B).

[145] In the alternative, the Court should hold that this determination (or any of the other determinations) "was arbitrary and capricious or an abuse of discretion," CPLR § 7803(3), because it is without foundation in fact.

In addition, the Court should hold that DEC's decision not to require any of the more than 500 MS4s covered by the Permit to monitor the pollution levels in their discharges or the effects of those discharges on the quality of the receiving waters "was arbitrary and capricious or an abuse of discretion," CPLR § 7803[3], because there is no reasonable way to determine compliance with effluent limitations and water quality standards in the complete absence of monitoring (Point IV).

Finally, the Court should reinstate Supreme Court's ruling that the Permit lacks proper compliance schedules required by 6 N.Y.C.R.R. § 750-1.14 because DEC expressly decided not to appeal that ruling (Point II.A). In the alternative, if the Court reaches the merits of that issue, it should hold that the Permit was "was affected by an error of law or was arbitrary and capricious or an abuse of discretion," CPLR § 7803(3), for failing to include proper compliance schedules (Point II.B).

Unless these aspects of the Permit are corrected on remand, hundreds of water bodies across New York State will remain degraded by municipal stormwater pollution, rather than meeting standards for drinking, fishing, swimming, and other uses, contrary to the intent of Congress and the State Legislature.

Dated: New York, New York
August 15, 2014

By: 

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ADDENDUM

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ADD1

New York State Department of Environmental Conservation
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Denise M. Sheehan
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MAY 12 2005

Mr. Walter Mugdan
Director
Division of Environmental Planning and Protection
United States Environmental Protection Agency
Region 2
290 Broadway - Room 2524
New York, New York 10007-1866

Dear Mr. Mugdan:

Enclosed is a long-term schedule for the development of TMDLs or other appropriate strategies to achieve water quality standards in waters listed as impaired on New York State's 1998, and subsequent, CWA §303(d) Lists.

The schedule has been previously shared and discussed with EPA Region 2 and it reflects the discussion that NYSDEC and EPA Region 2 have had over the past months regarding TMDL development. It also strives to balance the needs and commitment of resources of both agencies. Specifically, the schedule is consistent with EPA guidance that TMDLs be developed for all water/pollutant combinations listed on the New York State CWA §303(d) List within 8 -13 years of the date that each water/pollutant combination first appeared on the list. At the same time, the schedule also recognizes other means of de-listing waters in order to provide a reasonable response and plan for action for all waters on the List. The schedule also reflects the need to allow for adjustments to the TMDL development schedule to accommodate changes to subsequent lists.

NYSDEC and EPA Region 2 both recognize that TMDLs are not the only nor, in some cases, the most effective means of addressing water quality impairment and that other appropriate strategies may also result in attainment of water quality standards. Therefore, NYSDEC expects to address the water impairments on the schedule through a combination of TMDL development as well as implementation of other appropriate strategies necessary to achieve water quality standards.

Given anticipated changes (additions/deletions) in the New York State CWA §303(d) List, revisions to the applicable listing guidance, changing resource levels and priorities, and other considerations over the 13 year span of the schedule, some periodic review and

modification of the schedule is to be expected. The enclosed long-term schedule provides a description of the Annual Schedules for TMDL commitments, the required Two-Year Priorities for TMDL development, the Long-Term (thru 2017) Plan to address waters on the CWA §303(d) List, and expectations regarding periodic revisions to these schedules.

The enclosed schedule provides an effective means to direct resources, prioritize our focus and track progress toward the restoration of impaired waters in New York State. We look forward to working with our partners at USEPA as we address this challenge together.

Sincerely,

Sandra Allen
Director
Division of Water

Enclosure

ADD3

Schedule for Development of TMDLs and/or Other Appropriate Strategies

The following Schedule for Development of TMDLs and/or Other Appropriate Strategies reflects the Annual Schedule for TMDL commitments, the required Two-Year Priorities for TMDL development, the Long-Term (thru 2017) Plan to address waters on the CWA §303(d) List, and expectations regarding periodic revisions to the schedule.

Annual Schedule

The attached schedule identifies waterbodies/pollutant combinations for which TMDLs or alternative strategies are scheduled to be established and submitted to EPA Region 2 during FFY '05. A similar list of specific TMDLs (or other appropriate strategies) to be developed for subsequent fiscal years will be established on an annual basis during negotiation of the State/EPA PPG agreement.

Two Year Priorities

Every two years, coinciding with the issuing of a new CWA §303(d) List, NYSDEC will identify waterbodies/pollutants identified as high priority for TMDL or alternative strategy development during the two year 303(d) listing cycle. The list of waterbodies/pollutants scheduled to be addressed in the first year of the two year period will correspond to TMDL commitments in that year's State/EPA PPG agreement. The remaining waterbodies/pollutants identified as Two-Year Priorities in the CWA §303(d) List will be re-evaluated, updated and modified, as appropriate, based on resources, priorities and other considerations and finalized during negotiation of the annual State/EPA PPG agreement for that (second) year.

Long-Term Plan to Address Waters on the CWA §303(d) List

The enclosed schedule also outlines a timetable for the development of TMDLs or other appropriate strategies to address the remaining water impairments on the New York State CWA §303(d) List. This Long-Term Plan combines some listed waters into general categories of impairment (where possible). Additional information regarding the development of a TMDL or other appropriate strategy for these categories of waters is included in the Long-Term Plan, along with a projected date for completion of the TMDL/strategy/de-listing approach to address the water impairments. Waterbody/pollutant listings that cannot be combined into a specific category are listed separately in Table 1 - *Other 303(d) List Waterbodies/Pollutants (not attributed to categories)*. The schedule identifies the years when some number of these other, non-categorized waters will be addressed, although which of these specific waters will be addressed in a particular year has not yet been determined. A similar list and approach is used to address waters Needing Verification of Pollutants (Table 2).

Revision of Schedules/Priorities/Plan

The *Annual Schedule* for the development of TMDLs in any specific year will be finalized during negotiation of that year's State/EPA PPG agreement. Every two years, at the time NYSDEC submits its new CWA §303(d) List to EPA Region 2, NYSDEC may also revise and update the *Two Year Priorities* to reflect changes to the List. Similarly, the *Long-Term Plan* to address waters on the CWA §303(d) List may also be updated at a minimum every two years, coinciding with the issuing of an updated CWA §303(d) List and reflecting changes to the List. Other periodic changes to the Long-Term Plan may be appropriate in order to reflect changes in NYSDEC and EPA priorities, resources and applicable listing guidance.

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Schedule for Development of TMDLs and/or Other Appropriate Strategies - 2005

Number of TMDLs	Waterbody Name	Segment Identification		Pollutant	Date of		Lead Agency
		ID	WIN		Public Notice	Final Submittal*	
TMDLs or Other Appropriate Strategies to Meet WQ Standards Scheduled to be Established by 2005 (previously scheduled)							
8	Lake George Tributaries Foster Brook East Brook West Brook Prospect Mountain Brook English Brook Finkle Brook Indian Brook Hague Brook	 1006-0020 1006-0008a 1006-0008b 1006-0008c 1006-0008d 1006-0003 1006-0002 1006-0006	 C-101-P367-11 C-101-P367-37 C-101-P367-38 C-101-P367-39 C-101-P367-41 C-101-P367-56 C-101-P367-59 C-101-P367-86	Clean Sediment		Sept 2005	NYSDEC
	Comments: TMDL development was delayed due to potential ramifications on Phase II stormwater permits in Lake George Basin.						
4	Westchester County Harbors Larchmont Harbor Mamaroneck Harbor Milton Harbor Port Chester Harbor	 1702-0116 1702-0125 1702-0063 1702-0260	 (MW3.1) LIS (portion 2a) (MW3.3) LIS (portion 2b) (MW3.4) LIS (portion 2c) (MW3.6) LIS (portion 2d)	Floatables		Sept 2005	NYSDEC
	Comments: De-listing of these waters (due to CSO controls as more suitable measures) is being considered.						
2	Flanders/Reeves Bays Flanders Bay, east/center, and tribs Reeves Bays and tidal tribs	 1701-0030 1701-0272	 (MW6.1e) FB (MW6.3a) GB..FB-RB	Pathogens		Sept 2005	USEPA (contractor)
	Comments: EPA contractor is developing TMDLs for these waters using the previously developed shellfish/pathogens TMDL template. Contracting issues have delayed the completion of this TMDL.						
137	Acid Rain Waters (in Forest Preserve)	see attached	see attached	pH		Sept 2005	USEPA (contractor)
	Comments: Of these 137 waters, 49 are listed in the 2004 303(d) list in Appendix A - Smaller Lakes Impaired by Atmospheric Deposition (Acid Rain).						
3	Peconic R., Lower and Tidal Tribs Flanders Bay, West/Lower Sawmill Cr. Meetinghouse Creek/Terry's Creek	1701-0259 1701-0254 1701-0256		Nitrogen		Sept 2005	Peconic Estuary Program
	Comments: The Peconic Estuary Program is completing work on a model to be used to develop a TMDL for these waters.						
154	**Sub-Total of TMDLs Scheduled for Development in 2005, that were scheduled for completion in 2004**						

ADD5

Number of TMDLs	Waterbody Name	Segment Identification		Pollutant	Date of		Lead Agency
		ID	WIN		Public Notice	Final Submittal*	
TMDLs or Other Appropriate Strategies to Meet WQ Standards Scheduled to be Established by 2005							
2	Nutrient-Impaired Small Lakes Sleepy Hollow Lake Lake Lonely	 1301-0059 1101-0034		Phosphorus	6/1/05	8/1/05	NYSDEC
	Comments: NYSDEC is currently conducting a pilot project on these lakes to verify watershed land use models that will be used to develop TMDLs for these and similarly impaired lakes.						
6	Shellfishing Impaired Waters Goose Creek Hashamomuck Pond Richmond Creek and tidal tribs Noyack Creek and tidal tribs Northwest Creek and tidal tribs Acabonack Harbor	 1701-0236 1701-0162 1701-0245 1701-0237 1701-0046 1701-0047	 (MW6.1b) GB-SIS- 84-P423 (MW6.1b) GB-SIS- P420 (MW6.1c) GB..LPB- 90 (MW6.1d) GB-SIS-126 (MW6.1c) GB-SIS-NH-136 (MW6.1f) GB-AH	Pathogens	6/1/05	8/1/05	USEPA (contractor)
	Comments: A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed and approved for the Oyster Bay watershed. The six (6) specific waters (for which EPA, thru a contractor, will develop Draft TMDLs to be public noticed, finalized and submitted by NYSDEC) have been selected from the shellfishing waters listed on Part 2c of the 2004 CWA §303(d) List, based on the likely availability of data and other information necessary to develop a TMDL using the Oyster Bay template.						
1	Seneca River	0701-0001	Ont 66-12 (portion 2)	Oxygen Demand		???	NYSDEC
	Comments: NYSDEC to develop a TMDL using a model developed by Onondaga County; completion of the TMDL is dependent upon the timely completion of model verification by the county (using 2004 USGS monitoring data).						
1	Greenwood Lake	1501-0001	NJ-P1026	Phosphorus		Sept 2005	NYSDEC
	Comments: NYSDEC to establish a TMDL based on the approved TMDL established by NJDEP for this lake.						
4	Lake Salubria Whitney Point Reservoir	0502-0011 0602-0004	PA 3-58-20..P51 SR- 44-14-27-P35a	Phosphorus		???	NYSDEC
	Park Creek and tribs Unadilla River, Upper, Main Stem	0601-0031 0601-0037	SR- 52 SR-146 (portion 2)	Pathogens		???	NYSDEC
	Comments: Failing/inadequate onsite septic systems have been identified as a source of pathogens; a more appropriate strategy (than TMDL development) may be proposed. These waters are in the Chesapeake Bay Watershed where other efforts are underway and may be leveraged to address these impairments.						

ADD6

Number of TMDLs	Waterbody Name	Segment Identification		Pollutant	Date of		Lead Agency
		ID	WIN		Public Notice	Final Submittal*	
25	Lake Ontario Shoreline	0303-0023		PCBs		Sept 2005	NYSDEC (using EPA recommended approach)
	Lake Ontario Shoreline, Eastern	0303-0024	Ont (portion 1)				
	Lake Ontario Shoreline, Eastern	0303-0011	Ont (portion 2)				
	Chaumont Bay	0303-0025	Ont (portion 2a)				
	Guffin Bay	0303-0026	Ont (portion 2b)				
	Lake Ontario Shoreline, Eastern	0303-0027	Ont (portion 3)				
	Lake Ontario Shoreline, Eastern	0303-0022	Ont (portion 4)				
	Henderson Bay	0303-0028	Ont (portion 4a)				
	Lake Ontario Shoreline, Eastern	0303-0029	Ont (portion 5)				
	Lake Ontario Shoreline, Eastern	0303-0030	Ont (portion 6)				
	Lake Ontario Shoreline, Eastern	0303-0031	Ont (portion 7)				
	Lake Ontario Shoreline, Eastern	0303-0017	Ont (portion 8)				
	Lake Ontario Shoreline, Eastern	0302-0040	Ont (portion 9)				
	Lake Ontario Shoreline, Oswego Hbr	0302-0041	Ont (portion 10)				
	Lake Ontario Shoreline, Central	0302-0042	Ont (portion 11)				
	Lake Ontario Shoreline, Central	0302-0043	Ont (portion 12)				
	Lake Ontario Shoreline, Central	0302-0044	Ont (portion 13)				
	Lake Ontario Shoreline, Central	0302-0045	Ont (portion 14)				
	Lake Ontario Shoreline, Central	0302-0002	Ont (portion 15)				
	Rochester Embayment - East	0301-0068	Ont (portion 16)				
	Rochester Embayment - West	0301-0069	Ont (portion 17)				
	Lake Ontario Shoreline, Western	0301-0070	Ont (portion 18)				
	Lake Ontario Shoreline, Western	0301-0071	Ont (portion 19)				
	Lake Ontario Shoreline, Western	0301-0072	Ont (portion 20)				
	Lake Ontario Shoreline, Western	0301-0053	Ont (portion 21)				
	Lake Ontario Shoreline, Western		Ont (portion 22)				
	Comments: EPA staff will be presenting an approach to development of TMDL for these waters in January 2005.						
193	TOTAL of TMDLs or Other Strategies scheduled for development in 2005						

Note: It is possible that some waters may be de-listed based on 1) a re-assessment and determination that water quality standards are met, and/or 2) control strategies, other than TMDLs, that are more appropriate, and will result in water quality standards being met.

Schedule for Development of TMDLs and/or Other Appropriate Strategies - 2006 thru 2017

Year	Impairment Categories and Waterbody/Pollutant Listings
2006	
3	Nutrient-Impaired Small Lake Waters (3 of 42; 39 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 59; 53 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
1	NYC Urban Tributaries (1 of 28; 27 remaining) The schedule for TMDL development for specific NYC Urban Tributaries will reflect Long-Term Control Plans contained in the NYC CSO Consent Order.
20	NY-NJ Harbor/Toxics/Fish Consumption TMDLs for toxics (specifically cadmium, PCBs and dioxin) in the open waters of the NY-NJ Harbor Complex are scheduled to be developed through the HEP/CARP effort by May 2006.
39	Fish Consumption/PCBs/Migratory Species (39 of 39 segments) Impairment to fish consumption in these waters is a result of health advisories to restrict consumption of species that can be caught in these waters. Because the primary source of cotamination lies outside these waters, a TMDL is not considered an appropriate response to addressing this impairment. Efforts to justify de-listing of these waters are planned for the 2006 305(b)/303(d) Integrated Reporting/Listing cycle.
4	Fish Consumption/Toxics, isolated waters (4 of 40, 36 remaining)
2	Other, Non-Categorized Waters (2 of 42; 40 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
0	NY-NJ Harbor/Dissolved Oxygen, Nitrogen, Pathogens TMDLs for these conventional pollutants in the open waters of the NY-NJ Harbor Complex are scheduled to be developed through the HEP/CARP effort by May 2006. However, currently none of these open harbor waters are listed on the 303(d) List as being impaired due by these pollutants.
75	TOTAL of TMDLs or Other Strategies scheduled for development in 2006.

Year	Impairment Categories and Waterbody/Pollutant Listings
2007	
3	NY-NJ Waters (the Kills)/Floatables An appropriate response to address this impairment is dependent upon floatables control along the New Jersey shore. NYCDEP has a CSO Abatement Plan in place to address floatables contribution from New York State. A similar program in New Jersey would allow these waters/impairments to be de-listed due to control measures more suitable than a TMDL.
53	Fish Consumption/Mercury/Atmospheric Deposition Statewide efforts are unlikely to adequately address impairments that are the result of atmospheric deposition of mercury. Success will likely require a regional, if not national, effort. The difficulty of this problem and the uncertain value of a TMDL has also generated suggestions that these waters be de-listed as being unsuitable for TMDL development. If national efforts and/or de-listing approaches are not available for the 2006 303(d) Listing cycle, development of TMDLs or other strategies for these waters will likely be deferred to later years.
4	Nutrient-Impaired Small Lake Waters (4 of 39; 35 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 53; 47 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
4	Fish Consumption/Toxics, isolated waters (4 of 36, 32 remaining)
2	Other, Non-Categorized Waters (2 of 40; 38 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
72	TOTAL of TMDLs or Other Strategies scheduled for development in 2007.

Year	Impairment Categories and Waterbody/Pollutant Listings
2008	
9	Urban/Storm Runoff Waters (9 of 54, 45 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	On-site Wastewater Treatment System Waters (3 of 11, 8 remaining) These waters are impaired primarily by failing/inadequate on-site wastewater treatment systems. Resolution of these impairments by correcting/replacing these systems is likely a more appropriate response than developing a TMDL.
4	Nutrient-Impaired Small Lake Waters (4 of 35; 31 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 47; 41 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
4	Fish Consumption/Toxics, isolated waters (4 of 32, 28 remaining)
2	Other, Non-Categorized Waters (2 of 38; 36 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
28	TOTAL of TMDLs or Other Strategies scheduled for development in 2007.

Year	Impairment Categories and Waterbody/Pollutant Listings
2009	
5	Fish Consumption/PCBs, Lake Champlain Waters There are no specific efforts toward developing a TMDL for PCBs currently underway. Larger efforts to address water quality issues in Lake Champlain are being conducted through the Lake Champlain Basin Program.
20	Fish Consumption/Toxics, Great Lakes RAPs/AOCs There are no specific efforts toward developing a TMDL for toxics currently underway. Larger efforts to address water quality issues in Lake Champlain are being conducted through various Great Lakes Programs.
6	Nutrient-Impaired Small Lake Waters (6 of 31; 25 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 41; 35 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
6	NYC Urban Tributaries - (6 of 27; 21 remaining) The schedule for TMDL development for specific NYC Urban Tributaries will reflect Long-Term Control Plans contained in the NYC CSO Consent Order.
2	On-site Wastewater Treatment System Waters (2 of 8, 6 remaining) These waters are impaired primarily by failing/inadequate on-site wastewater treatment systems. Resolution of these impairments by correcting/replacing these systems is likely a more appropriate response than developing a TMDL.
4	Fish Consumption/Toxics, isolated waters (4 of 28, 24 remaining)
4	Other, Non-Categorized Waters (4 of 36; 32 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 45, 40 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
2	Unverified Pollutant Waters (2 of 26, 24 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
60	TOTAL of TMDLs or Other Strategies scheduled for development in 2009.

Year	Impairment Categories and Waterbody/Pollutant Listings
2010	
264	Acid Rain Waters (not in Forest Preserve) TMDL development for these waters may require review of current water quality standards, revision of standards or use attainability analysis. Of the 264 waters, 139 are listed in the 2004 303(d) List in Appendix A - Smaller Lakes Impaired by Atmospheric Deposition (Acid Rain).
11	Fish Consumption/Toxics, Lower Hudson
6	Nutrient-Impaired Small Lake Waters (6 of 25; 19 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 35; 29 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
5	NYC Urban Tributaries - (5 of 21; 16 remaining) The schedule for TMDL development for specific NYC Urban Tributaries will reflect Long-Term Control Plans contained in the NYC CSO Consent Order.
4	Fish Consumption/Toxics, isolated waters (4 of 24, 20 remaining)
2	On-site Wastewater Treatment System Waters (2 of 6, 4 remaining) These waters are impaired primarily by failing/inadequate on-site wastewater treatment systems. Resolution of these impairments by correcting/replacing these systems is likely a more appropriate response than developing a TMDL.
4	Other, Non-Categorized Waters (4 of 32; 28 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 40, 35 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	Unverified Pollutant Waters (3 of 24, 21 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
310	TOTAL of TMDLs or Other Strategies scheduled for development in 2010.

Year	Impairment Categories and Waterbody/Pollutant Listings
2011	
4	Fish Consumption/PCBs, Upper Hudson
65	Fish Consumption/Toxics, Great Lakes
6	Nutrient-Impaired Small Lake Waters (6 of 19; 13 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 29; 23 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
4	Fish Consumption/Toxics, isolated waters (4 of 20, 16 remaining)
2	On-site Wastewater Treatment System Waters (2 of 4, 2 remaining) These waters are impaired primarily by failing/inadequate on-site wastewater treatment systems. Resolution of these impairments by correcting/replacing these systems is likely a more appropriate response than developing a TMDL.
4	Other, Non-Categorized Waters (4 of 28; 24 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 35, 30 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	Unverified Pollutant Waters (3 of 21, 18 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
42	TOTAL of TMDLs or Other Strategies scheduled for development in 201

Year	Impairment Categories and Waterbody/Pollutant Listings
2012	
6	Nutrient-Impaired Small Lake Waters (6 of 13; 7 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 23; 17 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
4	Fish Consumption/Toxics, isolated waters (4 of 16, 12 remaining)
2	On-site Wastewater Treatment System Waters (2 of 2, 0 remaining) These waters are impaired primarily by failing/inadequate on-site wastewater treatment systems. Resolution of these impairments by correcting/replacing these systems is likely a more appropriate response than developing a TMDL.
4	Other, Non-Categorized Waters (4 of 24; 20 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 30, 25 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	Unverified Pollutant Waters (3 of 18, 15 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
30	TOTAL of TMDLs or Other Strategies scheduled for development in 2012.

Year	Impairment Categories and Waterbody/Pollutant Listings
2013	
4	Nutrient-Impaired Small Lake Waters (4 of 7; 3 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 17; 11 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
14	NYC Urban Tributaries - (14 of 16; 2 remaining) The schedule for TMDL development for specific NYC Urban Tributaries will reflect Long-Term Control Plans contained in the NYC CSO Consent Order.
4	Fish Consumption/Toxics, isolated waters (4 of 12, 8 remaining)
4	Other, Non-Categorized Waters (4 of 20; 16 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 25, 20 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	Unverified Pollutant Waters (3 of 15, 12 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
40	TOTAL of TMDLs or Other Strategies scheduled for development in 2013.

Year	Impairment Categories and Waterbody/Pollutant Listings
2014	
3	Nutrient-Impaired Small Lake Waters (3 of 3; 0 remaining) NYSDEC is currently developing a TMDL template based on land use models that will be used to develop TMDLs for the remaining lakes in this category.
6	Shellfish/Pathogen Waters (6 of 11; 5 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
4	Fish Consumption/Toxics, isolated waters (4 of 8, 4 remaining)
4	Other, Non-Categorized Waters (4 of 16; 12 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 20, 15 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	Unverified Pollutant Waters (3 of 12, 9 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
25	TOTAL of TMDLs or Other Strategies scheduled for development in 2014.

Year	Impairment Categories and Waterbody/Pollutant Listings
2015	
5	Shellfish/Pathogen Waters (5 of 5; 0 remaining) A template for the development of TMDLs to address shellfishing waters impaired by pathogens has been developed in the Oyster Bay watershed. The application of this approach may be used to address other similarly impaired shellfishing waters. For some of these waters, current implementation of Phase II Stormwater Regulations may be an adequate and more appropriate response.
4	Fish Consumption/Toxics, isolated waters (4 of 4, 0 remaining)
4	Other, Non-Categorized Waters (4 of 12; 8 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 15, 10 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	Unverified Pollutant Waters (3 of 9, 6 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
21	TOTAL of TMDLs or Other Strategies scheduled for development in 2015.
2016	
4	Other, Non-Categorized Waters (4 of 8; 4 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 10, 5 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	Unverified Pollutant Waters (3 of 6, 3 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
12	TOTAL of TMDLs or Other Strategies scheduled for development in 2016.

ADD17

Year	Impairment Categories and Waterbody/Pollutant Listings
2017	
2	NYC Urban Tributaries - (2 of 2; 1 remaining) The schedule for TMDL development for specific NYC Urban Tributaries will reflect Long-Term Control Plans contained in the NYC CSO Consent Order.
4	Other, Non-Categorized Waters (4 of 4; 0 remaining) These waters are listed on attached Table 1. The scheduling of specific waterbody/pollutant listing from this table will be determined during revision of the Section 303(d) List and annual PPG discussion.
5	Urban/Storm Runoff Waters (5 of 5, 0 remaining) These waters are impaired by wet-weather runoff that in some instances my be addressed by implementation of Phase II Stormwater controls.
3	Unverified Pollutant Waters (3 of 3, 0 remaining) These waters are listed on attached Table 2. These waters have been identified as having impairment, however the specific pollutant causing the impairment has not been identified. TMDL development for these waters will require additional monitoring and investigation.
14	TOTAL of TMDLs or Other Strategies scheduled for development in 2017.

ADD19

Impaired Waters Categories

Part 1

Lake George Tribs *	. . 8 segments
Small Nutrient Lakes	. 22 segments
NYC Urban Water Waters (various pollutants)	. 28 segments
Urban/Storm runoff (various pollutants)	. 51 segments
Kills, listed due to NJ Floatables	. . 3 segments
On-site Wastewater Treatment Systems	. . 9 segments
Other, Non-Categorized (see list)	. 32 segments
	153 segments

Part 2a - Acid Rain Segments

in Forest Preserve *	88 (+ 49 small lakes)	137 segments
in classified waters	125 (+139 small lakes)	264 segments
		213+188 = 401 segments

Part 2b - Fish Consumption

Mercury, Atmospheric Deposition	53 segments
PCBs, Upper Hudson	. 4 segments
PCBs, Lake Champlain	. 5 segments
Toxics (various)	
New York Harbor	. 20 segments
Lower Hudson	. 11 segments
Great Lakes	. 90 segments
RAP Areas of Concern	. 18 segments
Isolated waters	. 39 segments
PCBs, due to "migratory species"	39 segments
	279 segments

Part 2c - Shellfishing

Shellfishing/Pathogens *	67 segments

Part 3 - Requiring Re-Assessment

Part 3a - Needing Verification of Impairment

Small Nutrient Lakes	24 segments
Urban/Storm runoff (various pollutants)	. 9 segments
On-site Wastewater Treatment Systems	. 5 segments
Toxics, Fish Consumption (isolated)	. 3 segments
Other, Non-Categorized (see list)	12 segments

Table Other 303(d) List Waterbody/Pollutants (not attributed to categories)

WIN	WATERBODY	ID	TYPE	POLLUTANT	SOURCE
Ont 158- 6	Gill Creek and tribs	0101-0002	River	Unknown Toxicity	Urban Runoff,Contam.Sed
Ont 158-12 (portion 4)	Tonawanda Creek, Upper, and minor tribs	0102-0003	River	Silt/Sediment	Agric, Stream Erosion
Ont 158-12-32	Little Tonawanda Creek, Lower, and tribs	0102-0001	River	Silt/Sediment	Agric,Streambank Erosion
Ont 158-E (portion 7a)	Lake Erie (Dunkirk Harbor)	0105-0009	G.Lakes	Pathogens	Urban Runoff
Pa-63-13- 4-P122	Chautauqua Lake	0202-0020	Lake	phosphorus	Agriculture
Ont 138 (portion 4)	Oak Orchard Cr, Upper, and tribs	0301-0014	River	phosphorus	Agricultural
Ont 117 (portion 1)	Genesee River, Lower, Main Stem	0401-0001	River	phosphorus	various, multiple
Ont 117 (portion 1)	Genesee River, Lower, Main Stem	0401-0001	River	Pathogens	various, multiple
Ont 117 (portion 1)	Genesee River, Lower, Main Stem	0401-0001	River	Silt/Sediment	various, multiple
Ont 117 (portion 2)	Genesee River, Middle, Main Stem	0401-0003	River	phosphorus	Agriculture
Ont 117 (portion 2)	Genesee River, Middle, Main Stem	0401-0003	River	D.O./Oxygen Demand	Agriculture
Ont 117- 19	Black Creek, Lower, and minor tribs	0402-0033	River	phosphorus	Agric, Municipal
Ont 117- 19	Black Creek, Upper, and minor tribs	0402-0048	River	phosphorus	Agric, Municipal
Ont 117- 27-P57	Honeoye Lake	0402-0032	Lake	phosphorus	Agric, On-Site WTS
Ont 117- 27-P57	Honeoye Lake	0402-0032	Lake	D.O./Oxygen Demand	Agric, On-Site WTS
Ont 117- 40-P67	Conesus Lake	0402-0004	Lake	D.O./Oxygen Demand	Agriculture
Ont 117- 70-P115	Silver Lake	0403-0002	Lake	phosphorus	Agriculture
SR- 44-14-27-P35a	Whitney Point Lake/Reservoir	0602-0004	Lake	phosphorus	Agriculture
Ont 66-11-P26	Oneida Lake	0703-0001	Lake	phosphorus	Agricultural
Ont 66-11-P26-37	Chittenango Creek, Lower, and tribs	0703-0005	River	phosphorus	Agricultural
Ont 66-12 (portion 1)	Seneca River, Lower, Main Stem	0701-0001	River	D.O./Oxygen Demand	Agriculture
Ont 66-12-52-18	Pond Brook and tribs	0704-0004	River	D.O./Oxygen Demand	Agricultural

WIN	WATERBODY	ID	TYPE	POLLUTANT	SOURCE
Ont 66-12-52-23- 1	Marbletown Creek and tribs	0704-0003	River	various	Agricultural
Ont 66-12-P296 (portion 4)	Cayuga Lake, Southern End	0705-0040	Lake	Silt/Sediment	Municipal, NPS
Ont 66-12-P296 (portion 4)	Cayuga Lake, Southern End	0705-0040	Lake	phosphorus	Municipal, NPS
C	Cumberland Bay	1001-0001	Bay	D.O./Oxygen Demand	Industr, Contam.Sed.
C- 3 (portion 2)	Great Chazy River, Lower, Main Stem	1002-0001	River	Silt/Sediment	Agric, Erosion
C-101-P367	Lake George	1006-0016	Lake	Silt/Sediment	Urb/Storm, Erosion
	Whipple Brook	1102-0004	River	D.O./Oxygen Demand	Agricultural
H-240- 82 (portion 6)/P638a	Schoharie Reservoir	1202-0012	Lake(R)	Silt/Sediment	Erosion, Construction
H-240-187-	Steele Creek tribs	1201-0197	River	phosphorus	Agric,Streambank Erosion
H-240-187-	Steele Creek tribs	1201-0197	River	Silt/Sediment	Agric,Streambank Erosion
H- 31-P44-14- 1	Hallocks Mill Brook, Lower	1302-0051	River	Ammonia	Municipal
H- 31-P44-14- 1	Hallocks Mill Brook, Lower	1302-0051	River	D.O./Oxygen Demand	Municipal
H- 94	Quassaic Creek	1301-0079	River	Unknown Toxicity	Urban Runoff/CSOs
H-171-P848	Ashokan Reservoir	1307-0004	Lake(R)	Silt/Sediment	Streambank Erosion
H-171-P848-	Esopus Creek, Upper	1307-0007	River	Silt/Sediment	Streambank Erosion
H-221- 4- 3	Krumkill Creek	1311-0004	River	Unknown Toxicity	Urban Runoff/CSOs
H-234	Kromma Kill	1301-0027	River	Unknown Toxicity	Industrial
(MW3.2) LIS- 2	Hutchinson River, Middle, and tribs	1702-0074	River	Oil and Grease	Urb/Storm, Industr
(MW4.3a) LIS-HH-38	Glen Cove Creek, Lower, and tribs	1702-0146	Estuary	Pathogens	Urb/Storm, Mun/Ind
(MW4.3a) LIS-HH-38	Glen Cove Creek, Lower, and tribs	1702-0146	Estuary	Silt/Sediment	Urb/Storm, Mun/Ind
(MW6.1d) GB..GPB-P495	Mattituck (Marratooka) Pond	1701-0129	Lake	metals ??	Urb/Storm Runoff
(MW6.1c) GB..FB-110	Meetinghouse/Terrys Creeks and tribs	1701-0256	Estuary	D.O./Oxygen Demand	Agric (sediment beds)

ADD21

Table 2 - 303(d) List Waterbody/Pollutants Needing Verification of Pollutants

WIN	WATERBODY	ID	TYPE	POLLUTANT	SOURCE
Ont 158-12- 9	Beeman Creek and tribs	0102-0030	River	phosphorus	On-Site WTS
Ont 158-12- 9	Beeman Creek and tribs	0102-0030	River	Pathogens	On-Site WTS
Ont 158-12- 9	Beeman Creek and tribs	0102-0030	River	D.O./Oxygen Demand	On-Site WTS
Ont 158-12-11-1	Murder Creek, Lower, and tribs	0102-0031	River	phosphorus	On-Site WTS
Ont 158-12-11-1	Murder Creek, Lower, and tribs	0102-0031	River	D.O./Oxygen Demand	On-Site WTS
Ont 158-12-11-1	Murder Creek, Lower, and tribs	0102-0031	River	Pathogens	On-Site WTS
Ont 158-12-28	Bowen Brook and tribs	0102-0036	River	phosphorus	On-Site WTS
Ont 158-12-28	Bowen Brook and tribs	0102-0036	River	D.O./Oxygen Demand	On-Site WTS
Ont 158..E- 2- 1	South Branch, Lower, and tribs	0101-0036	River	phosphorus	Urban Runoff
Ont 158..E- 2- 1	South Branch, Lower, and tribs	0101-0036	River	Silt/Sediment	Urban Runoff, Erosion
Ont 158..E-19	Little Sister Creek, Lower, and tribs	0104-0045	River	phosphorus	On-Site WTS
Ont 158..E-19	Little Sister Creek, Lower, and tribs	0104-0045	River	Pathogens	On-Site WTS
Ont 120	Slater Creek and tribs	0301-0020	River	D.O./Oxygen Demand	On-Site WTS
Ont 117- 18	Little Black Creek, Lower, and tribs	0402-0047	River	Unknown Toxicity	Urban Runoff
Ont 117- 19-30	Bigelow Creek and tribs	0402-0016	River	phosphorus	Agriculture
Ont 117- 57	Jaycox Creek and tribs	0402-0064	River	phosphorus	Agriculture
Ont 117- 57	Jaycox Creek and tribs	0402-0064	River	Silt/Sediment	Agriculture
Ont 117- 66-22	Mill Creek and minor tribs	0404-0011	River	Silt/Sediment	Streambank Erosion
Ont 117- 70	Silver Lake Outlet, Upper, and tribs	0403-0034	River	unknown	Unknown
H-240 (portion 14)	Mohawk River, Main Stem	1201-0094	River	odors, floatables	Urban Runoff
H-240 (portion 14)	Mohawk River, Main Stem	1201-0094	River	copper	Urban Runoff
H-240 (portion 14)	Mohawk River, Main Stem	1201-0094	River	D.O./Oxygen Demand	Urban Runoff

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WIN	WATERBODY	ID	TYPE	POLLUTANT	SOURCE
H-240 (portion 14)	Mohawk River, Main Stem	1201-0094	River	Pathogens	Urban Runoff
H-240-227	Ninemile Creek, Lower, and tribs	1201-0014	River	Silt/Sediment	Streambank Erosion
H-139-13-59	Quaker Creek	1306-0025	River	D.O./Oxygen Demand	Agriculture
(MW3.6) LIS-13	Byram River, Lower	1702-0132	Estuary	Pathogens	On-Site WTS, Urban

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
MARYLAND

ANACOSTIA RIVERKEEPER, *et al.*	*	
Petitioners,	*	
	*	
v.	*	Case No. 339466-V
	*	
MARYLAND DEPARTMENT OF THE	*	
ENVIRONMENT, *et al.*, and	*	
MONTGOMERY COUNTY, MARYLAND	*	
Respondents.	*	

* * * * * * * * * * * * *

OPINION AND ORDER

This case is before the Court on remand from the Court of Special Appeals, to address the merits of a final determination by the Maryland Department of the Environment (MDE) concerning its issuance of the "National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Discharge Permit No. 06-DP-3320 MD0068349." The permit states that its purpose is to regulate discharges to and from the storm drain systems owned and operated by Montgomery County and other municipalities named in the permit.

The Court conducted a hearing under Rule 7-208 on November 20, 2013. The following disposition is entered under Rule 7-209.

Standard of Review

1. The scope of judicial review of an administrative agency's action is narrow, and the agency's action is entitled to a presumption of validity. When the matter is within the expertise of the agency, the agency's interpretation and application of its own rules are given considerable deference. However, when the agency's decision is predicated on an error of law, deference is not appropriate.

Merits

2. For the reasons stated below, the Court concludes that the permit does not comport with Maryland law, the federal Clean Water Act, and federal regulations implementing the Clean Water Act.

3. MDE issued the permit pursuant to its authority under Maryland Code, Environment Article §§ 9-323 and 9-324, which provide MDE with the authority to issue a water pollution discharge permit when it determines that the terms of the permit comply with all applicable state and federal water quality standards and effluent limitations. While the authority to issue permits was delegated to the state of Maryland by the federal government, the Clean Water Act and federal regulations also continue to apply to permits issued by MDE.

4. The Court concludes that the permit must include requirements needed to meet water quality standards, under Environment Article § 9-324, Clean Water Act §§ 301 and 402, and federal regulations, 40 C.F.R. § 122.44(d).

5. Under Environment Article § 9-324, the terms of the permit are crucial because the Court must look to those to determine whether the permit comports with applicable laws. Specific, enforceable standards, benchmarks, and deadlines for meeting applicable requirements must be stated in the permit. Permit requirements that are developed or modified outside of the permit process frustrate the public participation and judicial review requirements adopted by the General Assembly.

6. After reviewing the permit and the administrative record, the Court is unable to understand why MDE adopted the terms in the permit, or how those terms meet the requirements of the law. The permit does not state with clarity what the permittees will do, how they are to do it, what standards apply, or how one will measure compliance or noncompliance. The permit lacks ascertainable metrics for meeting water quality standards that can either be met or not met.

7. The Court finds that it is not sufficient for the permit to require that permittees engage in best management practices and file annual reports on their activities. Manuals and policies that exist outside of the permit change frequently, and do not inform the public or the Court of what the permit specifically requires. While it is allowable for the permit to require best management practices, specific requirements for meeting water quality standards must be stated in the permit.

8. The Court finds that the permit's requirement to restore 20% of impervious surface is simply too general to show how the permittees will meet water quality standards. It does not explain what the permittee is to do or how its performance is to be measured.

9. Federal regulations require that the permit include a monitoring program for representative data collection for the term of the permit, including a program to monitor and control pollutants in storm water discharges from sites that are contributing a substantial pollutant loading. 40 C.F.R. § 122.26(d). The permit requires monitoring in one tributary, and requires the permittees to submit an annual report to MDE regarding all activities under the permit. The Court finds that these requirements are not sufficient to meet the applicable requirements for monitoring.

Timeliness of the Petition

10. The Court finds that the petition was timely filed on July 24, 2009, by delivery to a court clerk. The later payment of appearance fees did not affect timeliness. Because the petition specifically identified the matter under judicial review, it complied, or at least substantially complied, with applicable procedural requirements.

Conclusion

11. The Court hereby remands this matter to MDE for further proceedings to allow the agency to comply with Maryland law, the Clean Water Act, and federal regulations consistent with the above discussion.

JUDGE RONALD B. RUBIN
CIRCUIT COURT FOR MONTGOMERY COUNTY

12-3-13

ADD27

April 16, 2004

MEMORANDUM

Subject: Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s

From: James A. Hanlon /s/
Director, Office of Wastewater Management

To: Water Management Division Directors, Regions I - X

The purpose of this memorandum is to provide guidance on implementing a partial remand of the Stormwater Phase II regulations. The U.S. Court of Appeals for the Ninth Circuit recently denied EPA's petition for rehearing in the Phase II litigation. Environmental Defense Center, et al. v. EPA, No. 70014 & consolidated cases (9th Cir., Sept. 15, 2003). The Department of Justice has informed us that further review by the U.S. Supreme Court is not available. This memorandum provides interim guidance to EPA and State NPDES permitting authorities pending a rulemaking to conform the Phase II rule to the court's order.

The Relevant Provisions of the Rules

This case challenged the NPDES stormwater regulations issued pursuant to Clean Water Act ("CWA") section 402(p)(6). That section directs EPA to "establish a comprehensive program to regulate" stormwater discharges designated by EPA. We commonly describe these regulations as stormwater "Phase II." The regulations require NPDES permits for discharges from certain municipal separate storm sewer systems ("MS4s") for which NPDES permits were not required under CWA section 402(p)(2) and the Phase 1 regulations.

The Phase II regulations require that MS4s reduce the discharge of pollutants "to the maximum extent practicable" (or "the MEP standard"). The regulations also require the MS4s to develop, implement and enforce a stormwater management program containing, among other things, best management practices ("BMPs") identified by the discharger. The regulations authorize the use of "general permits" and require that these BMPs (as well as measurable goals associated with these BMPs) be identified in the Notice of Intent ("NOI") filed by the MS4 in seeking authorization under a general permit. Relying on the "traditional" general permit model, the Agency did not require NOIs to be subject to public hearings.

The Ninth Circuit's Decision

The Ninth Circuit held that these NOI requirements violated various provisions of CWA section 402. They concluded that "the EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act." The remand raises important questions regarding the procedures that would be appropriate for authorization of Phase II MS4 discharges *other than* through an individual permit.

In denying EPA's motion for rehearing the court "vacated" the portions of the Phase II rule that address the procedural issues relating to the general permitting option for Phase II MS4s. Therefore, the Agency needs to take affirmative action to clarify the general permitting option for Phase II MS4s. In any such action, we believe it is imperative that implementation of the MEP standard remain an "iterative" process that optimizes the reduction of stormwater pollutants, rather than a static pollution reduction requirement.

In looking at options for implementing the court's decision, we want to continue to provide States with maximum flexibility. Some State Phase II MS4 permitting procedures already appear to meet the court's intent and will not need changes. However, the general permits and procedures of other States, along with the provisions developed by EPA in States where EPA has program implementation responsibilities, will need to change. To assist MS4 permitting authorities in moving forward with implementing program revisions where needed, EPA provides the following recommendations to address the court's decision.

Guidance for Issuance of New General Permits

1. Public availability of NOIs The Phase II rules already require that Phase II MS4 permittees make the records of their stormwater management plans publicly available at reasonable times during regular business hours. 40 C.F.R. 122.34(g)(2). NOIs (which essentially summarize stormwater management plans) should also be made publicly available. Permitting authorities can ensure the public availability of Phase II MS4 NOIs by providing notice on the web of the facilities applying for coverage under a general permit with either an electronic posting of the NOIs or information on how NOIs can be accessed. NOIs could also be public noticed in a newspaper, or by another effective manner.

Unless a permitting authority has already otherwise incorporated public notice procedures into its processes for issuance of Phase II MS4 general permits, NPDES agencies that have not yet issued final permits should include permit language explaining that (and how) NOIs will be made available to the public with sufficient time to allow for meaningful public comment. EPA recommends that permitting authorities make the NOIs available to the public at least thirty days before authorization to discharge.

2. Opportunity for public hearing The court's decision requires that the public be given an opportunity to request a public hearing. If the Phase II MS4 general permittee provides public notice for the NOI, the permitting authority will still need to provide the public an opportunity to request a hearing. EPA recommends that permitting authorities include permit language explaining the process for requesting a public hearing on an NOI, the standard by which such requests will be judged, the procedures for conducting public hearing requests that are granted, and the procedures for permitting authority consideration of the information submitted at the hearing in determining whether to grant authorization to discharge to the submitter of the NOI. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.

3. Permitting Authority reviews of NOIs The permitting authority will need to conduct an appropriate review of Phase II MS4s' NOIs to ensure consistency with the permit. General permits should, to the extent practicable, specify in objective terms what is expected of a Phase II MS4 in order to meet the MEP standard. Due to the iterative nature of the MEP standard, we do not believe official "approval" of NOIs is necessary, but the general permits will need to specify when authorization occurs, such as after notice from the permitting authority that review is complete, or after a specified waiting period. EPA notes that this process does not preclude the permitting authority from denying an MS4 authorization to discharge. Either of these timing options should provide the permitting authority with sufficient time to review NOIs, to ensure that NOIs have been publicly available, and that there has been an opportunity to request a public hearing to provide input.

Guidance for General Permits Already Issued for MS4s

Permitting authorities that already have issued general permits should determine the most effective way to provide public notice and review of MS4 NOIs. Unless a permitting authority has already otherwise incorporated such procedures into its processes for issuance of Phase II MS4 general permits, NPDES agencies that have issued final permits should:

- List on the State or EPA Region's web site those MS4 permittees who have submitted NOIs and how NOIs can be reviewed by the public. Include information on how comments can be submitted and a hearing can be requested. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.

- Conduct an appropriate review of submitted NOIs (to determine compliance with the permit) and contact the MS4 when changes appear to be needed.

MS4s continue to have an obligation to apply for permit coverage, whether under an individual NPDES permit or an NPDES general permit. We do not believe that the court ruling

creates legal vulnerability for violations of the CWA for Phase II MS4 permittees that have filed timely applications, whether or not authorization has been granted. The Phase II regulations establish application deadlines, not authorization deadlines. Even when Phase II MS4 permittees are authorized, the regulations do not require immediate compliance with the MEP standard, i.e., development and full implementation of the Phase II MS4 stormwater management program. Instead, the permitting authority specifies the applicable time period, which maybe be as long as five years after permit issuance.

We request that you communicate this guidance to States within your Region which are authorized to administer the NPDES program. If you have questions or concerns, please contact Linda Boornazian at (202) 564-0221 or Wendy Bell at (202) 564-0746.

cc: Ben Grumbles, OW
NPDES Branch Chiefs, EPA Regions I - X
Susan Lepow, OGC
Mark Pollins, ORE
Robbi Savage, ASIWPCA