To Be Argued By:
LAWRENCE M. LEVINE
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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.

SUPPLEMENTAL BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

When it rains in New York, polluted runoff from municipal separate storm sewer systems (MS4s) fouls hundreds of rivers, lakes, bays, and beaches in every corner of the state, harming human health, the environment, and recreational- and tourism-based sectors of the economy. The Legislature has charged Respondent New York State Department of Environmental Conservation (DEC) with the responsibility to ensure this pollution is brought under control, to protect the waters of the state and people who use them. The Legislature further mandated that DEC carry out this responsibility using a particular set of regulatory tools – including a water pollution permitting program governed by the Clean Water Act, under which MS4s are regulated as permittees.

DEC would have this Court believe the problem of polluted runoff is virtually intractable – or at least so challenging that the agency need only make a "reasonable" effort to address it, to which the Court should reflexively defer. In fact, the problem is a solvable one, and state and federal law provide a legally binding framework for solving it, which DEC has ignored. That framework can be implemented in a manner that treats municipalities with due respect for their varied local circumstances, while also subjecting them to meaningful regulatory oversight and holding them accountable for pollution control results. And it can be implemented without unduly taxing DEC's resources, taking advantage of legally

permissible efficiencies in regulating hundreds of MS4s across the New York. Other states have been up to the task, adopting permit terms that comply with the law – without resorting to micromanaging municipalities through "Soviet-style central planning," or a "top-down, command-and-control approach," as DEC would have this Court believe Petitioners seek.

The DEC Permit at issue in this case, which regulates hundreds of MS4s around the state, deviates in many ways from the applicable legal framework, and has been demonstrably ineffective as a result. DEC's defenses consistently miss the mark, both legally and factually. This Court should declare the Permit unlawful and remand it to DEC with clear instructions to issue a new Permit that lives up to the agency's obligations and protects the health, environment, and economy of the people of New York.

ARGUMENT

I. THIS COURT SHOULD NOT DEFER TO DEC'S ERRONEOUS LEGAL INTERPRETATIONS AND ARBITRARY DECISIONMAKING

The bulk of DEC's argument can be summarized in two words: judicial deference. But this Court owes no deference to an agency's legal interpretations when they contradict the clear mandates of state or federal law.[1] Further, even if a

[1] *See, e.g.*, *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 100, 107 (1997). Even when an agency is interpreting its own regulation, if it does so in a manner inconsistent with the regulation's plain meaning then a court owes the agency no deference. *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).

statute is ambiguous, this Court accords 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.[2] The Court owes no deference when an agency makes an error of law or, even if evaluation of facts is involved, when the agency's decisions are arbitrary or capricious.[3]

These principles apply to DEC's interpretations of both state environmental law and the federal Clean Water Act. This Court does not defer to a *state* agency's interpretation of a *federal* statute, particularly when the question is one of statutory analysis or legislative intent.[4] Federal courts abide by the same rule when reviewing state agency interpretations of federal law,[5] and other state courts have

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[2] *See, e.g., Belmonte v. Snashall*, 2 N.Y.3d 560, 566 (2004); *Claim of Gruber*, 89 N.Y.2d 225, 232 (1996); *Indus. Liaison Comm. v. Williams*, 72 N.Y.2d 137, 143-44 (1988).

[3] CPLR § 7803[3]; *see also Levitt v. Board of Collective Bargaining of City of New York*, 79 N.Y.2d 120, 135 (1992) (stating that an agency "determination is entitled to deference *so long as* it is not affected by an error of law, arbitrary and capricious or an abuse of discretion" (emphasis added)).

[4] *See Seittelman v. Sabol*, 91 N.Y.2d 618, 625 (1998) (declining to adopt the state's interpretation of a federal statute because the question was one of "statutory reading and analysis," and "[i]n such a case, courts are free to ascertain the proper interpretation from the statutory language and legislative intent" (internal citations omitted)).

[5] *See, e.g., Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) ("We review *de novo* a state agency's interpretation of a federal statute. . . . A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984)."); *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (citing *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491).

followed suit.[6] The Vermont Supreme Court has applied this principle specifically to the Clean Water Act.[7] This Court should do the same.[8]

In this case, all of DEC's arguments hinge on erroneous legal interpretations of statutory and regulatory language, to which the Court owes DEC no deference. To the extent some of Petitioners' claims hinge on factual determinations by DEC regarding the application of certain legal provisions, DEC's decisions also deserve no deference because they lack a foundation in the record – indeed, are often directly contradicted by the record and other agency documents – and are, therefore, arbitrary and capricious.

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[6] *See, e.g.*, *In re RCN of NY*, 186 N.J. 83, 85, 892 A.2d 636, 637 (2006) (quoting *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491).

[7] *In re Stormwater NPDES Petition*, 180 Vt. 261, 269, 910 A.2d 824, 830, n.2 (2006) (holding that judicial deference to a state environmental agency charged with administering the Act's permitting program "does not extend to interpretations of the scope and purpose of provisions of the CWA and implementing EPA regulations").

[8] Besides seeking deference to its own determinations, DEC suggests the Court should give weight to the fact that EPA did not exercise its Clean Water Act authority to veto the Permit. DEC Br. at 20 n.42. However, no inferences can be drawn from EPA's silence, since EPA has consistently maintained for decades (and federal courts have agreed) that its exercise of authority to veto unlawful state-issued permits is discretionary, not mandatory. *See Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1294-95 (5th Cir. 1977); *Historic Green Springs, Inc. v. U.S. E.P.A.*, 742 F. Supp. 2d 837, 852-54 (W.D. Va. 2010); *Miss. River Revival, Inc. v. EPA*, 107 F.Supp.2d 1008, 1013 (D. Minn. 2000).

II. THE APPELLATE DIVISION'S MODIFIED ORDER, AND THIS COURT'S DISMISSAL OF PETITIONERS' ORIGINAL APPEAL AND GRANT OF LEAVE TO APPEAL THAT MODIFIED ORDER, RENDER THE PARTIES' PRIOR BRIEFING ON THE "COMPLIANCE SCHEDULE" ISSUE ACADEMIC.

As Petitioners explained in their opening brief, the Appellate Division erred in reversing Supreme Court's ruling in Petitioners' favor on the "compliance schedule" issue because DEC did not appeal that issue. Pet'rs' Br. at 39-43. Petitioners filed a motion to reargue in the Appellate Division to fix this error, which DEC did not oppose. The motion was pending when this Court granted leave to appeal, and remained pending when Petitioners filed their opening brief in this Court. *Id*.

Approximately one month after Petitioners filed their opening brief, the Appellate Division granted the motion to reargue, withdrew its original decision, and issued a modified opinion and order that deleted its ruling on the compliance schedule issue, but was otherwise identical in substance to that court's original decision.[9] This Court then dismissed Petitioners' appeal of the Appellate Division's original order for lack of jurisdiction, and granted leave to appeal the Appellate Division's revised order. The Court provided an opportunity for the parties to file supplemental briefs, indicating that the Court would treat the merits briefs from the prior appeal (No. APL-2014-00095) as applicable to the appeal of

[9] *NRDC v. DEC*, 120 A.D.3d 1235 (2d Dep't 2014) (recalling and vacating the earlier decision, *NRDC v. DEC*, 111 A.D.3d 737 (2d Dep't 2013)).

the revised order. (This Supplemental Brief of Petitioners also serves as a reply brief, since Petitioners had not had the opportunity to file a reply brief, under Rule 500.12(d), before the Court dismissed the original appeal.)

The Appellate Division's revised order moots the arguments from the prior briefs on the compliance schedule issue. *See* Pet'rs' Br. at 39-45 (Point II). The Court can now disregard that issue entirely. Beyond this, there are no new circumstances that affect the arguments in Petitioners' opening brief.[10]

III. THE PERMIT FAILS TO ENSURE COMPLIANCE WITH WATER QUALITY STANDARDS.

DEC agrees with Petitioners that "[s]tate law requires permits (including stormwater discharge permits) to include conditions 'necessary to insure compliance with water quality standards.'"[11] DEC Br. at 72-73. Federal law is equally clear.[12] The amicus brief of twenty-one environmental law professors who

[10] In opposing Petitioners' motion for leave to appeal the Appellate Division's revised order, DEC argued that the recent filing of a mandamus petition in the U.S. Court of Appeals for the Ninth Circuit, to enforce that court's 12 year-old remand of a portion of EPA's MS4 permitting rules, was relevant to this case. Petitioners, in their reply to DEC's opposition, explained why that mandamus petition has no bearing on the case – neither on the wisdom of granting leave to appeal (which the Court has done), nor on the merits. To the extent DEC continues to suggest the Ninth Circuit mandamus petition has some relevance to this case, we refer the Court to Petitioners' reply memorandum of law, filed on Feb. 6, 2015. Nothing has changed in the Ninth Circuit proceeding since that time; the petition remains pending, awaiting a scheduling order from that court.

[11] ECL § 17-0811(5); *see also* 6 N.Y.C.R.R. § 750-1.11(a)(5).

[12] *See* 33 U.S.C. § 1342(a)(1)-(2) (requiring that all NPDES permits comply with section 301 of the Act, which requires, at 33 U.S.C. § 1311(b)(1)(C), achievement of "any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations"); 40 C.F.R. § 122.4(d) ("No permit may be issued . . . [w]hen the

specialize in the Clean Water Act, including eleven on the faculty of law schools in New York, elaborates further on this "fundamental premise of modern water pollution control law."[13]

There is an important reason behind the statutory mandate to ensure compliance with state water quality standards: those standards are set at levels designed to protect human health and the environment.[14] If the standards are not

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imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States"), 40 C.F.R. § 122.44(d) ("[E]ach NPDES permit shall include . . . any requirements . . . necessary to: (1) Achieve water quality standards established under section 303 of the CWA . . . .").

[13] Br. of Amici Curiae Environmental Law Professors in Support of Plaintiffs-Appellants at 6-14 (Feb. 19, 2015) (hereinafter "Law Professors' Amicus Brief"). Amici City of New York, et al., argue that federal law does not require MS4 permits to comply with water quality standards. That argument is irrelevant, because the parties agree that DEC is legally obligated to include in the Permit conditions that ensure such compliance. The amici are, in any case, wrong on this point. The plain language of the Clean Water Act and EPA's NPDES permitting rules, quoted above, and elaborated further in the Law Professors' Amicus Brief, applies to *all* NPDES permits, admitting of no special exemption for MS4s. *See also In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323 at *17 (EAB 2002) (decision of EPA's Environmental Appeals Board remanding MS4 permit because EPA did not "provide . . . support for its conclusion that the permit *will* 'ensure' compliance with the District's water quality standards," as required by the above-cited federal statutory and regulatory provisions (emphasis in original)).

[14] 33 U.S.C. § 1313(c)(2)(A) ("Such [water quality] standards shall be such as to protect the public health or welfare, enhance the quality of water and … shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes…"); *see also* ECL § 17-0301(4). The state has water quality standards for pollutants ranging from pathogens, to toxic metals, to algae-breeding nutrients, and more. *See* 6 N.Y.C.R.R. § 703. MS4s contribute a wide array these pollutants to the state's waters. See Brief for Amicus Curiae Citizens Campaign for the Environment at 4-8, 10-22 (brief attached to original motion filed Dec. 30, 2014, which was dismissed as academic when the Court dismissed the original appeal in this case, but which CCE is planning to refile in this appeal) (hereinafter "CCE Br.").

met, people who drink, or swim or fish in, the receiving waters may get sick or die.[15]

DEC, however, seeks to frame the issue as whether "[t]he General Permit's approach for complying with water quality standards is reasonable," DEC Br. at 70, or whether the Permit "adequately" ensures compliance. DEC Br. at 73, 80. But "reasonableness" is not the applicable statutory standard and the term "adequately" does not appear in ECL § 17-0811(5) or in the federal or state regulations. Rather, the question presented is whether the Permit includes limitations necessary to *insure compliance* with water quality standards adopted pursuant to state law.[16] The Permit does not – a point that DEC tacitly concedes by attempting to recast the legal standard and relegating this argument to page 70 of its brief.

We take each of DEC's arguments in turn.

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[15] *See, e.g.*, A. 66-77 (affidavits from Petitioners' members describing how MS4s' pollution adversely affects their use of beaches and bays, including curtailing swimming, fishing, shellfishing, boating and other activities, and adversely affecting property values and real estate business); *see also* ABC News, "California Surfer Dies After Ignoring Tainted Water Warning" (Jan. 6, 2015), *available at* http://abcnews.go.com/Health/california-surfer-dies-staph-infection/story?id=28028208 (ADD. 127-28) (reporting death of one surfer, and serious illness of two others, from bacterial infections contracted from surfing in waters where health officials warned of "dangerously high bacteria levels" following rainstorm). Items in the Addendum to this brief are cited herein in the form "ADD.[page number]". To distinguish citations to the addenda to other previously-filed briefs, those citations indicate the name of such brief before identifying the addendum page.

[16] ECL § 17-0811(5); *see also* 6 N.Y.C.R.R. § 750-1.3(f). The state and federal regulations use the term "ensure" rather than "insure," but the meaning is the same.

A. The General Permit Fails to Ensure Compliance with Applicable Water Quality Standards for Impaired Waters Without a TMDL.

The Permit fails to set limits that ensure compliance with water quality standards in water bodies that lack Total Maximum Daily Loads ("TMDLs").[17] DEC attempts to justify its approach by pointing to three "interim" controls in the Permit, which are insufficient on their face to ensure compliance, while ignoring other readily available options that would meet the legal requirement.

1. DEC's Three "Interim" Controls Pending Adoption of TMDLs Cannot Ensure Compliance with Water Quality Standards.

First, DEC claims that "experience and research" show that implementation of the required minimum control measures will result in pollution reductions over the life of the Permit, DEC Br. at 74 – even though most MS4s have been required to implement those measures since DEC's first MS4 permit in 2003 and any results should be evident by now. However, the record material DEC cites contains no data or evidence on this point, only the agency's own question-begging statement that "the Department *believes* that implementation of [minimum controls] will result in load reduction" (A. 717 (emphasis added)). And an August 2014 intergovernmental assessment of stormwater control efforts for Long Island Sound pointed out the lack of support for DEC's assertion:

[17] TMDLs are pollution budgets that define the maximum amount of pollution that may be discharged into each water body while still achieving water quality standards. *See* Pet'rs' Br. at 14; 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7.

> NYSDEC believes compliance with the six minimum control measures of the general MS4 permit can result in a roughly 10% reduction in nitrogen loading delivered by nonpoint sources to the Sound. However, no technical analysis had been conducted [i.e., by DEC or anyone else] to support that assertion.[18]

Notably, DEC does not even attempt to argue the minimum control measures will result in pollution reductions *sufficient to achieve compliance with water quality standards*, nor does the record provide any support for that unarticulated proposition.[19]

To the contrary, DEC's own statewide water quality reports demonstrate that the minimum control measures have *not* been sufficiently effective. Simply put, the Permit's terms have proven to be an abject failure when it comes to protecting water quality in New York. Because most current permittees were already subject

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[18] New England Interstate Water Pollution Control Commission, A Preliminary and Qualitative Evaluation of the Adequacy of Current Stormwater and Nonpoint Source Nitrogen Control Efforts in Achieving the 2000 Long Island Sound Total Maximum Daily Load for Dissolved Oxygen, 59 (Aug. 2014), *available at* http://www.neiwpcc.org/neiwpcc_docs/LIS%20TMDL_Watershed%20Synthesis%20Section.pdf. The Court can take judicial notice of this and other government documents cited herein because they are "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.

[19] *Cf. In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323 at *17 (finding MS4 permit unlawful because permitting agency did not prove in the record "that the Permit would, in fact, achieve water quality standards"). *Compare* DEC, SPDES General Permit for Point Source Discharges to Surface Waters of New York from Pesticide Applications: Fact Sheet at 16-17 (Nov. 2011), *available at* http://www.dec.ny.gov/docs/water_pdf/pesticdefactsheet.pdf (setting forth conclusion that pollution control measures specified in a different general permit, for pesticide application, "will result in discharges that are controlled as necessary to meet applicable water quality standards…[,] based on the cumulative effect of" five specifically enumerated factors, including specific scientific evaluations).

to minimum control measures for seven years under DEC's 2003 and 2008 general permits, the pollution reductions resulting from minimum control measures should have already been realized before the Permit came into effect in 2010, and certainly in the nearly five years since then. Unfortunately, however, the number of water bodies in New York impaired by discharges of stormwater from small MS4s has continued to climb. In 2008, DEC recognized that a total of 128 waterbodies were impaired by municipal stormwater runoff and required a TMDL but did not yet have a TMDL. By 2010, the number had risen to 177. By 2014, it had risen further to 183.[20] The rising number of stormwater impairments in New York shows that reliance on minimum controls measures to protect water quality was not working in the 2003, 2008, or 2010 permits, and is not working now, as DEC prepares to issue a 2015 permit. *See* DEC Br. at 43 (noting preparations to issue permit renewal by April 2015); Pet'rs' Mot. for Lv. to Appeal at 14 & n.19

[20] *See* DEC, *2014 Section 303(d) List of Impaired Waters Requiring a TMDL/Other Strategy* (Sept. 2014), *available at* http://www.dec.ny.gov/docs/water_pdf/303dlistfinal2014.pdf; DEC, *2010 Section 303(d) List of Impaired Waters Requiring a TMDL/Other Strategy* (June 2010) (ADD. 082-126); DEC, *2008 Section 303(d) List of Impaired Waters Requiring a TMDL/Other Strategy* (May 2008) (ADD. 022-081). It should be noted that over time DEC changed its method of counting impaired waterbodies. Initially, DEC counted every instance in which urban/stormwater runoff was mentioned as a cause of impairment. Later, DEC only counted urban/stormwater runoff once for each waterbody even if urban/stormwater runoff was associated with more than one cause/pollutant. The numbers given in this brief were arrived at using the more conservative approach, i.e., only counting the waterbody once for which urban/stormwater runoff was mentioned. Adding to the complications are apparent inconsistencies in the way DEC listed water bodies from year to year, such as identifying water bodies by different names, combining multiple waterbody segments into one listing, or separating them into multiple listings.

(explaining that DEC's proposed renewal would make no substantive changes to the Permit).

Ignoring these facts, DEC asserts that, "under EPA's regulations, compliance with [the] minimum control measures is sufficient to satisfy water-quality standards." DEC Br. at 74-75. However, DEC is citing the preamble to EPA's small MS4 permitting regulation – not the regulation itself – and ignores the portion of the preamble where EPA stated, "[*a*]*bsent evidence to the contrary*, EPA presumes that a small MS4 program that implements the six minimum measures in today's rule does not require more stringent limitations to meet water quality standards."[21] Further, EPA warned in the preamble that, if implementing minimum control measures proved to be "inadequate to protect water quality, including water quality standards, then the permit will need to be modified to include any more stringent limitations necessary to protect water quality."[22] Here, as discussed above, there is evidence showing that the minimum control measures have proved to be inadequate to meet water quality standards. Thus, DEC cannot merely rely on those controls in the vain hope that they will somehow lead to attainment of water quality standards.

[21] EPA, Regulations for the Revision of the Water Pollution Control Program, 64 Fed. Reg. 68,722, 68,753 (Dec. 8, 1999) (emphasis added).

[22] *Id.*

DEC also quotes 40 C.F.R. § 122.34(e)(2), DEC Br. at 75 & n. 116, which was actually labeled as "Guidance" in the Code of Federal Regulations. In that 1999 guidance, EPA recommended waiting until it had conducted an "evaluation of the storm water program in [40 C.F.R.] § 122.37," but, fifteen years later, there is no indication when or if EPA will ever complete that evaluation.[23]

DEC's second line of defense is that the Permit goes beyond the minimum controls by requiring a municipality to "ensure no net increase" of pollution. DEC Br. at 75. By definition, "impaired" waterbodies already receive too much pollution. Preserving the status quo is not enough when the status quo violates water quality standards. Even if it sets a "ceiling" for a permittee's pollution discharges, as DEC argues, the "no net increase" provision does not stop a municipality's existing discharge from causing or contributing to an ongoing violation of water quality standards, and thus does nothing to satisfy DEC's obligation to ensure compliance with water quality standards.

Third, DEC argues that its permit is saved by a provision stating that, if after permit coverage is granted it is *later* determined that a discharge causes or contributes to the violation of an applicable water quality standard, then a municipality must take all necessary actions to ensure that future discharges will

[23] 40 C.F.R. § 122.37, promulgated in 1999, provides: "EPA will evaluate the small MS4 regulations at §§ 122.32 through 122.36 and § 123.35 of this chapter after December 10, 2012 and make any necessary revisions."

not directly or indirectly cause or contribute to the violation. DEC Br. at 76, 79 (referring to A.263). However, this provision does not address pollution from the hundreds of municipal stormwater discharges that DEC had *already* determined were causing or contributing to water quality violations when DEC issued the permit and granted them coverage.

2. Contrary to DEC's Claims, It Is Possible to Ensure Compliance with Standards Even in the Absence of a TMDL.

DEC also argues that the permit's failure to protect water quality must be excused because, until the agency gets around to developing a TMDL, there is little DEC can do to develop effluent limits that ensure compliance with state water quality standards. This is simply not the case. Even where DEC cannot base numeric limits on a TMDL's wasteload allocation, it has other ways to create effective permit limits.

One permit element that would bring DEC closer to ensuring WQS (although likely not sufficient on its own) is for DEC to include a narrative prohibition on discharges that cause or contribute to WQS violations. Many other states' small MS4 permits do this. *See* CCE Br. at 24-25, 28. And DEC has done it in other general permits, including for other categories of stormwater. For example, in the 2007 iteration of its SPDES general for industrial stormwater, DEC included the following provision, under the heading "Maintaining Water Quality":

> It shall be a violation of this general permit and the Environmental Conservation Law ("ECL") for any discharge authorized by this general permit to either cause or contribute to a violation of water quality standards…[24]

DEC's general permits for discharges from small septic systems,[25] pesticide applications,[26] and construction activities[27] all contain a similar prohibition. When issuing the pesticide permit, DEC even expressly stated that this provision is required by law.[28] There is no corollary provision in the Permit under review in this case, but there should be.

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[24] DEC, SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit No. GP-0-06-002, at 1 (Mar. 28, 2007), *available at* ftp://ftp.dec.state.ny.us/dow/Chesapeake%20Record/New%20York%20General%20Permits%20in%202010/MSGP.pdf.

[25] DEC, General Permit GP-0-05-001, at 3, Condition 6 (May 11, 2005), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/spdesgppermit.pdf ("The discharge must not cause or contribute to a violation of water quality classifications and standards as contained in New York Codes, Rules, and Regulations, Title 6, Chapter X, Parts 700-705."). Notably, like the Permit here, the small septic system permit applies to existing discharges, not only to new permittees proposing to discharge.

[26] DEC, SPDES General Permit for Point Source Discharges to Surface Waters of New York from Pesticide Applications, Permit No. GP-0-11-001, at 5 (Nov. 1, 2011), *available at* http://www.dec.ny.gov/docs/water_pdf/pestgenprmtfinal.pdf ("The discharges from applications of pesticides must be controlled as necessary to meet applicable water quality standards.").

[27] DEC, SPDES General Permit for Stormwater Discharges from Construction Activity, Permit No. GP-0-15-002, at 1 (Part I.B.1) (Jan. 2015), *available at* http://www.dec.ny.gov/docs/water_pdf/gp015002.pdf ("The owner or operator must select, design, install, implement and maintain control measures to minimize the discharge of pollutants and prevent a violation of the water quality standards").

[28] DEC, SPDES General Permit for Point Source Discharges to Surface Waters of New York from Pesticide Applications: Fact Sheet at 16 (Nov. 2011), *available at* http://www.dec.ny.gov/docs/water_pdf/pesticdefactsheet.pdf ("The first part of this WQBEL includes the general requirement to control discharges as necessary to meet water quality standards, and as required by ECL §17-0501.").

Second, DEC also could require municipalities discharging into an impaired waterbody to ensure that the pollutant levels in their discharges do not exceed the ambient pollution caps set by applicable water quality standards.[29] That is, DEC could hold a municipality's end-of-pipe discharge to the same standard as the receiving waterbody. This type of limit ensures that even if a river or lake continues to exceed state standards, the municipality's discharge no longer causes or contributes to that problem.

Third, like many other states, New York could put permittees on a clear and enforceable schedule for creation and implementation of plans that lead them into compliance over time. *See* Pet'rs' Br. at 33; CCE Br. at 23-30. DEC has used this approach with other SPDES permittees, including in its permits for New York City's combined sewer system[30] and stormwater discharges from JFK International Airport.[31]

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[29] For example, if a river is impaired by the presence of coliform bacteria and the state water quality standards applicable to the river are a median count of 50 and a maximum of 240 colonies per 100mL of river water (*see* 6 N.Y.C.R.R. § 703.4(a)), then the municipal discharge would be required to meet these limits at the end-of-pipe, rather than allowing for dilution in the water body as DEC may be able to do by developing a TMDL.

[30] *See NRDC v. Grannis*, No. 110898/10, slip op. at 11-12 (Sup. Ct. N.Y. Cty. Aug. 4, 2011) (ADD. 001-021) (explaining that the permit includes a provision that incorporates by reference the terms of an administrative consent order that include a schedule of compliance for meeting WQS).

[31] DEC, SPDES Discharge Permit NY-000 8109 at 17, Special Condition 1 (June 2006, modified Oct. 2007), *available at* http://www.panynj.gov/airports/pdf/APPENDIX-A-SPDES-JFK-2007-Permit.pdf. (requiring permittee, subject to DEC oversight, to conduct the studies necessary to determine the extent to which its discharge contributes to water quality standards violations, and

Indeed, in this case below, Supreme Court cited DEC regulations providing that, "[w]ith respect to any discharge that is not in compliance with … applicable water quality standards … , DEC [shall] establish specific steps in a compliance schedule designed to attain compliance within the shortest reasonable time" (A. 31).[32] Supreme Court applied this regulation to discharges to impaired waters with a TMDL, and ordered DEC to revise the Permit to include compliance schedules for such discharges. *Id*. DEC did not appeal that aspect of Supreme Court's judgment and has said it will implement it in the permit modifications following this Court's decision. DEC Br. at 27 nn. 48, 49. Supreme Court erred, however, in not also applying this regulation to discharges to impaired waters *without* a TMDL. The compliance schedules regulation makes no such distinction.

Finally, DEC could include specific enhanced Best Management Practices appropriate to the pollutant causing the violation of water quality standards, as in Section IX of the permit. Section IX requires MS4s discharging to impaired waters with TMDLs to develop and implement certain identified control measures, in addition to the minimum measures required by Part VII or VIII of the permit (A. 321-39). Similarly, DEC could require MS4s discharging into *all* impaired waters to incorporate additional Best Management Practices designed to ensure

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to develop and implement a plan (subject to DEC review and approval) to reduce pollution sufficiently to eliminate that contribution).

[32] *See also* 6 N.Y.C.R.R. § 750-1.14.

compliance with water quality standards. DEC has used this approach, too, in other permits, such as the general permit for stormwater discharges from construction activities. [33]

Drafting permit requirements that compel protection of water quality may be more difficult in the absence of a TMDL, but it is nonetheless possible. Regardless, administrative burdens do not trump the Clean Water Act's statutory mandates. DEC must issue permits that ensure compliance with water quality standards regardless of whether a TMDL has been established.

3. DEC Should Not Be Permitted to Ignore the Law Because of a Problem That It Created for Itself.

The Court should not tolerate DEC's claims that its past failures to promulgate TMDLs for impaired waters somehow excuse its present failure to set effluent limits in this Permit. DEC has grossly violated the schedule it agreed to with EPA, fifteen years ago, for creation of TMDLs.[34] Pet'rs' Br. at 32-33. The

[33] DEC, Fact Sheet for SPDES General Permit for Stormwater Discharges from Construction Activity at 5 (Part I.B.1), *available at* http://www.dec.ny.gov/docs/water_pdf/gp015002factsheet.pdf (describing additional pollution control measures required for discharges to impaired waters). *See also* DEC, SPDES General Permit for Stormwater Discharges from Construction Activity, Permit No. GP-0-15-002, at 23 (Part III.C) (Jan. 2015), *available at* http://www.dec.ny.gov/docs/water_pdf/gp015002.pdf (imposing heightened pollution control practices for activities listed in Table 2, which in turn includes certain activities discharging to waters listed in Appendix E, which in turn is a list of impaired waters without a TMDL).

[34] *See Natural Res. Def. Council, Inc. v. Fox*, 30 F. Supp. 2d 369, 379 (S.D.N.Y. 1998) (describing schedule agreed by DEC and EPA to complete all TMDLs by 2005, extended to 2008), *aff'd Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

ECL and Clean Water Act do not provide for a grace period excusing DEC from issuing lawful permits simply because the agency has failed to meet its obligations in developing TMDLs. Pet'rs' Br. at 30-32. If they did, hundreds of waters DEC has placed on its impaired waters list, due to all types of pollution sources and not just MS4s, would be doomed to chronic impairment for decades.

Indeed, EPA has frequently reiterated that the failure to complete TMDLs cannot be used as an excuse to defer the inclusion in permits of terms that ensure compliance with water quality standards.[35] EPA regulations state that (i) all permits "shall include" more stringent limits to ensure compliance with water quality standards, whenever technology-based limits are insufficient to ensure such compliance;[36] and (ii) "[w]hen developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that [such limits] are consistent with the assumptions and requirements of *any available* wasteload allocation … ."[37]

Upon issuing the regulation, EPA clearly explained that, while permit limits must conform to a TMDL *if* one exists, the requirement to comply with water quality standards exists whether or not there is a TMDL. The agency

[35] EPA, National Pollutant Discharge Elimination System; Surface Water Toxics Control Program, 54 Fed. Reg. 23,868, 23,879 (June 2, 1989).

[36] 40 C.F.R. § 122.44(d)(1).

[37] 40 C.F.R. § 122.44(d)(1)(vii) (emphasis added).

acknowledged that, in many cases where the requirement to establish a water quality-based effluent limitation applies, "waste load allocations and total maximum daily loads will not be available for the pollutant of concern"; at the same time, EPA emphasized that, even "where a wasteload allocation is unavailable," the necessary effluent limits "must comply with … applicable water quality standards."[38]

The U.S. Court of Appeals for the First Circuit recently affirmed this principle. In reviewing an EPA-issued Clean Water Act permit in Massachusetts, that court confirmed that "'[d]evelopment of TMDL's is not a necessary prerequisite to adoption or enforcement of water quality standards….'"[39] Rather, the court held, permits must incorporate measures to ensure compliance with water quality standards, even while TMDLs are under development.[40]

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[38] EPA, National Pollutant Discharge Elimination System; Surface Water Toxics Control Program, 54 Fed. Reg. 23,868, 23,878 (June 2, 1989) (emphasis added). *See also id*. at 23,879 ("Today's language clarifies EPA's existing regulations by stating that when WLAs are available, they must be used to translate water quality standards into NPDES permit limits. Although subparagraph (vii) requires the permitting authority to use a wasteload allocation if one has been approved under Part 130, today's regulations do not allow the permitting authority to delay developing and issuing a permit if a wasteload allocation has not already been developed and approved."); EPA, Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978) ("Development of TMDLs . . . is not a necessary prerequisite to adoption or enforcement of water quality standards. . . .").

[39] *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 n.8 (1st Cir. 2012) (quoting EPA Notice on Total Maximum Daily Loads under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978)).

[40] *Id.* at 14 & n.8.

B. Even Where a TMDL Has Been Developed, the Permit Does Not Ensure Compliance with Applicable Water Quality Standards.

The Permit also fails to ensure compliance with water quality standards in water bodies for which TMDLs have been developed. Not only does it fail to specify baselines from which required reductions can be calculated, but it also lacks individualized allocations for each MS4, when multiple permittees discharge into the same impaired water body. Both elements are necessary to ensure that MS4s are held accountable for achieving the pollution reductions required by law.

1. DEC Failed to Include Baselines in the Permit.

The first issue relating to TMDL waters is relatively easily resolved. On its face, the Permit does not specify any baseline level of pollution from which the specified percentage reductions are to be calculated.[41] *See* Pet'rs' Br. at 35. Petitioners noted that their claim on this point would be satisfied if the Court definitively construes the Permit as incorporating the baselines from the TMDLs. *Id*. at 36. DEC responded by stating that, even though the baselines themselves are not set forth within the four corners of the Permit, the "Permit incorporates the TMDL's baselines." DEC Br. at 81. DEC also stated that the percentage-based reduction from the TMDL-specified baseline is a mandatory requirement of the

[41] For example, while the Permit requires MS4s discharging into Huntington Harbor to reduce their discharges of pathogens by 89% by September 30, 2022 (A. 332), those MS4s and other stakeholders are left to guess what resultant level of pollution equals an 89% reduction.

Permit. *See* DEC Br. at 80-81.[42] If the Court agrees with that reading of the Permit, then the issue will be resolved. If not, then the Court should order DEC to make this requirement explicit in the language of Permit itself.

2. The Permit Does Not Include Individualized Allocations for Each MS4 of the TMDLs' Percentage Reductions.

The Permit is also missing individualized allocations of the TMDL's waste load allocation for each MS4 discharging into the same impaired waterbody. *See* Pet'rs' Br. at 36-38. Instead, for most waterbodies with a TMDL, the Permit merely sets forth an aggregate pollution reduction percentage for the waterbody that is not individualized to each MS4 discharging into that same waterbody. Those aggregate pollution reduction percentages are described as a "Pollutant Load Reduction (Waste Load Allocation %)" or a "Pollutant Reduction (Waste Load Allocation %)." (A. 328, 331-333, 337.) Petitioners' opening brief gave the example of Peconic Bay, which receives stormwater from three towns (and other MS4s in those towns) and has a TMDL-imposed nitrogen reduction percentage of 15% set forth in the Permit. *Id*. at 37-38 (citing A.337, A.367). The Permit does not make clear to those MS4s, or to many other MS4s that discharge into a waterbody with an aggregate percentage reduction, what percentage reduction each MS4 is individually responsible for attaining. *See* Pet'rs' Br. at 36-39.

[42] For example, DEC stated: "The General Permit *requires* municipalities to bring their stormwater discharges into alignment with the TMDL's waste load allocation by complying with percentage-based reductions in specified pollutants." DEC Br. at 80 (emphasis added).

DEC has three main responses – the first of which misquotes EPA, the second proves Petitioners' point, and the third potentially resolves the issue, depending upon what DEC intends by its statement. First, DEC argues that EPA recommends individualized waste load allocations only "when circumstances allow." DEC Br. at 81-82 n.122. However, what EPA actually said in the guidance documents quoted by DEC is that while TMDL writers might, in some circumstances, stop short of disaggregating waste load allocations in TMDLs, permit writers should disaggregate them in permits. In particular, EPA's "2014 Guidance" states:

> EPA encourages permit writers to identify specific shares of an applicable wasteload allocation for specific permittees during the permitting process, as permit writers may have more detailed information than TMDL writers to effectively identify reductions for specific sources.[43]

Moreover, these documents are merely guidance and cannot relieve DEC of the obligation set forth in its regulations that the "provisions of each issued SPDES permit shall ensure compliance with … any more stringent limitations … necessary

[43] *See* Andrew D. Sawyers & Benita Best-Wong, Memorandum to Water Division Directors 8 (Nov. 26, 2014) ("2014 Guidance"), *available at* http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf; *see also* James A. Hanlon & Denise Keehner, Memorandum to Water Management Division Directors 5 (Nov. 12, 2010), *available at* http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf (to the same effect); Robert H. Wayland & James A. Hanlon, Memorandum to Water Division Directors 3-4 (Nov. 22, 2002), *available at* http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf (same).

to implement a … total maximum daily load/wasteload allocation…"[44] The crux of the legal issue is that an aggregated pollutant load allocation in a permit, without more, neither implements nor ensures compliance with the waste load allocation in a TMDL.

Second, DEC states that it has established individualized allocations for MS4s in "some" watersheds – namely, the East of Hudson MS4 watersheds – which is an admission that DEC has not done so for *all* the waters with a TMDL.[45] DEC Br. at 82. For the other waters, DEC states that it expects to provide "more" specific allocations (but still not all of them) pursuant to a process outside the Permit at some unspecified time, which is "years" off. *Id*. Because enforceable limitations for implementing TMDL waste load allocations are required in the

[44] 6 N.Y.C.R.R. § 750-1.11(a)(5)(ii); *see also* Pet'rs' Br. at 34 n.61.

[45] The amicus brief submitted by the East of Hudson Coalition states that DEC's disaggregation of the waste load allocation in that watershed has allowed the MS4s to work together to efficiently make progress towards achieving waste load allocations, because it is clear to all what their responsibilities are, both collectively and individually. Br. for Amicus Curiae East of Hudson Coalition at 4-13 (brief attached to original motion filed Dec. 19, 2014, which was dismissed as academic when the Court dismissed the original appeal in this case, but which Petitioners anticipate the Coalition is planning to refile in this appeal). While this is a policy argument presented by amici, not a legal argument, it actually serves to undermine DEC's argument that it should not be compelled to complete a similar disaggregation for all other TMDL water bodies.

Permit itself, *see* Pet'rs' Br. at 36 n.62,[46] a promise to develop those allocations separately and later cannot excuse DEC's failure to do so in the Permit.[47]

Third, and most important, DEC says:

> In the interim, the General Permit makes clear that *each municipality is responsible for reducing their contribution as instructed by the TMDL. Municipalities may meet this default obligation on their own,* or may form coalitions and achieve the reductions on a regional basis.

DEC Br. at 83 (emphasis added).[48] This is where DEC finally gets to the heart of the issue. For an MS4 that has not received a specific allocation from DEC, the

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[46] *See also* 6 N.Y.C.R.R. § 750-1.11(a)(5)(ii) ("provisions of each issued SPDES permit shall ensure compliance with … any more stringent limitations … necessary to implement a total maximum daily load/wasteload allocation").

[47] The approach taken by the two other states DEC cites, DEC Br. at 83 n.125, cannot, of course, render DEC's approach lawful.

[48] DEC's statement here that MS4s *may* form coalitions and achieve the percentage reductions on a regional basis, DEC Br. at 83, does not resolve the issue, for two reasons. DEC cites a permit provision at A. 265, which provides as follows:

> If MS4s form an RSE [Regional Stormwater Entity], the Department would allow compliance with this condition of the [Permit] to be achieved on a regional basis. In this case, the load reduction for each participating MS4 will be aggregated, to create an RSE load reduction…Each member of an RSE is in compliance if the aggregate reduction number…is met. If the aggregate number is not met, each of the participating MS4s would be deemed non-compliance until such time as they had met their individual load reductions.

First, given that coalitions are entirely optional, the potential for such coalitions cannot absolve DEC of its responsibility to provide allocations in the Permit for MS4s that do not join coalitions. Second, even for MS4s that join a coalition, this permit term provides that if the coalition does not meet the aggregate load reduction, each member of the coalition is still accountable for meeting its individual load reduction. But the permit does not specify the individual load reduction, unless, as discussed herein, the Permit is interpreted to mean that in the absence of an individualized reduction percentage, each MS4 is responsible for meeting the reduction set forth in the Permit for the waterbody.

relevant question becomes: What is the "default [pollution reduction] obligation" that each MS4 "is responsible for"? If, by the italicized text, DEC means to say that, in the absence of an individualized percentage reduction, the Permit applies to each individual MS4's pollutant loadings the mandatory "Pollutant Load Reduction (Load Allocation %)" or "Pollutant Reduction (Load Allocation %)" set forth in the Permit for the waterbody – and the Court construes the Permit the same way – then this aspect of the allocation issue can be resolved in a fashion similar to the baseline issue discussed above, i.e., through a definitive judicial interpretation of the Permit, rather than a court order requiring administrative modification of it. That would make the MS4s' responsibility clear in a way that the Permit itself, and DEC's prior statements, have not. It would mean, for example, that the three towns and any other MS4s discharging to Peconic Bay would each be required to reduce their discharges of nitrogen by the specified 15% by the March 9, 2021, deadline set forth on page 84 of the Permit. (A. 334.)

If, however, the Permit is not construed as such, then the Permit unlawfully and unjustifiably fails to implement the TMDL waste load allocations because the Permit does not tell MS4s what pollution reduction percentages they are responsible for meeting.

Accordingly, the Court should either: (i) declare that each MS4 lacking an individualized allocation is responsible for meeting, with respect to its own

pollutant loadings, the "Pollutant Load Reduction (Load Allocation %)" or "Pollutant Reduction (Load Allocation %)" set forth in the Permit at A. 328, 331-333, 337; or (ii) declare that the Permit fails to comply with the mandate set forth in 6 N.Y.C.R.R. § 750-1.11(a)(5)(ii) to "implement" waste load allocations in SPDES permits and order DEC to modify the Permit to include individualized waste load allocations for all MS4s discharging waters with an approved TMDL.

IV. THE PERMIT CREATES AN UNLAWFUL SELF-REGULATORY SYSTEM AND VIOLATES PUBLIC PARTICIPATION REQUIREMENTS

In regard to Petitioners' challenge to the self-regulatory nature of the Permit and the Permit's limitations on public participation, the questions before the Court are not, as DEC would have it, whether the agency's "determination to extend coverage to small municipalities through a General Permit for stormwater discharge [was] reasonable" and whether DEC's "determination regarding the extent of public participation provided under the General Permit [was] reasonable." DEC Br. at 3. Rather, the question is whether, having permissibly chosen to regulate municipal stormwater discharges through a general permit, the particular permit that DEC issued is lawful. It is not.

A. DEC May Use a General Permit to Regulate Stormwater, But It Failed to Issue a General Permit that Complies with Legal Requirements.

DEC fundamentally mischaracterizes Petitioners' arguments. Petitioners do not contend that DEC must replace "generalized permitting with individualized permit reviews and hearings" or "local discretion and judgment with top-down commands" – much less that the state utilize "Soviet-style" planning. DEC Br. at 3, 49-50 n.76. To the contrary, the parties agree that DEC may appropriately use a general permit to regulate municipal stormwater, and that localized concerns can appropriately influence pollution control requirements. The problem is that DEC applied these approaches in an unlawful manner.

In *Environmental Defense Center v. EPA* ("*EDC*"), the U.S. Court of Appeals for the Ninth Circuit held that EPA's small MS4 permitting regulations misused the general permitting approach, in violation of the Clean Water Act. The court described how a general permit typically functions:

> Under the traditional general permitting model, each general permit identifies the output limitations and technology-based requirements necessary to adequately protect water quality from a class of dischargers. Those dischargers may then acquire permission to discharge under the Clean Water Act by filing NOIs, which embody each discharger's agreement to abide by the terms of the general permit. Because the NOI represents no more than a formal acceptance of terms elaborated elsewhere [i.e., in the general permit], [the traditional] approach does not require that permitting authorities review an NOI before the party who submitted the NOI is allowed to

> discharge. General permitting has long been recognized as a lawful means of authorizing discharges.[49]

Like the EPA rules invalidated in *EDC*, however, DEC's Permit deviates from this model. Under the Permit, as under the vacated EPA rule, the "NOI [submitted by each MS4] contain[s] information on an individualized pollution control program that addresses each of the six general criteria specified in the Minimum Measures" and "establishes what the discharger will do to reduce discharges to the 'maximum extent practicable.'"[50] If DEC reviewed each MS4's proposed pollution control program, this alternative general permitting approach would not only provide flexibility to MS4s to adapt to local conditions, but would also satisfy DEC's obligation to ensure each MS4's pollution control measures are sufficient to reduce pollution to the maximum extent practicable. But DEC's self-regulatory Permit approach runs afoul of the law for the same reasons as EPA's permitting regulations:

> [I]n order to receive the protection of [the] general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum practical reduction. No one will review that operator's decision to make sure that it was reasonable, or even good faith. Therefore, … [the Permit] do[es] less than *require* controls to reduce the discharge of pollutants to the maximum extent practicable.[51]

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[49] *Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 853 (9th Cir. 2003) ("*EDC*").

[50] *Id.*

[51] *Id.* at 855 (emphasis in original). Likewise, in *Waterkeeper Alliance, Inc. v. EPA*, the Second Circuit struck down an EPA rule that failed to provide for agency review of permittees' pollution

As Petitioners explained, this approach – not DEC's decision to use a general permit, or to provide flexibility to MS4s – is what makes the General Permit unlawful, "contrary to the clear intent of Congress."[52] Pet'rs' Br. at 46-67.

A general permit that combines flexibility with DEC review of each MS4's pollution control plan, and with an opportunity for a public hearing in connection with that review (as discussed in Pet'rs' Br. at 56-60 and below), would allow DEC to take advantage of significant administrative efficiencies. It would be far less time-consuming than to write an individual permit for each MS4.[53] In other

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control plans, because it failed to ensure compliance with applicable "effluent limitations," or pollution control standards. 399 F.3d 486, 521 (2d Cir. 2005); *see* Pet'rs' Br. at 61-62. DEC's attempts to distinguish *Waterkeeper* are unavailing. *See* DEC Br. at 54-55. The concentrated animal feeding operation (CAFO) permits at issue in that case were not part of "an entirely different permitting system." *Waterkeeper* expressly found that there were no relevant differences between CAFO general permits at issue in that case and MS4 general permits at issue in *EDC*. 399 F.3d at 499-500 & n.18. DEC's attempted distinction turns on a fundamental misinterpretation of the term "effluent limitation." CAFO and MS4s are both subject to "effluent limitations," which the Clean Water Act defines as "any restriction" on pollution discharges, 33 U.S.C. § 1362(11), including narrative (non-numeric) requirements to take an action that will reduce the amount of pollution discharged, such as the "nutrient management plans" in *Waterkeeper* and the management practices required under the Permit in this case, *see* 40 C.F.R. § 122.34(a) (MS4 permits may include "narrative effluent limitations requiring implementation of best management practices (BMPs)."). While the substantive pollution control standard for CAFOs differs from the standard for MS4s, permits for both categories of discharger must ensure compliance with the applicable standard. The private ownership of CAFOs also makes no difference, as generally applicable NPDES requirements do not apply any differently based on whether a facility is publicly or privately owned. *Cf.* 33 U.S.C. § 1323 (holding federally owned facilities to the same discharge standards as non-governmental ones). Finally, it does not matter that CAFOs, unlike MS4s, can "choose to stop discharges"; both can implement measures that meet applicable pollution control standards.

[52] *EDC*, 344 F.3d at 856.

[53] *See id.* at 856 ("Our holding should not prevent the [small MS4] general permitting program from proceeding mostly as planned.").

words, DEC's goals of flexibility and efficiency and the legal prohibition on self-regulation are not mutually exclusive; a general permitting scheme can and should satisfy both.

B. DEC Cannot Rely on Federal Regulations that Violate the Clean Water Act and Have Been Vacated and Remanded by a Federal Court.

DEC attempts to justify the Permit's self-regulatory system by arguing that it follows the approach established in EPA's regulations for small MS4 general permits. DEC Br. at 21-23, 34-35. However, as Petitioners explained, more than a decade ago, a federal appeals court ruled that those same regulations violate the Clean Water Act. Pet'rs' Br. at 62-64 (citing *EDC*, 344 F.3d at 858). The U.S. Court of Appeals for the Ninth Circuit vacated those rules, in relevant part, holding correctly that their failure to ensure adequate permitting agency review of pollution control programs or opportunities for public participation in such review "contravene the express requirements of the Clean Water Act."[54] The *Environmental Defense Center* decision is the last word from the federal court system on these regulations. The Ninth Circuit is the highest court to have ruled on the rules' legality. DEC cannot rely on the 1999 regulations to defend the Permit's legal shortcomings because the *EDC* court held that those regulations are

[54] *Id*. at 879.

inconsistent with the law, vacated them to the extent they were unlawful, and explicitly directed EPA to revise them on remand.

DEC's statement that the Ninth Circuit remanded but did not vacate the regulations, DEC Br. at 18 n.37, is incorrect. The *EDC* decision explicitly stated: "We…*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, and remand so that EPA may take appropriate action to comply with the Clean Water Act."[55]

Further, contrary to DEC's assertion, EPA has not "adhered to its regulations" following the *EDC* ruling. DEC Br. at 19. Rather, EPA issued a memorandum providing guidance for "implementing the court's decision," recognizing that certain states' permitting procedures that were not in compliance with the court's ruling "will need to change."[56] EPA directed permitting agencies to follow the Ninth Circuit's instructions, stating that they will "need to provide the public an opportunity to request a hearing" and "will need to conduct an appropriate review

[55] *Id*. at 858 (emphasis added).

[56] Memorandum from James A. Hanlon, Director, EPA Office of Wastewater Management, to EPA Regional Water Management Division Directors, Regions IX, "Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s" at 2 (Apr. 16, 2004), *available at* http://www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf. Pet'rs' Br. at ADD. 28.

of MS4s' NOIs to ensure consistency with the permit."[57] EPA's instructions explicitly acknowledge that the procedures set forth in the federal regulations are not sufficient for compliance with the Clean Water Act.

In the context of Clean Water Act permits for other categories of polluters, DEC has shown it understands the effect of a court's vacatur or remand of federal permitting regulations. For example, after the U.S. Court of Appeals for the Sixth Circuit held that the Clean Water Act requires permits for the application of aquatic pesticides, and vacated a contrary EPA regulation,[58] DEC respected that ruling and adopted a general permit for aquatic pesticide discharges consistent with the Sixth Circuit's decision.[59] Similarly, in 2004, the U.S. Court of Appeals for the Second Circuit remanded the provisions in EPA's cooling water intake structure regulations authorizing "restoration measures" because they were plainly inconsistent with the Clean Water Act's text and Congress's intent.[60] Although (unlike the Ninth Circuit in *EDC*) the Second Circuit only *remanded* the offending

[57] *Id.* at 3. The instruction to substantively review NOIs, while not necessarily obligating permitting agencies to issue an "official 'approval,'" nonetheless exceeds what is required in the regulations (as well as DEC's own practice).

[58] *Nat'l Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009).

[59] *See* DEC, "Fact Sheet: SPDES General Permit for Point Source Discharges to Surface Waters of New York from Pesticide Applications" at 15 (2011), *available at* http://www.dec.ny.gov/docs/water_pdf/pesticdefactsheet.pdf ("This SPDES general permit is required pursuant to the *National Cotton Council* decision….").

[60] *Riverkeeper, Inc. v. U.S. EPA*, 358 F.3d 174, 189-91, 205 (2d Cir. 2004).

provisions and did not *vacate* them, and EPA took more than ten years to finally remove those provisions from the Code of Federal Regulations,[61] DEC never once sought to rely on the remanded regulations, and DEC's own statewide cooling water policy, issued in 2011 while the remanded federal regulations were still on the books, made no mention of "restoration measures" as an available option for permittees.[62]

Perhaps seeking safety in numbers, DEC points out that the Permit's flawed procedure for granting coverage to MS4s is similar to that followed in some other states. DEC Br. at 25 & n.47, 60 & n.92. Yet many *other* states have issued permits that seek to comply with the *EDC* holding and with EPA's post-*EDC* memorandum, rather than with EPA's vacated rules, by providing for permitting authority review of MS4s' proposed pollution control measures. Numerous examples are documented in the amicus curiae brief of Citizens Campaign for the Environment. CCE Br. at 30-33. And while it may be true that other jurisdictions beside New York have also ignored the Ninth Circuit's ruling, the actions of those other states cannot, of course, render DEC's Permit lawful.

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[61] EPA, Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300, 48,311-312 (Aug. 15, 2014).

[62] DEC, DEC Policy CP-#52 / Best Technology Available (BTA) for Cooling Water Intake Structures (July 10, 2011), *available at* http://www.dec.ny.gov/docs/fish_marine_pdf/btapolicyfinal.pdf.

C. The Permit's Requirements Are Too Vague to Enable DEC to Ensure that MS4s' Pollution Control Programs Meet the Applicable Legal Standards Absent DEC Review of Each MS4's Proposed Program.

DEC does not contest that its review of NOIs is only to ensure that the NOIs are "complete." That is, DEC does not review NOIs to ensure that each MS4's self-selected pollution controls are sufficient to reduce pollution to the "maximum extent practicable" and achieve compliance with water quality standards. DEC is wrong, however, when it claims that the terms of the Permit, in conjunction with its review of NOIs for "completeness," guarantees that each MS4's controls will meet these statutory requirements. That is because many of the Permit's key provisions provide only a vague and general framework for a pollution control program. This vagueness also undermines DEC's attempts at after-the-fact enforcement of the permit's terms.

1. DEC Performs No Substantive Review of NOIs to Determine the Adequacy of MS4s' Proposed Pollution Control Measures.

DEC asserts that it "reviews every NOI prior to accepting it." DEC Br. at 40. But the Permit and the affidavit DEC cites, submitted by the head of DEC's permit program, both make clear that DEC reviews NOIs only for "completeness" (A. 162, 255, 261-63). According to the affidavit, DEC checks NOIs to see if the MS4 has pledged to comply with the Permit, identified its self-selected pollution control measures and self-selected goals, and sworn to the accuracy of its submission (A.

162). DEC does not check to see if the selected pollution control measures and goals are sufficient to reduce pollution to the maximum extent practicable. (Similarly, when deadlines subsequently arrive for certain MS4s to select heightened pollution controls to meet water quality standards, DEC does not check to see if the selected controls are sufficient to achieve those standards.)[63]

DEC's track record in approving or disapproving NOIs proves Petitioners' point. The three rejection notices DEC cites, DEC Br. at ADD. 141-146, and the corresponding discussion in DEC's brief, *see* DEC Br. at 40-41, establish that the department will approve any and every NOI as "complete" so long as the NOI includes "at least one" pollution control activity for each of the Permit's broadly-defined "minimum control measures." Based on DEC's response to Petitioners' Freedom of Information Law request, as of November 26, 2014, these are, in fact, the only NOI rejection notices DEC has ever sent under the Permit.[64] This

[63] After obtaining permit coverage, MS4s that discharge into impaired waters with TMDLs must develop Watershed Improvement Strategies (WISs) and adopt them as amendments to their SWMPs by specific dates; these WISs are intended to achieve the Pollution Load Reductions required under the applicable TMDL (A. 264-266, 321-339). One element of these WISs is a "retrofit program" to reduce discharges of pollution in post-construction stormwater runoff from land that is already developed (A. 325-326, 329-330, 335-336, 338-339). With the exception of the retrofit program, however, the Permit does not require DEC review of the adequacy of permittees' WISs.

[64] *See* NRDC, FOIL Request for Records Relating to Implementation of the SPDES General Permit for Small MS4s (No. GP-0-10-002) (hereinafter "FOIL Request Letter") at 3, ¶ B.6 (June 16, 2014), *available at* http://docs.nrdc.org/water/wat_15022001.asp (hereinafter "FOIL Document Bank"), Folder: "DEC FOIL request and response letters," Filename: "NRDC FOIL Request 6.16.2014" (requesting all records of DEC's "determinations of whether MS4s' submissions pursuant to Part II of [the Permit] were sufficient to obtain coverage under that

perfunctory review – which amounts to making sure that no boxes or fill-in-the-blank lines on the form have been left empty – cannot ensure that MS4s' pollution control measures meet the applicable statutory standards.

DEC's lack of oversight extends to the Annual Reports that most MS4s, covered under the prior iteration of the Permit, submit in lieu of NOIs. As with NOIs, the Permit requires only a "complete" Annual Report, not a substantively adequate report, and provides that MS4s "shall be permitted to discharge in accordance with the renewed permit … upon the submission of their Annual Report, unless otherwise notified by the Department" (A. 255, 272). DEC does not review these Annual Reports to determine whether MS4s' pollution control measures meet the applicable statutory standards.[65]

DEC's failure regulate has resulted in NOI acceptance and Permit coverage for MS4s that were plainly not meeting the applicable statutory standards. For

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permit"); DEC, thirty-seven letters to MS4s accepting or rejecting NOIs (various dates), *available at* FOIL Document Bank Folder: "DEC FOIL Responsive Records – Part B/B.6 Responsive Records" (records provided in response to ¶ B.6 of FOIL request, comprising all of DEC's NOI acceptance and rejection notices under the Permit). Petitioners can provide hard copies (or electronic files on CD-ROM) of any documents in the FOIL Document Bank upon request.

[65] Under the Freedom of Information Law, Petitioner NRDC requested from DEC all "[r]ecords concerning, in whole or in part, the Department's determinations of whether MS4s' Annual Reports submitted pursuant to Part V.C of [the Permit]…were sufficient to demonstrate compliance with that permit." When DEC responded, the agency said it could identify no such records apart from whatever may be contained within selective compliance audits of MS4s, conducted by DEC after MS4s receive authorization to discharge. *See* NRDC, FOIL Request Letter at 3, ¶ B.7; Email from R. Simson, DEC, to L. Levine, NRDC at 2, ¶ B.7 (Nov. 26, 2014), *available at* FOIL Document Bank, Folder: "DEC FOIL request and response letters," Filename: "DEC FOIL Reply 11-26-14".

example, DEC granted the City of Glens Falls (an MS4 permittee since 2003) coverage under both the 2008 and 2010 versions of the Permit, based on the city's submittal of Annual Report forms, despite the fact that – unbeknownst to DEC until it finally audited the city in 2012 – Glens Falls had never developed or implemented a Stormwater Management Program ("SWMP") *at all*.[66] Because DEC does not perform compliance audits of all MS4s, even after they obtain permit coverage (A. 165), and does not require submission of SWMPs (A. 267), there is no way to know how many other times this may have happened, nor is there any way to know how many MS4s have developed SWMPs that do not meet the statutory standards.

2. The Permit's Conditions, and the Contents of NOIs, Are Too Vague to Ensure MS4s' Programs Satisfy Legal Requirements

In response, DEC argues that it need not review NOIs because the Permit gives sufficiently clear and specific direction to permittees.[67] DEC Br. at 34-38. The Permit's text belies that claim.

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[66] Order on Consent, DEC Case No. R5-20120419-1096, *In the Matter of City of Glens Falls* (Aug. 29, 2012), *available at* FOIL Document Bank, Folder: "DEC FOIL Responsive Records/B.1 Responsive Docs"), Filename: "B-1 Order.MS4.NYR20A083.2012-08-29.pdf"..

[67] Notably, DEC has *not* argued that the terms of Part IX of the Permit are specific enough that a WIS that complies with those terms will necessarily be sufficient to ensure compliance with water quality standards, nor does the record reflect any finding to that effect. In fact, many of the requirements of Part IX – which sets forth additional requirements, beyond the minimum measures, that apply MS4s discharging to impaired waters with TMDLs – are also excessively vague. For example, those MS4s are required to develop "policy and procedures for the inspection, maintenance and repair of a *covered* entity's stormwater management practices,"

In particular, DEC points to terms in the Permit that direct each MS4 to develop procedures for "identifying," "locating," and "eliminating" illicit discharges. DEC Br. at 37 (citing A. 288). But those terms say next to nothing about the content of the procedures. A procedure for eliminating illicit discharges can be technically rigorous and effective, or unsophisticated and ineffective. Neither DEC, nor the public, will know where on that spectrum any procedure developed by an MS4 falls. Nor will an MS4 know, unless it is audited years later, well after implementation has begun, whether DEC believes its procedures are adequate. Many other Permit terms suffer from a similar lack of specificity. *See* Pet'rs' Br. at 49-52. [68] Yet DEC has offered no rebuttal to those.

3. DEC Cannot Rely on After-the-Fact Enforcement Measures, Which Are Limited by the Vague Terms of the Permit.

DEC's selective, after-the-fact enforcement measures are not a legally adequate substitute for universal, pre-authorization review of permittees' proposed

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without further detail, and "procedures for proper fertilizer application on municipally-owned lands" (A. 327).

[68] To elaborate on another example, the permit terms concerning pollution from municipally-owned facilities directs permittees to "*[d]evelop* … and *implement* a pollution prevention/good housekeeping program for *municipal* operations and facilities that: … determines *management practices*, policies, procedures, etc. that will be *developed* and *implemented* to reduce or prevent the discharge of (potential) pollutants" (A. 298). Permittees are further instructed to "[s]elect and implement appropriate pollution prevention and good housekeeping *BMPs* and *measurable goals* to ensure the reduction of all [pollutants] in *stormwater discharges* to the *MEP*" (A. 299). The Permit refers MS4s to other guidance materials for suggested practices, but these are not binding (A. 298). Consequently, there are no objective standards to which an MS4 can be held when judging compliance with these terms.

programs. *See* Pet'rs'. Br. at 54-55. Further, as a practical matter, the vague terms of the Permit have hindered DEC's ability to bring enforcement actions in all but the most extreme cases.

Because the Permit's terms are so unspecific, DEC's records show that the only kind of violation the agency can typically enforce is a permittee's failure to implement a requirement *at all*. Only exceedingly rarely has DEC alleged that an MS4 took *some* action to implement a permit provision but that the action fell short of the applicable legal standard. For example, the only Notices of Violation (NOVs) that DEC has sent to permittees since 2012 – eighty-five in total – notified MS4s that they had completely failed to submit an Annual Report form or retrofit plan.[69] DEC did not send out a single NOV in that time period alleging that a permittee's Annual Report or retrofit plan (or any other pollution control activity) was substantively inadequate.

The state and federal enforcement orders cited in DEC's brief – along with numerous other enforcement orders that DEC did not cite – further prove this point. Petitioners obtained from DEC, under the Freedom of Information Law, every administrative enforcement order the agency issued under the Permit through November 26, 2014. In nearly all of DEC's orders, and all of the additional EPA

[69] Notices of Violation can be found in the FOIL Document Bank, Folder: "DEC FOIL Responsive Records – Part B/B.2 Responsive Docs."

orders cited in DEC's brief, the agency brought the action because the permittee completely failed to implement a permit requirement, most often a requirement to adopt a local law or ordinance, to submit an Annual Report, or to develop a program to prevent illicit disposal of non-stormwater pollution via a storm sewer system.[70] These actions did not seek to enforce any *insufficient* implementation actions – only completely *nonexistent* ones. In the remaining cases, DEC only brought an enforcement action after a specific problem discharge was detected and

[70] *Matter of Village of Nyack*, Order on Consent, Case No. R3-20110824-85 (DEC Jan. 3, 2012 (enforcing failure to adopt required local ordinances); *Matter of Village of New Square*, Order on Consent, Case No. R3-20100630-126 (DEC Oct. 20, 2011) (enforcing failure to adopt ordinances regarding illicit discharges, construction, or post-construction); *Matter of Village of Spring Valley*, Order on Consent, Case No. R3-20110114-23 (DEC Aug. 22, 2011 (enforcing failure to develop a sewershed map or to enact certain required components of the post-construction ordinance); *Matter of Village of Huntington Bay*, Order on Consent, Case No. CO1-20101210-7 (DEC Mar. 25, 2011) (enforcing failure to submit Annual Report and Municipal Compliance Certification form); *Matter of Village of Mamaroneck*, Administrative Order, No. CWA-02-2011-3022 (EPA Mar. 11, 2011) (enforcing failure to implement an illicit discharge program); *Matter of City of Rensselaer*, Administrative Compliance Order, No. CWA 02-2011-3019 (EPA Feb. 2, 2011) (enforcing failure to implement multiple permit requirements); *Matter of Village of Kiryas Joel*, Order on Consent, Case No. R3-20080229-14 (DEC Dec. 9, 2010) (enforcing failure to submit SWPPP review procedures or construction site monitoring and enforcement procedures); *Matter of Village of Lindenhurst*, Order on Consent, Case No. CO1-20100113-5 (DEC May 3, 2010) (enforcing failure to submit Annual Report and Municipal Compliance Certification form); *Matter of Town of Stony Point*, Order on Consent, Case No. R3-20091005-101 (DEC Apr. 21, 2010) (enforcing failure to develop an outfall map, to develop an illicit discharge detection program, and to develop a "track down" program to address non-stormwater discharges); *Matter of City of Mount Vernon*, Order on Consent, Case No. R3-20090604-74 (DEC Dec. 21, 2009) (enforcing failure to develop a construction ordinance, outfall map, or "track down" program for illegal discharges). DEC Br. at ADD. 27-46, 59-140. All DEC enforcement orders not in the Addendum to DEC's Brief can be found in the FOIL Document Bank, Folders: "DEC FOIL Responsive Records – Part A" and ""DEC FOIL Responsive Records – Part B/B.1 Responsive Docs."

traced back to the municipality.[71] Petitioners also obtained from EPA, under the federal Freedom of Information Act, all other EPA enforcement orders issued under the permit. These fit the same pattern, with orders falling into the same two general categories.[72] There is simply no evidence that enforcement actions have been an effective tool to hold MS4s accountable for developing proactive programs that are designed, in the first instance, to meet relevant legal standards.

D. The Permit's Limited Opportunities for Public Participation Violate the Clean Water Act, and this Court Can and Should Rule on the Issue in this Facial Challenge to the Permit.

DEC identifies several "opportunities" the Permit offers the public to provide feedback on NOIs and SWMPs. DEC Br. at 58-59. But none of these opportunities allow for comment *and* a hearing *before the decision maker* – i.e., DEC – at the time when the decision is being made to grant permit coverage.

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[71] *Matter of Town of Brookhaven*, Order on Consent, File No. R1-20140714-84 (DEC Jul. 9, 2014) (enforcing failure of municipal activities to reduce pollutants of concern, after sediment discharges caused water quality violations); *Matter of City of Cohoes*, Order on Consent, File No. R4-2011-0926-109 (DEC Apr. 2, 2012) (enforcing lack of pollution prevention and good housekeeping practices at municipal facility after inspection found pollutants being discharged into river); *Matter of Village of Mamaroneck*, Administrative Order, No. COW-02-2011-3022 (EPA Mar. 11, 2011) (enforcing failure to prevent illicit discharges after EPA found evidence of such discharges through water quality sampling, which was performed as part of an EPA compliance inspection); *Matter of City of Ithaca*, Consent Order, Case No. R7-2008-0208-9 (DEC Mar. 21, 2008) (enforcing violations at a specific municipal construction site where the city implemented no controls and failed to seek coverage under the state's construction general permit). DEC Br. at ADD. 1-8, 20-26, 47-58, 119-128.

[72] *See* FOIA Online, Tracking Number EPA-R2-2014-007491 (July 17, 2014), https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d2802ae535 (EPA web page archiving Petitioner NRDC's June 2014 FOIA request for enforcement orders issued under the Permit and EPA's responsive records).

DEC's refusal to allow the public's voice to be heard, at the time when its feedback could make a difference to the permitting authority's decisions, contravenes Congress's intent.[73] As amici Law Professors explain, the text and legislative history of the Clean Water Act make clear that the public must be treated as "welcome participants" with "a meaningful role" in addressing "policy and technical issues" concerning permitting authorities' "establishment of control requirements" and permit conditions.[74]

DEC's reading of state and federal law is overly cramped.[75] The fact that NOIs and SWMPs "are not individual permit applications" is irrelevant to the reason why they must be subject to public participation requirements. DEC Br. at 62. As the Ninth Circuit explained in *EDC*, NOIs are "functionally equivalent" to individual permit applications, and therefore, the Clean Water Act's public availability and public hearing requirements must apply to them.[76] Additionally,

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[73] *See Costle v. Pac. Legal Found.*, 445 U.S. 198, 216 (1980) (citing "the statutory command that permits be issued 'after *opportunity* for public hearing.' … 33 U.S.C. § 1342(a)(1) (emphasis supplied)" and stating that public participation is "an essential element of the NPDES program").

[74] Law Professors' Amicus Br. at 16-18.

[75] And its reliance on EPA's regulations is misplaced; a federal court invalidated those regulations for one of the same public participation defects found in this Permit. *EDC*, 344 F.3d at 856-57 (holding that EPA's Phase II regulation was "contrary to the clear intent of Congress insofar as it does not provide for public hearings on NOIs as required by 33 U.S.C. § 1342(a)(1)").

[76] *EDC*, 344 F.3d at 857. DEC claims that the Seventh Circuit disagreed with the Ninth Circuit's ruling concerning public hearings. DEC Br. at 63 (citing *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964 (7th Cir. 2005)). But that Seventh Circuit case is readily

SWMPs are the documents in which MS4s define their own particularized requirements under the Permit, and thus – as the Second Circuit recognized in a similar case about agricultural Clean Water Act permits – their contents constitute the Permit's "effluent limitations," which must be subjected to all public participation requirements attendant to issuance of a permit.[77] While SWMPs might not "alter the requirements of the General Permit," DEC Br. at 62, they add the substance to the Permit's otherwise vague and open-ended terms. Because SWMPs are enforceable against the permittee (*see* A. 269 ("Each [permittee] is *required to . . . implement* a SWMP" (emphasis added))), it is clear that, despite

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distinguishable on the facts. It dealt with a general permit for stormwater runoff from construction sites (not from municipal storm sewers), and the court described that permit as containing "*specific rules*" for permittees that require them to comply with "previously established permit terms." 410 F.3d at 968 (emphasis added), 978. Therefore, the court held, there was no need for NOIs to be made available to the public for comment or hearings, since such opportunity had been provided when the substantive permit terms were established. *Id.* at 978. In other words, that permit followed the "traditional general permitting model" discussed above. In contrast, the Ninth Circuit in *EDC* found that EPA's MS4 permitting rules, like the Permit at issue in this case, "le[ft] the choice of substantive pollution control requirements to the regulated entity" after permit issuance – unlawfully sidestepping the requirement of an opportunity for a hearing on the adequacy of pollution control requirements. *EDC*, 344 F.3d at 856 n.33. (Although the Seventh Circuit construed its own opinion to be in conflict with *EDC*'s reading of the Clean Water Act, 410 F.3d at 978 n.13, the results of these two cases can in fact be reconciled based on the facts as described here. In any case, the Seventh Circuit did not rule on the validity of EPA's municipal stormwater permitting rules, or on any permit issued under those rules. Only the Ninth Circuit did. Further, to the extent the two court's rationales conflict, Petitioners submit that the Ninth Circuit's reasoning in *EDC* was correct and this Court should follow it.)

[77] *See Waterkeeper*, 399 F.3d at 503 ("[T]he terms of the nutrient management plans constitute effluent limitations" such that the public has a "right to assist in the[ir] 'development, revision, and enforcement...'" (quoting 33 U.S.C. § 1251(e)). As explained above, *supra* note 51, DEC identified no legally relevant distinctions between *Waterkeeper* and this case.

DEC's protestations to the contrary, the SWMPs "set the terms of compliance."[78] DEC Br. at 62. Congress plainly intended for the public to play a role in the development of all permit limitations.[79] As the *EDC* and *Waterkeeper* courts held, that principle applies when discharger-specific permit limits are developed after a general permit is issued.

DEC argues that it would be more appropriate for Petitioners to challenge a specific NOI or SWMP that had not been made available for public comment and a hearing. DEC. Br. at 58. However, a facial challenge is perfectly appropriate where, as here, such steps would be futile given DEC's repeated refusals to allow for such hearings.[80] DEC's firm position has been that hearings are not available as a matter of law. (*See, e.g.*, A. 261 (permit provision setting out other public participation requirements, like public comment opportunities, without any mention of hearings), A. 703-04 (rejecting commenters' suggestions that additional public participation opportunities, beyond notice and comment, be provided as part of granting permit

[78] 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). Like other components of the SWMP, they are enforceable (A. 269).

[79] 33 U.S.C. § 1251(e).

[80] *See Lehigh Portland Cement Co. v. N.Y. State Dep't of Envtl. Conservation*, 87 N.Y.2d 136, 140-41 (1995) (exhaustion not required where further administrative steps would be futile in light of a firm statement of agency policy); *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978) ("The exhaustion rule … need not be followed … when resort to an administrative remedy would be futile" (internal citations omitted)).

coverage)). *See also* DEC Br. at 60-63 (rejecting Petitioners' asserted right to an opportunity for a hearing, as a matter of law).

V. THE PERMIT ARBITRARILY FAILS TO REQUIRE WATER QUALITY MONITORING, WHICH IS NECESSARY TO DETERMINE COMPLIANCE WITH THE PERMIT'S EFFLUENT LIMITATIONS

DEC's choice not to include monitoring requirements in the Permit makes it impossible to determine compliance with special pollution control requirements that apply to MS4s that contribute to water quality standards violations. This choice overstepped the agency's lawful discretion, and DEC's asserted reasons for excluding monitoring requirements simply do not hold water.

As explained in Petitioners' opening brief, federal and state law require permits to include any monitoring requirements that are needed to ensure compliance with permit limits and water quality standards. Pet'rs' Br. at 16-17, 67-69. DEC contends that Petitioners' explanation of the law is "misleading … [because] none of these provisions *mandates* that monitoring be required." DEC Br. at 64 n.101 (emphasis in original). This is incorrect.

Under federal and state law, a permit "shall" require monitoring *to the extent that* monitoring is necessary "to carry out the objective of the [Clean Water Act]"[81] or is "reasonably required by [DEC] to determine compliance with effluent

[81] 33 U.S.C. § 1318(a) (the permitting authority "shall require" permittees to conduct monitoring "[w]henever required to carry out the objective of [the Clean Water Act]").

limitations and water quality standards that are or may be [a]ffected by the discharge."[82] While the phrase "reasonably required" does afford DEC some discretion to make a judgment about the need for monitoring, it cannot exercise that discretion unreasonably to require no water quality monitoring in *this* Permit, given the water quality-based requirements the Permit applies to many MS4s (i.e., the "no net increase" and Pollutant Load Reduction limits, as well as the stricter limits that are required by law, *see supra* Point III).

No one, including DEC, can determine whether MS4s are meeting these requirements without any monitoring of the pollution levels in those MS4s' discharges or in receiving waters. But the Permit does not require MS4s to conduct either type of water quality monitoring. DEC does not contend that it does. This complete lack of monitoring requirements is arbitrary and capricious.

None of the alternatives on which DEC relies can, as a matter of law, allow for a determination of MS4s' compliance with the Permit's water quality-based requirements.

First, DEC cannot rely on the Permit's requirements for tracking "compliance with the General Permit's *minimum* control measures." DEC Br. at 66-67 (emphasis added). Those provisions do not relate to ensuring compliance

[82] 6 N.Y.C.R.R. § 750-1.13(a) (providing 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 [DEC] to determine compliance with effluent limitations and water quality standards that are or may be [a]ffected by the discharge").

with the *additional* pollution control requirements that apply to MS4s that contribute to water quality standards violations.

Second, DEC cannot rely on the Permit's requirement that MS4s discharging to impaired waters with TMDLs "participate in or use ambient water-quality monitoring programs to…[*inter alia*] 'evaluate the effectiveness' of the additional best management practices…they are using." DEC Br. at 65-66. The Permit, since it only regulates permittees – i.e., the MS4s – cannot guarantee that any third-party monitoring programs will be available for the MS4s to "participat[e] in" or "use."[83] This is true even of DEC's own anticipated monitoring, which is entirely subject to budgetary whims: the agency's meager water quality monitoring budget, intended to address every sort of pollutant from every sort of polluter statewide, has shrunk by more than one-third over the last three years, from $2.9 million to $1.9 million.[84] Even in the best of times, the agency's planned monitoring of any given

[83] Further, the cited provision does not pertain to MS4s discharging to impaired waters without a TMDL. As explained in Point II.A, above, the Permit must (though it does not currently) require those MS4s to reduce their pollution enough to ensure compliance with water quality standards. And, the Permit does currently (albeit inadequately) require those MS4s to meet the quantitative performance standard of "no net increase" in pollution. But the Permit fails even to mention a role for third-party monitoring in connection with those MS4s' discharges, much less any requirement for MS4s to conduct their own monitoring.

[84] In response to Petitioners' Freedom of Information Law request for records concerning DEC's current and planned programs for ambient water quality monitoring of impaired waters, DEC provided a spreadsheet summarizing its monitoring program expenditures for the last four fiscal years, which documents this declining budget. DEC, "Spending Plans," *available at* FOIL Document Bank, Folder: "DEC FOIL Responsive Records – Part B/B.11 Responsive Records," Filename: "B-11 Spending Plans."

water body is extremely infrequent and, by DEC's own admission, its thoroughness is entirely contingent on available resources.[85]

Third, "computer modeling" is also not a substitute for (or a form of) monitoring. DEC Br. at 68. Petitioners explained this at length in their opening brief, citing DEC's own statements in the record and in other official agency records. Pet'rs' Br. at 73-74.

Other states' permits demonstrate that it is entirely feasible to impose monitoring requirements on MS4 permittees. Despite DEC's protestations that MS4s may lack the technical expertise, Petitioners and amici have identified at least nine other small MS4 permits that impose monitoring requirements, including many that have heightened monitoring requirements for discharges to impaired waters (both with and without a TMDL). Pet'rs' Br. at 69-71; CCE Br. at 36-41.

[85] In each of the state's 17 major drainage basins – such as the Long Island Sound, Lake Ontario, Upper and Lower Hudson River, and Alleghany River basins – DEC's monitoring program calls for only one round of monitoring every five years. When monitoring does occur, "[t]he number of locations sampled is determined by available staff and financial resources." DEC, *Quality Assurance Management Plan for the New York State Water Quality Monitoring Strategy* at 15 (July 2014), *available at* FOIL Document Bank, Folder; "DEC FOIL Responsive Records – Part B/B.11 Responsive Records," Filename: "B-11 Quality Assurance Management Plan for the NYS Quality Monitoring Strategy." Even one of the permittees recently complained, loudly and publicly, that DEC's monitoring is inadequate to determine whether MS4s are satisfying their obligations to meet water quality standards. Grant Parpan, "Town Officials: It's Time to Reopen Waterways to Shellfishing," *Suffolk Times*, Feb. 10, 2015, *available at* http://suffolktimes.timesreview.com/2015/02/56071/town-officials-its-time-to-reopen-waterways-to-shellfishing/ (ADD. 129-30) (describing complaints by Town of Southold (an MS4 on the North Fork of Long Island that discharges to a water body with a TMDL for bacteria) that DEC's inadequate water quality monitoring prevents a determination of whether shellfishing closures attributed to stormwater runoff can now be lifted).

These other permits also illustrate that permittees need not rely on their own in-house expertise to fulfill monitoring requirements, but can also be allowed to contribute funding to a collective monitoring effort, in lieu of implementing their own monitoring.[86] CCE Br. at 39-40.

Moreover, while DEC protests that there are too many discharge locations in a storm sewer system to monitor them all, Petitioners do not argue that monitoring must be at the "end of pipe," and DEC's regulations do not require it. DEC's permitting rules provide flexibility to require monitoring of *either* the "discharge, [*or*] waters of the State or other … sink [i.e., receiving water]…."[87] And, even if DEC chooses to require of end-of-pipe discharge, the agency's regulations provide that "[s]amples and measurements . . . shall be representative of the quantity and character of the monitored discharges," not that sampling must be performed at every discharge point.[88] Other states' permits referenced above rely either on monitoring of receiving waters or representative monitoring of selected outfalls,

[86] DEC attempts to distinguish certain states' monitoring requirements by pointing out that they have fewer MS4s than New York, DEC Br. at 69, but this fact is irrelevant. The total number of MS4s in a state has no effect on the monitoring obligations the state must impose on each individual MS4.

[87] 6 N.Y.C.R.R. § 750-1.13(a).

[88] 6 N.Y.C.R.R. § 750-2.5(a)(2). *See also* 40 C.F.R. § 122.48(b) (federal regulations providing that "[a]ll permits shall specify…(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity . . . .").

demonstrating that these are practical approaches. Pet'rs' Br. at 69-71; CCE Br. at 36-41.

In sum, DEC has abused whatever discretion it has on this matter, and the agency's failure to include a monitoring requirement in the Permit is arbitrary and capricious.

CONCLUSION

For the reasons stated above, and in Petitioners' opening brief, 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. Petitioners' opening brief concluded by describing the precise relief this Court should grant (Pet'rs' Br. at 75-76); that description remains accurate, with the exception of the "compliance schedule" issue, which is now academic (*see supra* Point III).

Dated: New York, New York
February 24, 2015

By: /s/ Lawrence M. Levine

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